

**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	)	EIGHTEENTH SUPPLEMENTAL
Network Elements, Transport,	)	ORDER
and Termination (Recurring	)	
Costs)	)	
	)	DENYING MOTION TO STRIKE
	)	COST MODEL AND TESTIMONY
	)	
.....	)	

**I. INTRODUCTION**

1 **Synopsis:** *The Commission denies Verizon’s motion to strike the AT&T and MCI cost model filed in this proceeding, and denies Verizon’s motion to strike the witness testimony addressing the cost model.*

2 **Proceedings.** Docket No. UT-023003 – also referred to as the “new generic cost case” – is a generic proceeding initiated by the Commission to review Qwest’s and Verizon’s recurring and nonrecurring 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. On August 5, 2003, in the Twelfth Supplemental Order in this case, the Commission bifurcated the recurring from the nonrecurring cost portions of Docket No. UT-023003. The Commission will consider nonrecurring costs in Docket No. UT-033034. On November 25, 2003, the Commission entered an order removing Qwest cost issues from both proceedings. Only Verizon’s costs are now at issue in the cost dockets.

- 3 **Appearances.** Qwest Corporation (“Qwest”), by Lisa Anderl, attorney, Seattle, Washington; Verizon Northwest Inc. (“Verizon”), by Catherine Ronis, 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, Senior Assistant Attorney General.
- 4 **Background.** AT&T and MCI filed their HAI 5.3 cost model on June 26, 2003, in this case. They are using the cost model to develop costs and prices for Verizon’s unbundled network elements (UNEs). The model relies on customer location data, software, and algorithms supplied by TNS<sup>1</sup>. TNS retains proprietary and intellectual property rights to customer data from Dun and Bradstreet and Metromail as well as to software and algorithms that input information into the HAI model.
- 5 On August 20, 2003, Verizon filed a motion to compel AT&T and MCI to respond to several data requests seeking information about the TNS customer-location information and cluster algorithms incorporated into the cost model. Verizon’s rationale for making the request was that without the TNS information, Verizon could not fully explore the methodology used in the HAI model to develop UNE costs.
- 6 On September 8, 2003, the Commission entered its Thirteenth Supplemental Order determining that the information Verizon sought was relevant and calculated to lead to the discovery of information pursuant to WAC 480-09-480(6). In making its ruling requiring AT&T and MCI to produce the

information, the Commission cited its prior orders on the same issue in the Universal Service Docket No. 980311(a). In that case, the Commission was confronted with the same situation as in this proceeding. The cost model incorporated preprocessing of customer-location data using algorithms and codes all of which were proprietary to PNR, the predecessor company to TNS. The Commission ordered the PNR information to be produced in discovery, but when it was not produced, the Commission noted that it would take that fact into consideration in the weight it accorded the cost model.

- 7 On September 17, 2003, AT&T and MCI filed a motion for interlocutory review of the Thirteenth Supplemental Order. In their motion AT&T and MCI asserted that they did not possess the information sought by Verizon, that the TNS information is commercially available to Verizon, that they have not produced this type of information in any of hundreds of cost proceedings across the country and that they were in the process of producing a new version of the HAI model that would rely on raw customer location information obtained from Verizon. However, they admitted that even then, they would rely on TNS to some extent to supply customer location information to fill in any gaps in customer location.
- 8 On October 14, 2003, the Commission entered its Fourteenth Supplemental Order requiring AT&T and MCI to “make every effort to provide that [TNS] information as requested by Verizon” within ten days of the entry of the order. The Commission again cited the Universal Service orders on this issue and stressed the importance of providing cost models that are transparent and readily capable of verification.

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<sup>1</sup> Taylor Nelson Sofries

- 9 **Motion.** On November 17, 2003, Verizon filed a motion to strike the AT&T and MCI HAI 5.3 cost model (HAI Model), pursuant to WAC 480-09-480.<sup>2</sup> Verizon also moved to strike the prefiled testimony of AT&T and MCI's witnesses Mark T. Bryant and John C. Donovan, as well as selected portions of the testimony of Staff witness Thomas L. Spinks.
- 10 In its motion, Verizon argues that the Commission unequivocally ruled that AT&T and MCI should respond to Verizon's discovery requests regarding the TNS information. Since AT&T and MCI did not respond, Verizon is entitled to one of the sanctions listed in WAC 480-09-480 for failure to comply with a Commission order: dismissal, striking of testimony, evidence or cross-examination, or monetary penalties. Verizon requests that the Commission strike the cost model and prefiled testimony. Verizon asserts that AT&T's and MCI's claims that they do not have the information, and cannot obtain it from TNS without payment of a substantial fee, are meritless in view of the explicit terms of the Commission's order, and in view of the fact that they had produced at least some of the same data in other recent UNE proceedings in Massachusetts and California.<sup>3</sup>
- 11 Verizon further contends that AT&T and MCI knew that Verizon would seek this information and could have made arrangements with TNS early on to allow the information to be released under the terms of a protective agreement.

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<sup>2</sup> WAC 480-09-480 is the Commission's rule on discovery. It provides that if a party fails to comply with a commission discovery order, sanctions may be imposed "including, but not limited to, dismissal, striking of testimony, evidence, or cross-examination, or monetary penalties as provided by law."

