ORDER NO. 03-533

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1025

In the Matter of	)	
	)	
QWEST CORPORATION,	)	
	)	ORDER
Investigation to Review Costs and	)	
Establish Prices for Certain Unbundled	)	
Network Elements provided by Qwest	)	
Corporation.	)	

DISPOSITION: MOTION TO COMPEL GRANTED IN PART

Introduction

On June 11, 2003, the presiding Administrative Law Judge (ALJ) granted in part a motion filed by Qwest Corporation (Qwest) to compel discovery of certain information relating to a cost model filed in this docket by AT&T Telecommunications of the Pacific Northwest, Inc., AT&T Local Services on behalf of TCG Oregon, and WorldCom, Inc. (AT&T and WorldCom.).

On June 23, 2003, AT&T and WorldCom filed a Motion for Certification of the ALJ's decision pursuant to Oregon Administrative Rule 860-014-0091 and OAR 860-012-0035(1)(I). In accordance with an agreement by the parties, Qwest responded to the motion on July 10, 2003. AT&T and WorldCom replied on July 28, 2003.

The presiding ALJ has determined that AT&T and WorldCom failed to show that the challenged ruling will result in substantial prejudice to the public interest, undue prejudice to any party, or deny or terminate any person's participation in this proceeding. See OAR 860-014-0091. Nevertheless, because the instant dispute involves a matter of first impression for the Commission and a departure from the Oregon Rules of Civil Procedure (ORCP), the ALJ certified this issue for Commission resolution.

Procedural History

Pursuant to the Telecommunications Act of 1996, incumbent local exchange carriers (ILECs) such as Qwest must provide unbundled network elements (UNEs) to competitive local exchange carriers (CLECs) at cost-based rates. In prior dockets, the Commission established the recurring and nonrecurring rates that Qwest currently charges for UNEs. This investigation docket was initiated to determine if the Commission-approved UNE rates assessed by Qwest should be revised.

Both Qwest and AT&T/WorldCom have filed cost models in this proceeding for consideration by the Commission. The purpose of the models is to estimate the type and cost of telecommunications facilities required to serve Oregon customers, and specifically, the cost of UNEs. The relative merits of the competing cost models are the central focus of this investigation.

The cost model sponsored by AT&T and WorldCom is known in the telecommunications industry as the "HAI model.[1]" According to Qwest:

> [T]he initial step in the [HAI] model upon which the other steps are based is determining the amount and location of current demand for local exchange service, network elements, and network interconnection in Oregon. To establish the location of current demand, the model relies on geocoded customer location data, when available, combined with a method of assigning surrogate locations when geocoded information is not available. After customers are placed in locations, they are grouped into clusters, with each cluster representing "a single telephone plant serving area." [T]he clusters have a significant effect on the amount of network-related investment that the model includes, because they are specifically used to estimate the type and amount of outside plant required to serve customers. The make-up of a cluster determines, for example, the amount of feeder and distribution plant and related investment that HAI assumes is required to serve a group of customers. There is, therefore, a direct relationship between the accuracy of HAI's customer locations and clusters on the one hand, and the accuracy of the model's estimated investment for outside plant, on the other.[2]

AT&T and WorldCom retained a consulting firm, Taylor, Nelson, Sofres (TNS) to create the customer clusters used in the HAI model. TNS developed a computer code, or algorithm, for that purpose. The algorithm requires the use of geocoded customer location data specific to the state of Oregon.

[1] There have been several versions of the HAI model. The version at issue here is "Release 5.3."
[2] Qwest Motion to Compel, dated April 4, 2003 at 2-3. *See also*, HAI Model, Release 5.3 at 3.

AT&T originally requested that Qwest provide its actual customer location data for Oregon. When Qwest objected to providing the data,[3] AT&T and WorldCom asked TNS to develop the information. TNS created geocoded customer location data from the most current residential and business address lists available, pursuant to restrictive licensing agreements with other companies. TNS then used this customer location data to produce the customer clusters that were delivered to AT&T and WorldCom for inclusion in the HAI model.[4]

On February 6, 2003, Qwest filed a series of data requests designed to ascertain the methodologies and assumptions used in compiling the HAI model. Among other things, Qwest requested information regarding the process that the model uses to place customers at particular locations in Oregon and to create "clusters" of customers that the model treats as the equivalent of distribution areas. As noted above, the customer location and cluster inputs have a direct impact on the amount of outside plant investment estimated by the HAI model to be necessary to serve Oregon customers. AT&T and WorldCom refused to provide Qwest with the customer location data and clustering algorithm developed by TNS.

