BEFORE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Review of Unbundled Loop and Switching Rates and Review of the Deaveraged Zone Rate Structure	))))))))	Docket No. UT-023003 PETITION BY AT&T AND MCI FOR COMMISSION REVIEW OF INTERLOCUTORY RULING COMPELLING AT&T AND MCI TO RESPOND TO DATA REQUESTS

Pursuant to WAC 480-09-480(7) and 480-09-760, AT&T Communications of the Pacific Northwest, Inc. ("AT&T") and MCI (formerly known as WorldCom, Inc.) petition the Commission to review the Thirteenth Supplemental Order of the Administrative Law Judge in this proceeding, granting, in part, motions to compel by Qwest Corporation and Verizon Northwest, Inc.

I. BACKGROUND

1. Both Verizon and Qwest have propounded substantial discovery on AT&T and MCI in this proceeding. This motion involves data requests 22, 24, 27 and 32 issued by Qwest in its First Set of Data Requests, requests 4, 5, 9, 12, 13, 15, 18 and 21 from Verizon's First Set of Data Requests and requests 2, 6, 11, 21, and 24 from Verizon's Third Set of Data Requests. AT&T timely provided objections and responses to these requests. Qwest filed a motion to compel on August 12, 2003 and Verizon filed a similar motion on August 20, 2003. Copies of these motions, along with the responses to the motions filed by AT&T and MCI are attached to this petition.

2. On September 8, 2003, Administrative Law Judge Theodora Mace issued a Thirteenth Supplemental Order partially granting the motions to compel.[1] There was no hearing on the motion.

II. DISCUSSION

A. The Commission Should Review the Interlocutory Ruling.

3. Discovery rulings are subject to review under WAC 480-09-760.[2] The Commission may review discovery rulings upon a finding that "review is necessary to prevent substantial prejudice to a party that would not be remediable by post-hearing reviewing" or "review could save the Commission and the parties substantial effort or expense or some other factors present that outweighs the cost and time and delay of exercising review."[3] The Commission should make such a finding with respect to the ruling here.

4. AT&T and MCI objected to the disputed data requests principally on the grounds that the information requested was not within their possession, custody or control. The particular data at issue are databases and software programs used and developed by a third party, Taylor, Nelson, Sofres ("TNS"), to create customer clusters that are processed within the HAI Model filed in this proceeding. TNS refuses to release this information because it is commercially valuable and proprietary. Neither AT&T nor MCI has access to these materials or any way to obtain the materials from TNS. Ordering AT&T and MCI to produce these materials, therefore, would cause substantial prejudice. AT&T and MCI are unable to comply with the interlocutory ruling, leading to a likelihood of additional motions and the potential for sanctions. AT&T and MCI should not be placed in this position.

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[1] Qwest's motion also raised issues with respect to data requests 11, 14, 15, 16, 17, 18, 19, 44 and 45. This petition does not address the ALJ's rulings with respect to these requests.

[2] WAC 480-09-480(7).

[3] WAC 480-09-760(1)(b) and (c).

5. AT&T, MCI and other parties have submitted the HAI Model in hundreds of proceedings across the United States. In none of those proceedings have AT&T or MCI produced the information that is the subject of the Thirteenth Supplemental Order granting the Qwest and Verizon motions to compel. They have not produced this information because they cannot produce what they do not have. Nevertheless, as commissions across the United States have recognized in accepting the HAI Model, the substantial information that is available regarding the model is sufficient to permit the model's accuracy to be tested and analyzed without access to TNS's proprietary data.

6. Qwest and Verizon are fully aware of these facts from their participation in countless other cases. Their motions to compel here were designed not to obtain necessary information, but rather as a tactic to seek the imposition of sanctions upon AT&T and MCI. The Commission should not condone this tactic by accepting the Thirteenth Supplemental Order.

B. The Commission Should Reverse the Interlocutory Ruling.

1. AT&T and MCI Cannot Produce the Requested Information.

7. The information at issue in the Qwest and Verizon motions to compel has been used within the HAI Model since early 1998. Before that date, the HAI Model used information regarding census block groups as a proxy to estimate the locations of customers to be served and the facilities required to serve those customers. In an attempt to make the model more accurate, AT&T and MCI engaged a consulting company now known as TNS to develop a means of using actual customer locations in running the model.

8. To perform this work, TNS purchased commercial databases of residential and business addresses from Dunn & Bradstreet and Metromail.[4] To gain access to these

[4] TNS had no choice but to rely on commercial databases since ILECs typically refuse to permit access to their own information about customer locations. In this case, for example, AT&T and MCI had hoped to make their initial filing of the HAI Model in this proceeding using the Qwest and Verizon customer locations rather than the commercial

databases, TNS was required to enter into agreements to preserve the confidentiality of this commercially valuable information. Using these databases, TNS developed software programs enabling it to gather the addresses into geographic clusters. Any company wishing to use the HAI Model may purchase these cluster databases for any particular geographic area from TNS. The cluster databases are then used in running the model.

9. AT&T and MCI have produced the customer cluster database used in running the HAI Model as filed in this proceeding. With their motions to compel, Qwest and Verizon also sought production of the actual customer location databases purchased by TNS from Metromail and Dunn & Bradstreet, along with the software, input files, computer codes and algorithms developed by TNS to cluster the locations. TNS has never provided any of this information to AT&T and MCI. In fact, TNS has directly refused to provide this information, on grounds that it itself is not permitted to provide access (with respect to the Metromail and Dunn & Bradstreet information) or that the information is commercially valuable and proprietary to TNS (the computer coding, software and other inputs developed by TNS).[5] TNS is the only source for this information. Without it, AT&T and MCI cannot respond to the discovery at issue in the Thirteenth Supplemental Order.

Metromail and Dunn & Bradstreet databases. Unfortunately, both Verizon and Qwest failed to respond in a timely fashion to discovery seeking to obtain this customer location information. AT&T propounded its discovery seeking this information in early December 2002. Verizon failed to provide the requested information until May 22, 2003. Qwest refused to respond until AT&T and MCI filed a successful motion to compel in July 2003.

[5] Here, AT&T's counsel has provided all of the data requests at issue to TNS and requested access to the customer location databases and TNS's proprietary computer coding, inputs and software required to permit a response to those requests. On September 16, 2003, TNS verbally stated that it would not comply. TNS agreed to state its position in writing. AT&T and MCI will provide this statement from TNS to the Commission as soon as it is received.

2. Verizon and Qwest Have No Need for the Requested Information.

10. AT&T and MCI have no desire to withhold necessary information from any of the parties to this proceeding. In fact, AT&T and MCI are in the process of expending tens of thousands of dollars to produce a new version of the HAI Model for use in this proceeding that will rely on customer location information obtained from Qwest and Verizon rather than the commercial Metromail and Dunn & Bradstreet databases. Once this process is complete, the model will no longer rely on the proprietary Metromail and Dunn & Bradstreet information. Nevertheless, even without this added step, both Verizon and Qwest already have all of the information necessary to analyze the HAI Model.

11. The information at issue in the Thirteenth Supplemental Order relates to the investment required for outside plant facilities used in determining the cost of an unbundled loop. The principal cost drivers of this investment are the total amount of cable required to serve customers and the manner in which the model assumes that the cable is placed. Information regarding customer locations is used in modeling the amount of cable distribution required to provide service to all of an incumbent local exchange carrier's ("ILEC's") customers.

12. Qwest and Verizon contend that they need information about the specific customer locations used in the HAI Model to test the accuracy of the customer location process. Determining how a model precisely locates each specific customer, however, provides little information relevant to determining whether a model includes the necessary amount of distribution cable to reach every customer[6] The real issue is whether there is enough outside distribution plant placed by the model in a given geographic area to serve the customers located in that area. Both Verizon and Qwest

[6] In fact, until its most recent iteration, Qwest's RLCAP model filed in prior proceedings did not even attempt to make presumptions as to where each specific customer was located. Instead, RLCAP adopted generic presumptions about the amount of plant that would be required to serve areas with certain customer densities.

already have more than enough information to make this determination with respect to HAI Model.

13. The information actually processed through the HAI Model is information about clusters of customers. For each cluster, AT&T and MCI have provided both Qwest and Verizon with the precise location of the cluster, its size and approximate shape, the number and type of households contained within the cluster, the number of businesses and employees, and the total lines broken down by type. Verizon and Qwest also know the amount of distribution plant that the HAI Model calculates is required to join the customer locations located within each cluster.

14. With this information, Qwest and Verizon can determine whether the HAI Model as filed within this proceeding includes enough outside plant investment to serve any particular cluster of customers. From that, Qwest and Verizon can determine whether the Model as a whole produces enough investment in outside plant facilities. Knowing where the model precisely locates any particular customer or how TNS goes about creating the customer clusters would add nothing measurable to the analysis.

Moreover, if Qwest and Verizon do want to review actual customer locations, they can arrange with TNS to obtain temporary access that would enable them to review the customer location databases either on site at TNS's facility or at another location. Both Qwest and Verizon are aware that this information is available and have taken advantage of the access TNS is willing to provide in other proceedings. Neither party has contacted TNS in this proceeding seeking to review the available information.

3. AT&T and MCI Should Not Be Ordered To Produce What They Do Not Have.

AT&T and MCI have made an uncontroverted showing that they do not have the materials they have been required to produce in the 13th Supplemental Order. In addition, Qwest and Verizon have made no showing that they need the requested

materials in order to analyze the HAI Model. For these two reasons, the Commission should reverse the interlocutory ruling.

As the 13th Supplemental Order recognizes, the civil rules governing discovery specifically limit the scope of discovery to information within the "possession, custody, or control of the party upon whom the requested is served." *See* C.R. 34(a). Although this Commission's rules do not specifically address the issue, there is no basis for extending discovery to materials that a party does not possess. The matter is one of common sense.

The rationale of the 13th Supplemental Order appears to be that AT&T and MCI have introduced the HAI Model and must, for this reason, be required to produce all information that bears some relationship to the model, whether they possess that information or not. Such a ruling would prevent any party other than an ILEC from producing a useful cost model. Unlike Qwest and Verizon, AT&T and MCI do not have access to information about Qwest and Verizon's customers and had no option but to rely upon commercial databases. AT&T and MCI also do not have the expertise required to convert these databases into information that is useful within a cost model. Their only option, then, was to hire a consultant who could perform this necessary work.

The Commission's rules specifically recognize that discovery may be limited if it is

> unduly burdensome or expensive, taking into account the needs of the adjudicative proceeding, limitations on the parties' resources, the scope of the responding party's interest in the proceeding, and the importance of the issues at stake in the adjudicative proceeding.

See WAC 480-09-480(6)(a)(iv). Clearly, it is unduly burdensome to require a party to produce information it does not possess and cannot obtain. Moreover, in this proceeding, Qwest and Verizon have shown no need for the information requested, providing yet another basis for refusing their request.

This Commission has already determined that the HAI Model can be evaluated based on information that is available concerning the model. In this Commission's Universal Service Proceeding, Docket No. UT-98031(a), Commission ordered production of some of the customer location information at issue in the Thirteenth Supplemental Order. AT&T was unable to provide this information for precisely the reason argued here – the information is not within the possession, custody or control of any of the parties. See *In the Matter of Determining Costs for Universal Service*, Docket No. UT-98031(a), Tenth Supplemental Order – Order Establishing Costs (released November 20, 1998) at ¶ 180. Nevertheless, the Commission refused a request by Qwest to strike the model, specifically because the model can be evaluated based on information provided. *Id. at* ¶ 182.

Other Commissions have reached the same conclusion. In this region, for example, the Arizona, Minnesota and New Mexico Commissions have refused to compel AT&T and MCI to produce the information requested here. The Arizona Commission, in fact, denied a motion by Qwest to strike the HAI model, and used the model in determining unbundled network element costs. Only a handful of Commissions have reached a different result since the HAI model was revised in 1998 to rely upon to use the customer cluster data obtained from TNS. In many cases, Qwest, Verizon, and other ILECs have not even sought production of that data. The fact that Qwest and Verizon have routinely participated in cost proceedings without seeking production of the data they seek here underscores that the real purpose of this motion is tactical, not a genuine attempt to obtain relevant information.

III. RELIEF REQUESTED

Wherefore, AT&T and MCI request the following relief:

A. That the Commission accept review of the Thirteenth Supplemental Order and deny the motions by Qwest and Verizon to compel AT&T to respond to the disputed requests; and

B. Such other and further relief as the Commission finds fair, just, reasonable and sufficient.

Respectfully submitted, this _____ day of September, 2003.

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