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**BEFORE THE 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

**QWEST'S ANSWER IN OPPOSITION TO PETITION BY AT&T AND MCI FOR COMMISSION REVIEW OF INTERLOCUTORY RULING COMPELLING AT&T AND MCI TO RESPOND TO DATA REQUESTS**

**I. INTRODUCTION**

In accordance with the schedule established by the Commission in this matter, Qwest Corporation ("Qwest") hereby files this answer to the Petition by AT&T and MCI for Commission Review of Interlocutory Ruling Compelling AT&T and MCI to Respond to Data Requests ("Petition") submitted by AT&T Corporation of the Pacific Northwest ("AT&T") and WorldCom, Inc. (referred to herein as "MCI") (collectively "AT&T/MCI"). In that petition, AT&T/MCI seek Commission review of the Administrative Law Judge's Thirteenth Supplemental Order: Granting, In Part, Motions to Compel. That order granted, in large part, the motions to compel discovery filed by Qwest and Verizon. Specifically, the Thirteenth Supplemental Order required AT&T/MCI to produce customer location data and algorithms necessary for Qwest to evaluate the AT&T/MCI cost model in this proceeding, HM 5.3.

AT&T/MCI have thus far failed to comply with the Thirteenth Supplemental Order, and

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**Qwest**  
1600 7<sup>th</sup> Ave., Suite 3206  
Seattle, WA 98191  
Telephone: (206) 398-2500  
Facsimile: (206) 343-4040

1 now ask the Commission to review that order and set it aside. While Qwest agrees that WAC 480-  
2 09-480 allows for the filing of a petition for interlocutory review of an order such as the Thirteenth  
3 Supplemental Order, Qwest disagrees that the result should change after Commission review. The  
4 ALJ properly evaluated the issues and relied on prior Commission rulings on that are precisely on  
5 point. AT&T/MCI raise no new issues in their petition, but merely ask the Commission to review  
6 the same arguments and Commission precedent that the ALJ considered in the Thirteenth  
7 Supplemental Order and reach a different conclusion. However, the conclusion reached by the  
8 ALJ is the correct one. The data sought is clearly relevant, and prior Commission orders on this  
9 subject support the ALJ's ruling.

## 10 II. ARGUMENT

### 11 A. The Information Qwest Seeks is Relevant

12 In the Petition, AT&T/MCI argue that the information sought is not "necessary" and that  
13 enough information has already been provided to test the accuracy of the models. *Petition at*  
14 *paragraphs 10 to 13*. It does not appear as though they are arguing that the information is  
15 irrelevant, as no party could credibly make that claim. The Thirteenth Supplemental Order, at  
16 paragraph 14, describes how the data sought is integrally necessary to an analysis of HM 5.3, and  
17 AT&T/MCI do not appear to challenge those findings. Rather, they seem to be suggesting that  
18 because other, different information is available, the requesting parties are not entitled to the  
19 underlying information. This argument was considered and rejected in the Thirteenth  
20 Supplemental Order (*see paragraphs 10 and 16*).

21 AT&T/MCI essentially concede that the requested information would enable Qwest to test  
22 the accuracy of the model and that Qwest is entitled to do so. AT&T/MCI state that Qwest can  
23 test the accuracy of the model by looking at the distribution plant outputs to see if the model  
24 produces enough plant to serve customers in a give area. However, this argument misses two  
25 essential points. First, Qwest is entitled to test the accuracy of the model through methods it finds  
26 to be most probative, not through methods recommended by the sponsors of the model. Second,

1 the methods suggested by AT&T/MCI only allow Qwest to analyze the outputs of the model after  
2 the TNS data has been input and processed – what Qwest is seeking to do is to test the accuracy of  
3 the inputs and methodology of TNS in creating the clusters in the first instance. In order to test the  
4 accuracy of that information, Qwest should be permitted to attempt to replicate the creation of the  
5 clusters. To do that, Qwest would need both the underlying customer location information and the  
6 algorithms. Yet that is the very information that AT&T/MCI refuse to provide.