On April 4, 2003, Qwest filed a Motion to Compel responses to several of its data requests.[5] With respect to the HAI model, Qwest sought to compel discovery of (a) the data used to determine the locations of customers; (b) the clustering algorithm used for creating the clusters; (c) documents and data relied upon by the company (TNS) that created the clusters, including any documents that explain TNS' processes and methods for creating the clusters; (d) explanations of the methodology used to place customers when their actual locations were unknown; and (e) information and data that permit Qwest to understand the extent to which the customer clusters were formed without data establishing actual locations of customers. [6]

On April 17, 2003, AT&T and WorldCom filed a response opposing Qwest's Motion to Compel. They contend that:

(a) Qwest has already received a substantial amount of detailed information regarding the HAI model. The information provided is sufficient to enable Qwest to analyze the accuracy of the customer location data and ascertain how the HAI model functions;

[3] Qwest responded that the customer location data requested by AT&T was confidential information, overly broad, unduly burdensome, and required Qwest to conduct an unduly expensive special study. Qwest Response to AT&T's First Set of Data Requests, Request No. 001.

[4] AT&T and WorldCom's Motion to Request Certification of ALJ Petrillo's Ruling Granting Qwest's Motion to Compel (hereafter, Motion to Certify), dated June 23, 2003, at 2.

[5] Qwest's Motion to Compel also requested disclosure of information relating to AT&T and WorldCom's construction costs and practices. Those data requests were addressed in the June 11 Ruling, but are not mentioned in AT&T and WorldCom's Motion to Certify.

[6] Qwest First Set of Data Requests, Nos. 1-021, 1-022, 1-023, 1-026, and 1-031.

(b) Under ORCP 43A, AT&T and WorldCom are not required to produce the customer location data and clustering algorithm. That information is the intellectual property of TNS and has never been in the possession, custody or control of AT&T and WorldCom;

(c) AT&T and WorldCom's failure to produce the customer location data is not "inherently prejudicial" to Qwest's analysis of the HAI model because much of the requested information is commercially available from TNS for a fee;

(d) The data requested by Qwest is overly broad, unduly burdensome and not calculated to lead to the discovery of admissible evidence;

(e) If Qwest had provided its customer location data to AT&T and WorldCom in the first place, it would not need the data developed by TNS.

On April 23, 2003, Qwest filed a reply to AT&T and WorldCom. Qwest refutes the claims made by AT&T and WorldCom and emphasizes that the customer location data and clustering algorithm are relevant and discoverable.

On May 7, 2003, a telephone conference was convened by the ALJ to discuss the status of the discovery dispute. During the conference, the parties agreed to hold additional discussions in an effort to resolve the issue informally.

On May 16, 2003, AT&T and WorldCom notified the Commission that TNS will allow Qwest to view the customer location data developed for Oregon, as well as the processes TNS used for creating the cluster information. In order to view this data, however, Qwest has to pay TNS $5,000 for the "set up," and $4,000 per day thereafter. On the other hand, TNS considers the clustering algorithm as "highly confidential intellectual property," and refuses to make that information available to Qwest under any circumstances.[7]

On May 23, 2003, Qwest notified the Commission that AT&T and WorldCom's proposal was inadequate. Without access to the algorithms, Qwest can not replicate the process used by TNS to create the customer clusters in the HAI model. Qwest also objects to having to pay TNS to view the customer location data. Qwest estimates that it will have to spend approximately $100,000, and will still be unable to conduct a meaningful audit.[8]

[7] Letter dated May 15, 2003, from Lisa F. Rackner, counsel for AT&T and WorldCom, to ALJ Petrillo.
[8] Letter dated May 20, 2003, from John M. Devaney, counsel for Qwest, to ALJ Petrillo.