<sup>3</sup> Verizon asserts that AT&T produced the clustering software in Massachusetts and a conversion program and clustering software in California. *Verizon motion at 8.*

- 12 Staff filed a response to Verizon's motion stating that the Commission has not stricken cost models in past cost dockets for failure to adequately possess the traits of openness and transparency.<sup>4</sup> Staff contends that any objection along those lines goes to the weight to be given the model, not to its admissibility.
- 13 AT&T and MCI respond that the Commission's Thirteenth and Fourteenth Supplemental Orders directed AT&T and MCI to make every effort to secure the requested TNS information for Verizon, but did not indicate in any way that the penalty for failure to do so would result in the striking of the cost model or testimony addressing it. They cite a United States Supreme Court case<sup>5</sup> for the proposition that dismissal of a complaint is not authorized by noncompliance with a pretrial production order, if failure to comply was related to inability and not willfulness or bad faith. AT&T and MCI also assert that Verizon has not demonstrated any bad faith or willful failure to respond to the Commission's order on their part.
- 14 AT&T and MCI also assert that the TNS data does not affect every aspect of the HAI model and that they are in the process of developing customer-location data that does not require processing by TNS. However, to the extent AT&T and MCI must continue to rely on TNS data, they argue that striking the cost model and testimony pertaining to it is not the appropriate remedy.
- 15 Finally, AT&T and MCI state that TNS has agreed that if AT&T and MCI use raw customer-location data from Verizon to develop a new cost model, TNS will provide, and AT&T and MCI will make available to the parties, under appropriate safeguards, several pieces of information related to the clustering algorithm and its use in the HAI model.<sup>6</sup> AT&T and MCI assert that this

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<sup>4</sup> Staff response at 2.

<sup>5</sup> Societe Internationale Pour Participations Industrielles v. Rogers, 357 U.S. 197, 212, 78 S. Ct. 1087 (1958), AT&T and MCI Opposition to motion at 2-3.

<sup>6</sup> AT&T and MCI Opposition to motion at 5.

information, together with commercially available geocoding software, would enable Verizon to replicate the process TNS uses to incorporate customer location data into the model.

- 16 AT&T and MCI indicate that the only item Verizon would not receive would be the source code for the TNS clustering algorithm. AT&T and MCI would work with TNS to make a representative available to answer questions about the algorithm. If that proved insufficient, and Verizon demonstrated a need for the source code information, TNS would provide that information to the Commission and Commission Staff for evaluation. If the Commission determined that Verizon would be unduly prejudiced without the information, AT&T and MCI would then try to persuade TNS to provide it to Verizon with appropriate protection for confidentiality.
- 17 AT&T and MCI request that the Commission confirm that the disclosure to which TNS has agreed will satisfy the Commission, that is, that the Commission would then be willing to give significant weight to the evidence.
- 18 Verizon was granted leave to reply to this proposal and filed its reply on December 2, 2003. Verizon reiterates in its reply that there is no weight the Commission can give to the HAI model unless the underlying information upon which it is based is provided to Verizon. Since AT&T and MCI have failed to provide that information, the Commission must strike the model.
- 19 Verizon argues that it is not asking that the case be dismissed, but merely that the HAI model and testimony about it be eliminated. AT&T and MCI could still participate fully in the cost proceeding, as they have in prior proceedings, without providing their own cost model.<sup>7</sup> Verizon also argues that WAC 480-09-475 does not contain a “bad faith” test to be met before sanctions can be imposed

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<sup>7</sup> UT-003013

under the rule and that the TNS information *does* have an impact on many aspects of the model's outputs aside from just the UNE loop calculation.

20 Finally, Verizon contends that the compromise proposal for providing TNS information in this proceeding would omit more than just the source code for the clustering algorithms. Verizon cites several items that would not be provided, including such information as the software and source code used to remove inaccurate geocoding results and duplicates and the software and source code used to surrogate customer locations.<sup>8</sup>

21 **Discussion and decision.** The Commission is persuaded that granting Verizon's motion to strike the cost model and testimony addressing the cost model would be a drastic measure and uncalled-for at this point. The Commission prefers that a cost model be open and capable of verification. However, few cost models are perfect, and submitting them to the scrutiny of cross-examination and Commission review reveals both strengths and weaknesses, which add or subtract to the weight the Commission gives to evidence associated with the model. In addition, AT&T's and MCI's offer to provide sensitive TNS information for review in this case may alleviate many, if not all, of the concerns about the transparency of the HAI model, but we can't evaluate that at this time. Moreover, the Commission is not able to confirm, prior to submission and review of the new HAI model that AT&T and MCI appear to be proposing, what weight it will accord the evidence.

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<sup>8</sup> See Verizon Reply at 8-9. See also, AT&T and MCI's letter response, filed without leave on December 3, 2003. AT&T and MCI address which of the items Verizon mentions would actually not be provided and which would.

**II. ORDER**

22 **THE COMMISSION ORDERS** That Verizon's motion to strike the HAI cost model and the testimony of witnesses Bryant, Donovan and Spinks is denied, based on the representation of AT&T and MCI that they will provide information from TNS as indicated in their opposition to the motion.

Dated at Olympia, Washington, and effective this 5th day of December, 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner