ORDER NO. 03-747

ENTERED DEC 18 2003

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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: APPLICATION FOR RECONSIDERATION DENIED

Procedural History

This docket was initiated by the Public Utility Commission of Oregon (Commission) to investigate the costs and prices of unbundled network elements (UNEs) provided by Qwest Corporation (Qwest) to competing telecommunications carriers pursuant to the Telecommunications Act of 1996. The central focus of the investigation involves two cost models; one filed by Qwest and another filed jointly by AT&T Telecommunications of the Pacific Northwest, Inc., AT&T Local Services on behalf of TCG Oregon, and WorldCom, Inc. (now known as MCI), (jointly, AT&T/MCI). The AT&T/MCI model is known as the "HAI" model.

In February, 2003, Qwest filed discovery requests asking AT&T/MCI to produce, among other things, customer location data and the clustering algorithm used in compiling the HAI model. The data were developed for AT&T/MCI by Taylor-Nelson-Sofries (TNS), a third party contractor. TNS claims the data requested by Qwest is trade secret information. It is willing to release the customer location data for a substantial fee ($4000/day), but will not release the clustering algorithm to Qwest under any circumstances.

AT&T/MCI declined to produce the information sought by Qwest. Among other things, it argued that disclosure is not required under the Oregon Rules of Civil Procedure 43A (ORCP) because it is not in their "possession, custody and control." AT&T/MCI also claimed that Qwest was not harmed by the failure to disclose because it could obtain the customer location data from TNS for a fee.

On June 11, 2003, the presiding Administrative Law Judge issued an oral ruling requiring AT&T/MCI to provide the customer location data and clustering algorithm. AT&T/MCI subsequently filed a motion to certify the ALJ's ruling to the Commission. Although AT&T/MCI did not meet the requirements of OAR 860-014-0091, the ALJ certified the matter to the Commission because the instant dispute involves issues of first impression and arguably, a departure from the ORCP.

On August 28, 2003, the Commission entered Order No. 03-533 affirming the ALJ's ruling. The Order holds that (1) AT&T/MCI may not prevent discovery of information central to the investigation merely because it chose to use a third party to develop that information, and; (2) AT&T/MCI's proposal to require Qwest to pay for discovery is contrary to the public interest.

On October 28, 2003, AT&T/MCI filed an application for reconsideration of Order No. 03-533. On November 12, 2003, Qwest filed a response opposing AT&T/MCI's application.

Standard of Review

Oregon Administrative Rule 860-014-0095(3) provides that the Commission may grant an application for rehearing or reconsideration if the applicant shows:

> (a) New evidence which is essential to the decision and which was unavailable and not reasonably discoverable before issuance of the order;
> (b) A change in the law or agency policy since the date the order was issued, relating to a matter essential to the decision;
> (c) An error of law or fact in the order which is essential to the decision; or
> (d) Good cause for further examination of a matter essential to the decision.

AT&T/MCI Application for Reconsideration

a) OAR 860-014-0091 provides that a ruling of the ALJ may not be appealed during a proceeding except where the ALJ certifies the question to the Commission upon a finding 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 the proceeding.

AT&T/MCI argues that it has been denied due process because it was not afforded an opportunity "for additional briefing on the merits" after the ALJ certified the issue to the Commission for resolution.[1] There is no basis for this claim. First, OAR 860-014-0091 says nothing about providing parties with an opportunity to file

[1] AT&T/MCI Application for Reconsideration at 1-2.

"additional briefing" once a matter has been certified. Second, AT&T/MCI has had numerous opportunities to comment on the issues in dispute. It has filed three sets of comments, participated in two telephone conferences and submitted over 160 pages of supplemental materials for consideration.

b) AT&T/MCI argues that new developments occurring since Order No. 03-533 was entered justify reconsideration. Specifically, it asserts that the revised cost model filed by Qwest on September 25, 2003, also uses geocoded customer location data created by TNS. AT&T/MCI states:

> Qwest presumably obtained a license to use the TNS data, but Qwest's filing does not include the algorithms that TNS used to develop these surrogate customer locations or any other information that would enable other parties to determine how TNS performed this function for the data used in Qwest's cost model.[2]

Qwest denies AT&T/MCI's allegations and emphasizes that it "uses the same process for customer locations that the FCC uses in its publicly-available Synthesis Model. Unlike AT&T/MCI, Qwest has full access to customer locations used in its model, which it obtained by paying TNS a licensing fee."[3] Also, "in contrast to the HAI model's reliance on the proprietary TNS clustering process, Qwest's's model uses the FCC's clustering algorithm," which is "publicly available through the FCC's web site."[4]

The Commission finds that issues relating to Qwest's cost model are irrelevant to whether it was proper to require AT&T/MCI to disclose essential elements of the HAI model. The discovery procedures affirmed in Order No. 03-533 are applicable to all parties. In other words, Qwest would be required to disclose the same type of model data now required from AT&T/MCI. As Qwest emphasizes, however, there are no outstanding motions or claims regarding its model.

Moreover, Qwest's response raises serious questions regarding the accuracy of AT&T/MCI's allegations. Qwest emphasizes that its model was specifically designed to ensure it would be "transparent and verifiable" in accordance with FCC standards.[5] Qwest also affirms that the customer location data and clustering algorithm in its model are available for discovery purposes.

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[2] *Id. at 2*.
[3] Qwest Response at 8.
[4] *Id.*
[5] In its recent *UNE Pricing NPRM*, the FCC noted: "[T]wo goals identified in the universal service context-transparency and verifiability-also may be relevant to a state commission's ability to determine UNE costs in a reasonable time frame. By transparency we mean that the logic and algorithms of a cost study should be revealed and understandable by the parties and regulators. For example, if a cost model were presented in an electronic spreadsheet, but all the formulae were concealed so that the parties could not ascertain the underlying assumptions, the model would not be transparent. By verifiability we mean that data or inputs that are used to estimate costs should be derived from public sources, or they should be able to be verified or audited without undue costs or delay. *See* Notice of Proposed Rulemaking, *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service*

c) Order No. 03-533 requires AT&T/MCI to produce data crucial to the operation of its HAI cost model or risk having those portions of the model that rely upon that data excluded from consideration. As noted above, the disputed data was developed for AT&T/MCI by TNS. At the time AT&T made arrangements with TNS, it knew or should have known that: (1) examination of the HAI model would be a central focus of this investigation; (2) the information developed by TNS is critical to the operation of the HAI model, and (3) every significant element of the HAI model would be subject to extensive discovery by other parties and the Commission. In addition, AT&T knew prior to entering into the arrangement that TNS had a policy of refusing to disclose the disputed data.

Order No. 03-533 explains in detail why it is essential for the Commission and the parties to have the opportunity to examine the disputed cost model inputs, even though AT&T does not have "possession, custody and control"of the data as provided in ORCP 43A.[6] Although Order No. 03-533 characterizes our decision as a "departure" from ORCP 43A, we noted that a reasonable argument can be made to the contrary.[7] Qwest advocates a similar position. Since AT&T/MCI acknowledges that "Oregon appellate courts have not interpreted the phrase 'possession, custody, and control'" in ORCP 43A, Qwest argues that "it cannot be a *departure* from existing law to require AT&T/MCI to produce the TNS materials." Instead, Qwest maintains that this case is "closely analogous to the situation in which a party retains an expert to prepare an analysis that the party intends to use in litigation. In this situation, courts have uniformly ruled that the party must produce not only the expert's work product, but also any data, work papers, and other materials related to the work product."[8]

To the extent our decision represents a "departure" from ORCP, which we do not concede, it is clearly warranted under the circumstances, and within the scope of our authority pursuant to OAR 860-011-0000(3).[9] Unless the disputed information is produced, we will not consider those portions of the AT&T/MCI model that rely on that data.

In its application for reconsideration, AT&T/MCI alleges, *inter alia*, that Order No. 03-533 results in a denial of due process, represents arbitrary and capricious decision making, and is inconsistent with the public interest and fundamental fairness. It further maintains that it "reasonably relied" on ORCP 43A, and had "no reason to predict that the Commission would pull "the Civil Rules rug from under them." [10]

By Incumbent Local Exchange Carriers, WorldCom, Dkt. No. 03-173, FCC 03-224 (rel. Sept. 15, 2003) ("*UNE Pricing NPRM*"), at 17, ¶41. (Internal footnotes omitted.)

[6] Order No. 03-533 at 5-9.

[7] *Id.* at 7, footnote 14.

[8] *Qwest Corporation Response* at 4; *see also, AT&T/MCI Motion to Certify* at 4.

[9] OAR 860-011-0000(3) states that "[t]he 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."

[10] *AT&T/MCI Application for Reconsideration* at 3.

In other words, AT&T/MCI is saying that it retained TNS to develop the disputed cost data with the understanding that it would be able to preclude discovery of the data under ORCP 43A. As Qwest observes, however, any such "reliance on [AT&T/MCI 's] part was patently unreasonable, since no party can reasonably expect to shield from discovery plainly relevant material that it chose to have a third party prepare for use in litigation." The Commission will not permit parties to hide critically important information under the guise that they have no control over outside experts and/or third parties they have consciously chosen to retain.

AT&T/MCI insists that our decision in this matter is misguided and unfair, but, in fact, the opposite is true. AT&T/MCI's attempt to "hide the ball" is contrary to the public interest, contravenes the notion of procedural fairness, and completely misapprehends the Commission's regulatory function. The Commission will not consider costs and prices proposed by AT&T/MCI -- or any other party for that matter -- if we cannot discern how those costs and prices are calculated. It is unreasonable for AT&T/MCI to suggest otherwise.[11]

d) In a related argument, AT&T/MCI argues the Commission should have convened "a rulemaking or other generic policy-making proceeding devoted to this issue." It claims that Order No. 03-533 interprets OAR 860-011-0000(3) "to simply disregard the Civil Rules on a case-by-case basis."

AT&T/MCI's argument is unpersuasive. OAR 860-011-0000(3) clearly contemplates that exceptions to ORCP will be determined by the Commission on a case-by-case basis as circumstances require. As Order No. 03-533 emphasizes, the facts presented in this case demonstrate that allowing AT&T/MCI to rely on ORCP 43A to refuse to disclose critical elements of their model is contrary to the public interest and incompatible with the Commission's regulatory responsibilities.[12]

e) Order No. 03-533 states:

> 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.[13]

[11] Put another way, we hold that one cannot arrange for key material to be produced outside of its "possession, custody, and control," use that key material to make its case, and then resist discovery by claiming that the key material is outside of its "possession, custody and control."
[12] Moreover, it would be impractical for the Commission to attempt to fashion rules that encompass the myriad of factual circumstances that might result in an exception to the ORCP.
[13] Order No. 03-533 at 9.

AT&T/MCI takes issue with this statement, and observes that Qwest's decision to rely on TNS-produced data, "implicitly concedes that TNS represents the best, if not only, source of such data."[14] It contends that all parties are "in the same bind" and if the Commission does not accord any weight to the TNS data, then (a) no party will be able to produce credible evidence and (b) the Commission will not have a sufficient factual record upon which to render a decision.[15]

This argument fails for two reasons. First, Qwest is not "in the same bind" as AT&T/MCI, because both the customer location data and clustering algorithm used in the Qwest model are subject to discovery.[16] Second, AT&T/MCI's argument misses the point. Order No. 03-533 stands for the proposition that the Commission must have access to the critical inputs and assumptions underlying *any cost study or model*, not merely the model submitted by AT&T/MCI. If neither AT&T/MCI nor Qwest were able to submit a model satisfying these requirements, our recourse would be to terminate the investigation until a transparent and verifiable[17] cost model could be produced.

f) The remaining arguments advanced in AT&T/MCI's application for reconsideration are already addressed in Order No. 03-533 and require no additional comment.

Commission Disposition

The Commission finds that the arguments set forth in AT&T/MCI's application for reconsideration do not satisfy the requirements of OAR 860-014-095. The application should therefore be denied.

[14] AT&T/MCI Application for Reconsideration at 5.
[15] *Id.* at 7.
[16] Qwest Response at 7-8.
[17] *See,* footnote 5, *supra*.

ORDER

IT IS ORDERED that the application for reconsideration filed by AT&T Telecommunications of the Pacific Northwest, Inc., AT&T Local Services on behalf of TCG Oregon, and WorldCom, Inc. (now known as MCI), on October 28, 2003, is denied.

Made, entered, and effective _____.

_____	_____
Lee Beyer Chairman	**John Savage** Commissioner
	_____
	Ray Baum Commissioner

A party may appeal this order to a court pursuant to ORS 756.580.