On or about June 5, 2003, the parties notified the Commission that they had reached impasse regarding the disputed information requests. On June 10, 2003, AT&T and WorldCom filed supplemental materials in support of their position.

On June 11, 2003, a telephone conference was held to consider Qwest's Motion to Compel and other pending procedural matters. At the conference, the ALJ issued an oral ruling (June 11 Ruling) granting Qwest's motion in part.

On June 23, AT&T and WorldCom filed a Motion for Certification of the ALJ's June Ruling pursuant to OAR 860-014-0091 and OAR 860-012-0035(1)(I).

The June 11 Ruling

At the telephone conference held on June 11, 2003, the ALJ concluded that:

- The customer location data and clustering algorithm requested by Qwest are critical elements of AT&T and WorldCom's HAI model and are relevant to this proceeding.[9] See discussion above.

- AT&T and WorldCom have participated in numerous Commission cost investigations over the past several years. They are aware that when a party submits a cost model for consideration, it is subjected to detailed examination by other parties and the Commission. They also know that it is standard practice in Commission proceedings for the parties to submit extensive data requests to determine how cost models function.

- AT&T and WorldCom knew or should have known that information essential to the operation of its HAI model would be subject to detailed discovery in this proceeding. Specifically, it was reasonable for AT&T and WorldCom to contemplate that Qwest and other parties would seek discovery of the customer location data and clustering algorithm. Thus, any arrangement that AT&T and WorldCom made with TNS to develop data used in the HAI model should have contemplated the need for discovery by other parties and the Commission.

[9] OAR 860-014-0045(1) defines "relevant evidence" as (a) Evidence tending to make the existence of any fact at issue in the proceeding more or less probable than it would be without the evidence, and (b) Is admissible if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs. Relevant evidence may be excluded under subsection (1)(c) if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay. The ALJ ruled that AT&T and WorldCom must respond to all of Qwest's discovery requests, with the exception of Nos. 1-013(b), 1-021, and 1-043. Those requests were found to be overbroad and were limited in scope by the ALJ.

- It is unreasonable for AT&T and WorldCom to claim that data critical to the operation of its cost model cannot be produced simply because AT&T and WorldCom chose to use a third party to develop that information. If the Commission and other parties cannot ascertain how the HAI model operates, it effectively becomes a "black box" and cannot be analyzed in detail or compared with other cost models presented for consideration. AT&T and WorldCom's decision to retain TNS does not justify refusal to produce information central to the outcome of this investigation.

- The position advocated by AT&T and WorldCom also creates an incentive to "farm out" data development to third parties in order to avoid discovery. This result is contrary to the public interest because it prevents disclosure of relevant information, disadvantages other parties, and impedes the ability of the Commission to carry out its statutory responsibilities.

- AT&T's and WorldCom's proposal that Qwest pay TNS a fee to obtain the customer location data used in the HAI model is rejected. It is unreasonable to require parties and/or the Commission to pay for discovery. Not only does such a policy seriously disadvantage opposing parties, it also limits the Commission's fact finding ability. Both are clearly unacceptable from a public interest standpoint.

- AT&T and WorldCom's claim that Qwest already has sufficient information to enable it to recreate the customer location data and clustering algorithm is not persuasive. Qwest should not have to perform a separate analysis or study in an effort to recreate how the HAI model functions. Qwest and the Commission[10] should have access to the formulas and algorithms that allow them to replicate the customer clusters and meaningfully audit the process TNS used to create the clusters.

- AT&T and WorldCom have not explained why the protective order issued in this proceeding does not adequately protect the confidentiality of the information requested by Qwest.[11] The Commission's standard protective order is specifically tailored to safeguard confidential commercial information from unauthorized disclosure.

Motion to Certify

[10] AT&T and WorldCom also declined to provide PUC Staff with the customer location data used in the HAI model. *See*, Response of AT&T Communications of the Pacific Northwest to Staff Request No. AT&T 18-23, Dated May 6, 2003, Response to Data Request No. 19.
[11] Order No. 02-771, entered October 30, 2002.