7 Nor is it an answer to suggest, as AT&T/MCI do at paragraph 10 of the Petition, that they  
8 will refile the model with Qwest’s actual customer location information in place of the commercial  
9 database information. Clearly, at that point it will be even more critical for Qwest to be able to  
10 determine how TNS used that data to create the clusters. However, AT&T/MCI will no doubt  
11 continue to refuse to provide the algorithms necessary to do that analysis. Thus, this argument  
12 does not address or resolve the issue of Qwest’s need for the requested information.

13 **B. AT&T/MCI Should be Ordered to Produce the Data**

14 At paragraphs 7 to 9 of the Petition, and again at page 7, AT&T/MCI claim that they  
15 cannot produce the data because they do not have it. This argument was made and addressed in  
16 the proceedings below. AT&T/MCI devoted a good portion of their answer to Qwest’s motion to  
17 compel explaining how they did not have the data, could not produce it, and could not force TNS  
18 to produce it. The ALJ saw through these flimsy arguments and properly rejected them. Clearly, a  
19 party should not be able to shield otherwise relevant evidence from discovery, *evidence that was*  
20 *created at its direction*, by having a third party do the work and then claiming that the information  
21 is not available.

22 Such a result would provide bad incentives for parties in future proceedings, and would run  
23 counter to the Commission’s goal of having open and transparent cost models.<sup>1</sup> Indeed, this

24 <sup>1</sup> The Commission has emphasized that acceptable models in cost proceedings should be open and transparent. “An  
25 open or transparent model would provide an interested person with the opportunity to review both the compiled and  
26 uncompiled source codes. Furthermore, support for input values, and a narrative description of how the model  
operates, should be available.” “An open or transparent model is in the public interest in that it allows a full  
exploration of the advantages and limitations of a model and allows the public to evaluate all of the information which  
is used to set prices.” *In the Matter of the Pricing Proceeding for Interconnection, Unbundled Elements, Transport*

1 Commission has considered the very same arguments in prior cases and rejected them there as  
2 well. In the Universal Service proceeding, Docket No. UT-980311(a), the Commission stated that  
3 "access to the pre-processed geocoding and clustering data used to 'geocode'" customers and  
4 create the customer serving areas is critical to evaluate the HAI Model's database and software.  
5 The Commission is also sensitive to the concerns of AT&T with respect to this information.  
6 However, AT&T's position leaves the parties and the Commission in a totally unacceptable "black  
7 hole" with respect to evaluating this information." Accordingly, the Commission in that case  
8 ordered AT&T to provide the information.<sup>2</sup>

9 The simple fact of the matter is that AT&T/MCI have full and total control over the data  
10 that is used in the model – if not directly, then through their business relationship with TNS. They  
11 contracted or otherwise arranged for TNS to obtain the underlying customer location data and  
12 create the clustering algorithm. In light of prior orders requiring the TNS data to be produced,  
13 AT&T/MCI clearly could have made arrangements with TNS for purposes of this proceeding to  
14 make the underlying customer data and the algorithms available. That AT&T/MCI did not seek to  
15 do so should not shield their model from discovery and critique.

16 AT&T/MCI were clearly on notice from the prior proceedings that this type of data might  
17 be sought and that arrangements could and should have been made to enable AT&T/MCI to  
18 respond to discovery. AT&T/MCI do not address this point at all in their Petition, though they  
19 certainly could have done so if they had any legitimate rationale to offer on this point. They argue  
20 only that TNS has stated it will not comply with the discovery at issue, but do not explain what  
21 efforts, if any, AT&T/MCI expended either before or during this proceeding to negotiate a  
22 different resolution with TNS.

23 Finally, AT&T/MCI argue that the Commission's discovery rule supports limiting

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24 *and Termination, and Resale*, Docket No. UT-960369, et al., Eighth Supplemental Order, Interim Order Establishing  
Costs for Determining Prices in Phase II, April 16, 1998, at paragraphs 25 and 506.

25 <sup>2</sup> *In the Matter of Determining Costs for Universal Service*, Docket No. UT-980311(a), Seventh Supplemental Order  
26 Granting and Denying, in Part, GTE's Motion to Compel and Denying U S WEST's Motion to Remove Testimony,  
August 26, 1998, at pages 3 and 5.

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1 discovery in this case. *Petition at page 7, citing WAC 480-09-480(6)(a)(iv)*. However, they do not  
2 analyze the provisions of that rule. An analysis of the plain language of the rule leads inescapably  
3 to the conclusion in this case that limiting discovery is not warranted on this issue. Discovery may  
4 be limited if it is “unduly burdensome or expensive, taking into account the needs of the  
5 adjudicative proceeding, limitations on the parties’ resources, the scope of the responding party’s  
6 interest in the proceeding, and the importance of the issues at stake in the adjudicative  
7 proceeding.” AT&T/MCI simply claim that the discovery is burdensome because TNS refuses to  
8 release the data and algorithms. They utterly fail to address whether the TNS information could be  
9 obtained at some additional expense. They also do not address the other factors to be considered.  
10 In this case, AT&T/MCI are the sponsors of one of three cost models – they seek to have the  
11 Commission adopt their model, and to set Qwest’s wholesale rates based on the model. Clearly,  
12 under such circumstances, the needs of the adjudicative proceeding are high, the responding  
13 parties’ interest in the proceeding is high, and the importance of the issues at stake is high. Thus,  
14 all of the factors in the rule weigh in favor of *requiring* discovery, not limiting it.

15 **C. Other Issues**

16 AT&T/MCI introduce a theme in paragraphs 3 to 6 of the Petition that Qwest feels it must  
17 respond to. AT&T/MCI claim that Qwest’s discovery in this matter is nothing more than a  
18 litigation “tactic,” and that because Qwest has participated in “countless” other cases in which  
19 AT&T/MCI failed or refused to produce data such as that requested here, the discovery was only  
20 designed to produce grounds for sanctions. *Petition at paragraph 6*. This claim is entirely  
21 unwarranted. Qwest has already responded to the allegations regarding the legitimate need for the  
22 data in section A above. With regard to the claim that this is a “tactic,” it is unclear whether  
23 AT&T/MCI believe that legitimate, relevant discovery is an improper litigation “tactic” or if they  
24 are implying that Qwest has sought discovery for an improper purpose. If the allegation is the  
25 latter, Qwest denies that that is the case. The relevance of the data has been clearly established.  
26 AT&T/MCI seem to suggest that because they have failed or refused to produce this data in other

1 states means that Qwest is not entitled to even ask for it in this proceeding. That suggestion is of  
2 course absurd. In light of the demonstrated relevance of the data, and AT&T/MCI's knowledge of  
3 prior Washington rulings that required this data to be provided, it is well within the scope of  
4 reasonableness that Qwest sought this data and that the ALJ confirmed that it should be produced.

5 In sum, the customer location data and clustering information that Qwest seeks in Requests  
6 24, 27, and 32, is relevant and should be produced. If AT&T/MCI do not have custody of this  
7 information, they should be ordered to obtain the information from TNS and to produce it to  
8 Qwest.

9 **IV. CONCLUSION**

10 For the reasons stated, the Commission should deny the relief requested in the Petition for  
11 Interlocutory Review and affirm the requirements of the Thirteenth Supplemental Order.

12 RESPECTFULLY SUBMITTED this 24th day of September, 2003.

13 QWEST

14  
15 /s/ Lisa A. Anderl

16 Lisa A. Anderl, WSBA # 13236

17 Adam Sherr, WSBA # 25291

18 Qwest

19 1600 7<sup>th</sup> Avenue, Room 3206

20 Seattle, WA 98191

21 Phone: (206) 398-2500

22 *Attorneys for Qwest*