

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Review of: ) DOCKET NO. UT-023003  
Unbundled Loop and Switching )  
Rates; the Deaveraged Zone )  
Rate Structure; and Unbundled ) FOURTEENTH SUPPLEMENTAL  
Network Elements, Transport, ) ORDER: DENYING PETITION FOR  
and Termination (Recurring ) REVIEW OF INTERLOCUTORY  
Costs) ) ORDER; GRANTING MOTIONS TO  
..... ) COMPEL

**I. INTRODUCTION**

1 *Synopsis: The Commission denies the Petition of AT&T and MCI for interlocutory review of an order compelling AT&T and MCI to respond to Verizon’s and Qwest’s data requests.*

2 **Proceedings.** Docket No. UT-023003 – also referred to as the “new generic cost case” – is a generic proceeding to review recurring costs for unbundled network element (“UNE”) loop and switch rates, including the deaveraged loop zone rate structure, previously established by the Commission in other proceedings.<sup>1</sup>

3 **Background.** On August 12 and August 20, 2003 Qwest Corporation (“Qwest”) and Verizon Northwest Inc. (“Verizon”) respectively filed motions to compel AT&T and MCI to respond to certain data requests. The Qwest and Verizon data requests asked about the third party proprietary customer location databases, computer programs and cluster algorithms incorporated in AT&T and MCI’s

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<sup>1</sup> On August 5, 2003, in the Twelfth Supplemental Order in this case, the Commission bifurcated the recurring and nonrecurring cost portions of Docket No. UT-023003. The Commission will now consider nonrecurring costs in Docket No. UT-033034.

HAI 5.3 cost model. Qwest also proffered data requests related to the costs and engineering practices experienced by AT&T and MCI in the placement of outside plant.

4 On September 8, 2003, Administrative Law Judge Theodora M. Mace rendered an interlocutory decision partially granting the motions to compel.

5 On September 17, 2003, AT&T and MCI filed a petition for Commission review of the Administrative Law Judge's interlocutory decision as it related to Verizon and Qwest data requests for third party propriety data bases, programs and algorithms incorporated into the HAI 5.3 cost model.<sup>2</sup>

6 **Appearances.** The following parties appeared at the prehearing conference: Qwest Corporation ("Qwest"), by Lisa Anderl, attorney, Seattle, Washington; Verizon Northwest Inc. ("Verizon"), by William Richardson, attorney, Washington, D.C.; Covad Communications Company ("Covad"), by Brooks Harlow, attorney, Denver, Colorado; AT&T of the Pacific Northwest, Inc. ("AT&T"), Pac-West, Inc. ("Pac-West"), and XO Washington, Inc. ("XO"), by Mary Steele, attorney, Seattle, Washington; MCI/WorldCom ("WorldCom") by Michel Singer-Nelson, attorney, Denver, Colorado; WeBTEC, by Arthur Butler, attorney, Seattle, Washington; Eschelon Telecom, Inc. ("Eschelon"), by Dennis Ahlers, Minneapolis, Minnesota; and Commission Staff, by Shannon Smith, Assistant Attorney General.

## II. DISCUSSION AND DECISION

7 On June 26, 2003, as part of their direct testimony, AT&T and MCI filed in this proceeding the HAI 5.3 cost model (HAI model). The HAI model purports to design a network to serve customers grouped in clusters based on customer

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<sup>2</sup> AT&T and MCI did not contest the portion of the interlocutory order that required them to submit answers to data requests about the costs and engineering practices they experienced in developing their own networks.

location data from mailing lists that are geo-coded – assigned a longitude and latitude. When geo-coded information is not available to provide customer location information, surrogate locations are assigned. The population clusters derived from this process serve as distribution areas for the HAI model and are assigned to serving wire centers. The clusters have an effect on how the HAI model determines the amount of required network-related investment, because they are the basis for estimates of the type and amount of outside plant required to service customers.

8 Since the HAI Model 5.0a was released in early 1998, every version of the model has used such customer cluster information. AT&T and MCI have purchased the customer location information and the algorithms and software used to develop it from Taylor-Nelson-Sofres Telecom (TNS).<sup>3</sup> TNS does not give the information to AT&T and MCI, but rather incorporates the information into the HAI model for them.