OAR 860-014-0091(1) provides that a ruling of the ALJ may not be appealed during the proceeding except where the ALJ certifies the question to the Commission pursuant to OAR 860-012-0035(1)(i), upon a finding that the ruling (a) May result in substantial detriment to the public interest or detriment or undue prejudice to any party; or (b) Denies or terminates any person's participation. AT&T and WorldCom argue that the June 11 Ruling is "contrary to law and the public interest, and will result in substantial prejudice."[12]

ORCP 43A. AT&T and WorldCom reiterate their claim that the June 11 Ruling is unlawful because it contravenes ORCP 43A, which limits discovery to documents in the "possession, custody and control of the party upon whom the request is served." AT&T and WorldCom acknowledge that "Oregon appellate courts have not interpreted the phrase "possession, custody and control," but emphasize that cases interpreting Rule 34 of the Federal Rules of Civil Procedure (FRCP) require that a party have "control" over the requested items.[13]

AT&T and WorldCom's argument is not persuasive. To begin with, OAR 860-011-0000(3) specifically provides that "the Oregon Rules of Civil Procedure shall govern in all cases, *except as modified by these rules, by order of the Commission, or by ruling of the ALJ*." Subsection (3) acknowledges that it may be necessary for the Commission to adopt procedures different from those set forth in the ORCP in order to accommodate circumstances unique to utility regulatory proceedings. The instant dispute is an example of precisely such a situation.[14] Here, AT&T and WorldCom have taken the illogical position that fundamental elements of their cost model should be shielded from discovery when the model itself is the focus of this docket. As the ALJ emphasized in his June 11 Ruling, the Commission and other parties must be able to examine fully all of the formulas and algorithms essential to the operation of the model. Absent such information, the model is little more than a "black box," and cannot be accorded substantial weight.

Furthermore, as Qwest points out, the cases cited by AT&T and WorldCom interpreting FRCP 34 can be distinguished from the factual situation presented here. In those cases, the federal courts declined to require production of documents possessed by a third party that were prepared, not for use in the litigation, but in the ordinary course of the third party's business. In this case, by contrast, AT&T and WorldCom retained TNS to develop cost model inputs that are at the very heart of the Commission's investigation. We agree with the ALJ that AT&T and WorldCom's decision to employ a third party to supply important model inputs should not insulate them from the duty to disclose relevant information about their model. Under the circumstances, it was both logical and reasonable to expect that the Commission and other parties would require access to the customer location data and clustering algorithm.

[12] AT&T and WorldCom Motion to Certify at 3.
[13] *Id.* at 4-6.
[14] Although the parties do not address this point, it is arguable that TNS is an agent of AT&T and WorldCom, thereby affording them "possession, custody, and control" of the TNS data.

In their reply comments, AT&T and WorldCom claim that the June 11 Ruling contravenes the public interest. They maintain that the Commission "has a strong interest in ensuring that parties who appear before it can expect fair procedural rulings that uphold the ORCP."[15] While it is certainly true that parties are entitled to "fair procedural rulings," the public interest clearly necessitates an exception to ORCP 43A in this case for the reasons described above. The public is ill served by allowing a party to foreclose discovery of crucial information simply because another entity was used to develop that information. Such a policy would seriously constrain the fact finding ability of the Commission and prevent us from making decisions based upon a full and complete record. As the ALJ recognized, the Commission has adopted a protective order process designed to safeguard confidential information. There is no reason why AT&T and WorldCom could not have made arrangements with TNS to have the customer location data and clustering algorithm released pursuant to the protective order.

AT&T and WorldCom's proposal to have Qwest pay to obtain the customer location materials from TNS is also contrary to the public interest. As the ALJ emphasized, such a policy would disadvantage parties without significant financial resources and would seriously limit the fact gathering capability of the Commission Staff.

Undue Prejudice. AT&T and WorldCom argue that the June 11 Ruling results in undue prejudice because it subjects them to discovery sanctions "for failing to produce documents that they do not possess and cannot obtain."[16] AT&T and WorldCom assert that their decision to contract with TNS was not "improper or illegal" and should not cause them to be "punished" because they are unable "to do the impossible."[17]

The flaw in this argument is that AT&T and WorldCom have a fundamental obligation to make essential elements of their model available to the Commission and other parties for review and analysis. Without such information, the Commission does not have an adequate basis upon which to judge the merits of the model. While there is certainly nothing improper about retaining a third party to develop model inputs, it does not relieve AT&T and WorldCom of their duty to produce data underlying their model. As emphasized above, AT&T and WorldCom should have known that every significant element of the HAI model would be subject to discovery and should have taken this into account when they made arrangements with TNS to develop the customer location data and clustering algorithm. AT&T and WorldCom cannot rely on their arrangement with TNS to shield critical data from discovery and still expect the Commission to accord substantial weight to the results of the cost model.[18]

In fact, AT&T and WorldCom are in a predicament of their own making. When they retained TNS to develop the customer location/clustering data, they knew that

[15] AT&T and WorldCom Reply at 7.
[16] AT&T and WorldCom Motion to Certify at 1; Reply at 1.
[17] *Id*.
[18] AT&T and WorldCom acknowledge that, "to the extent that the Commission determines that the HAI model is not adequately verifiable, that should be factored into the weight it gives the model." AT&T and WorldCom Reply at 6.

TNS had refused to disclose the same data in other jurisdictions.[19] AT&T and WorldCom explain that they decided to use TNS only after Qwest refused to produce its actual customer location data. They further add that they chose not to seek an order compelling Qwest to respond because of their concern about delay.[20] This may be true, but the fact remains that AT&T and WorldCom opted to use TNS despite knowledge of its nondisclosure policy. They now blame Qwest for their situation, but, in reality, they made a strategic error by assuming they would not have to divulge the customer location data and clustering algorithm in this proceeding. Any sanctions AT&T and WorldCom incur for failure to comply with the June 11 ruling will not constitute undue prejudice.

Oregon Trade Secret Act. AT&T and WorldCom have asked TNS to produce the information required by the June 11 Ruling. TNS has refused, however, claiming that the customer location and clustering algorithm are "trade secrets." AT&T and WorldCom assert that TNS' trade secret claim "appears to be sound" and that the disputed information is therefore protected from disclosure by the Oregon Trade Secret Act, ORS §646.461 *et seq.* They allege that the June 11 Ruling therefore places them "in an impossible bind, contrary to the public interest, and to their significant detriment."[21]

Again, this argument misses the point. If AT&T and WorldCom want the Commission to accord weight to the results of the HAI cost model in this proceeding, they must disclose all of the information necessary to determine how the model works. AT&T/WorldCom cannot rely on TNS' trade secret claim to make relevant information inaccessible to other parties and the Commission.

While AT&T and WorldCom have clearly placed themselves "in a bind," their situation may not be "impossible" as they contend.[22] If TNS is unwilling to provide the customer location data and clustering algorithm required to properly analyze the HAI model, perhaps AT&T and WorldCom can resubmit the model using actual customer location data obtained from Qwest, and a clustering algorithm developed by a firm other than TNS. Since AT&T and WorldCom never addressed this possibility, it is unclear whether these tasks can be performed within a reasonable time frame. Nevertheless, there remains a possibility that AT&T and WorldCom might be able to find a way out of the dilemma they have created for themselves.

Commission Decision

For the reasons set forth above, the Commission affirms the ALJ's June 11 Ruling granting, in part, Qwest's Motion to Compel. We find that an exception to ORCP 43A is appropriate under the circumstances presented in this case. AT&T and WorldCom cannot prevent discovery of relevant information central to the outcome of

[19] AT&T and WorldCom Motion to Certify at 7.
[20] This decision was made notwithstanding the fact that the Arizona Commission had previously ordered Qwest to provide its customer location data within 30 days. *See*, Supplemental Materials in Support of AT&T and WorldCom's Opposition to Qwest's Motion to Compel Discovery at 5, also, Exhibit D.
[21] AT&T and WorldCom Motion to Certify at 7-8.
[22] *Id* at 8.

this proceeding simply because they chose to have the data developed by a third party. Second, we find that it is contrary to the public interest to require parties to Commission proceedings (and potentially the Commission itself) to pay for discovery.

If AT&T and WorldCom do not produce the information required by the June 11 Ruling, the Commission will accord limited weight to those elements of the HAI model that depend on the omitted information.

ORDER

IT IS SO ORDERED.

Made, entered, and effective _____.

_____	_____
Roy Hemmingway	**Lee Beyer**
Chairman	Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.