9 Qwest and Verizon each posed discovery questions that they claim are essential to enable them to understand and audit the HAI model's customer location and clustering methodology.<sup>4</sup> Qwest and Verizon pointed out that in the universal service proceeding, the Commission was faced with the same issue and ordered competitive local exchange carriers (CLECs) sponsoring the HAI model in that case to provide the underlying third party customer databases and algorithms.<sup>5</sup>

10 Both sides to this discovery dispute cite various state jurisdictions where regulatory authorities have considered this issue and come out with different results. In some instances other jurisdictions have: required similar information to be provided to requesting incumbent carriers; rejected the HAI model because of failure to provide the information; or rejected the discovery requests

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<sup>3</sup> TNS was previously known as PNR.

<sup>4</sup> The text of the discovery requests are attached to Qwest's and Verizon's respective motions to compel.

<sup>5</sup> *Docket No. UT-980311(a), Seventh Supplemental Order, August 26, 1998, at 3 and 5.*

themselves because the competitive carriers did not possess the information requested.

11 In their petition for interlocutory review AT&T and MCI reassert the claim that court rules governing discovery provide that only information that is both relevant and in the possession, custody and control of the party upon whom the request is served is discoverable.<sup>6</sup> They point out that federal courts interpreting the federal rule that parallels Washington state's court rule on discovery generally hold that a party cannot be required to produce information or things unless it has control of them.<sup>7</sup> Furthermore, they argue that the Commission's discovery rule limits discovery when the discovery sought is unduly burdensome or expensive, taking into account the needs of a particular proceeding and the parties' resources and interests in the proceeding.<sup>8</sup> AT&T and MCI claim that it is unduly burdensome for the Commission to require them to produce information and data that they do not, in fact, actually have in their possession.

12 AT&T and MCI contend that the databases, algorithms and software programs used to derive customer locations contained in the HAI model are the intellectual property of TNS and that the information is commercially available. This means that upon payment of a \$5,000 set up fee and \$4,000 per day, Verizon and Qwest could obtain remote access to TNS directly and manipulate TNS data.<sup>9</sup> This remote access still does not provide access to the TNS databases, source codes and algorithms that Verizon and Qwest are seeking here. The parties estimate that such access to TNS proprietary information would cost approximately \$2-2.5 million.<sup>10</sup> AT&T and MCI state that TNS has never provided them with either the

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<sup>6</sup> WA Superior Court Civil Rules, CR 26(b) and CR 34(a); Federal Rules of Civil Procedure 26(b) and 34(a).

<sup>7</sup> See, *Oil Heat Institute of Oregon v. Northwest Natural Gas*, 123 F.R.D. 640 (D.Or. 1988); *McLaughlin v. Int'l Union of Petroleum and Industrial Workers*, 870 F.2d 1450 (9<sup>th</sup> Cir., 1989); *Searock v. Stripling*, 736 F.2d 650 (11<sup>th</sup> Cir., 1984).

<sup>8</sup> WAC 480-09-480

<sup>9</sup> Prehearing discovery/scheduling conference, September 25, 2003, Docket No. UT-023003.

<sup>10</sup> *Id.*

clustering algorithm, the software or the proprietary customer location databases. On September 16, 2003 TNS confirmed verbally to AT&T's counsel that it would not comply with the data requests in this proceeding. *Petition for Interlocutory Review at 4, fn. 5*. For this reason, AT&T and MCI contend that the information Qwest and Verizon seek is not in their possession, custody or control and is not discoverable under the court rules.

13 AT&T and MCI argue they have presented the HAI model incorporating TNS data in literally hundreds of proceedings across the United States. In none of those proceedings have they produced the information that is at issue here. AT&T and MCI also repeat their argument that the motions should be denied because the information Qwest and Verizon actually need regarding customer location to permit them to verify the HAI network design, has already been supplied to them. The HAI model itself contains detailed information on the clusters associated with Qwest and Verizon territory. Clusters are associated with wire centers. For each cluster the precise location of the cluster is provided, along with the size and approximate shape of the cluster. Many characteristics associated with the cluster would allow the parties to test the accuracy of the customer locations. These include the line density associated with the cluster, the rock depth, rock hardness, surface texture, and water depth. *AT&T's and MCI's Opposition at 9-10; Petition for Interlocutory Review at 5-6*.

14 AT&T and MCI further contend that they are in the process of producing a new version of the HAI model for use in this proceeding that will rely on raw customer location information obtained from Qwest and Verizon, rather than on the commercial databases used by TNS. *Petition for Interlocutory Review at 5*. However, even in this new HAI model, AT&T and MCI will utilize TNS programs and algorithms, to some extent, to supply customer location information that will fill in the gaps that may still exist in the raw data supplied by Verizon and Qwest.<sup>11</sup>

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<sup>11</sup> *Id.*

- 15 Finally, AT&T and MCI claim that determining how a cost model precisely locates each specific customer has little bearing on determining whether a model includes the necessary amount of distribution plant. They assert that until recently, Qwest's Regional Loop Cost Analysis Program (RLCAP), filed in prior proceedings at the Commission, did not include any presumptions as to where each specific customer was located. Rather, RLCALP adopted generic presumptions about the amount of plant that would be required to serve areas with certain customer densities.
- 16 **Decision.** WAC 480-09-480(6)(a)(vi) states that information is discoverable if it is relevant and "reasonably calculated to lead to discovery of admissible evidence." It also states that the Commission may limit discovery if it is unduly burdensome or expensive.
- 17 There is no requirement in the rule that a party "need" the data requested or that the information requested must be in the possession or control of the party from whom it is requested. The rule generally requires the Commission to balance the need for the information sought with the overall needs of the adjudicative proceeding.
- 18 The key role of the TNS databases, algorithms and software in the HAI model establishes the relevancy of the information sought by Qwest and Verizon. As to whether the production of the information should be required because it belongs to a third party, it is instructive that the Commission was confronted with exactly the same discovery dilemma during the course of the universal service proceeding in Docket No. UT-980311(a). In the Seventh Supplemental Order in that case, the Commission indicated that when a party puts in issue a cost model such as the HAI model, other parties must be entitled to obtain information necessary to validate the accuracy of the model, no matter whether that information is pre-processed by a third party. In that Order, the Commission

required CLECs to provide the equivalent of the TNS information sought here, although at that time, TNS was known as “PNR.”

- 19 Later, in the Tenth Supplemental Order in the universal service proceeding, the Commission noted that the CLECs had not provided third party proprietary information they had been ordered to provide. The Commission proceeded to evaluate the HAI model in light of that fact as well as all the testimony and evidence presented in the case.<sup>12</sup>
- 20 MCI and AT&T have put the HAI model at issue in this proceeding as a means for determining what is the appropriate cost and pricing for the incumbents’ network elements. As part of the model, MCI and AT&T have chosen to include preprocessed customer location and algorithm inputs from a third party. Even though the CLECs have provided Qwest and Verizon with much information about customer location inputs and results from the HAI model, this is not sufficient to permit the incumbents an opportunity to explore how the preprocessed inputs operate to create customer location data upon which network costs are based.
- 21 The Commission continues to stress that the parties’ cost models should be transparent and readily capable of verification. Without the TNS information, it is not clear that the HAI model would meet this test. Moreover, the Commission is concerned that even the CLECs’ soon-to-be filed revised HAI model will rely, to some extent, on TNS data, computer programs and algorithms. The Commission recognizes that there is a significant cost burden attached to obtaining the requested data. Because the TNS proprietary information forms a significant basis for the HAI model outputs, the Commission directs AT&T and MCI to make every effort to provide that information as requested by Qwest and

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<sup>12</sup> Tenth Supplemental Order, November 20, 1998, at ¶¶ 202-206.

Verizon. They must answer the Qwest and Verizon discovery requests at issue here within ten calendar days of the entry of this order. They must update their responses for the TNS data, computer programs and algorithms they rely on in their revised HAI model.

**III. ORDER**

22 THE COMMISSION ORDERS That AT&T and MCI's petition for interlocutory review is denied. AT&T and MCI must respond to Qwest and Verizon's data requests related to TNS data, computer programs and algorithms, within ten calendar days of the entry of this order. Similarly, they must provide the same information as it relates to the revised HAI cost model they intend to file later in this proceeding.

Dated at Olympia, Washington, and effective this 14<sup>th</sup> day of October, 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner