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March 26, 2004

RECEIVED

MAR 26 2004

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

RE: Review of the Commission's Rules Regarding The Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers, WC Docket No. 03-173

Dear Ms. Dortch:

Enclosed for filing please find an original and four copies of the Opposition of the Verizon Telephone Companies ("Verizon") to the Motion of AT&T Corp. ("AT&T") to Permit Data Requests in the above-referenced proceeding. I am also providing an additional copy to be file-stamped and returned to me.

Please note that while the Commission's web site indicates that AT&T filed its motion on March 15, 2004, the motion is dated March 16, 2004 and, as the certificate of service indicates, AT&T served Verizon on that date. Pursuant to rules 47 C.F.R. §§ 1.45(b) and 1.47(b), Verizon's opposition is timely filed today.

Please do not hesitate to contact me at 202.663.6455 should you have any questions.

Sincerely,



Lynn R. Charytan

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List ABCDE

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**MAR 26 2004**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

**Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
Suite TW-A325**

**ORIGINAL**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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**MAR 26 2004**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

In the Matter of )  
)  
Review of the Commission's Rules )  
Regarding the Pricing of Unbundled )  
Network Elements and the Resale of )  
Service by Incumbent Local Exchange )  
Carriers )

WC Docket No. 03-173

**OPPOSITION OF THE VERIZON TELEPHONE COMPANIES  
TO AT&T CORP.'S MOTION TO PERMIT DATA REQUESTS**

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March 26, 2004

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**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of

Review of the Commission's Rules Regarding )  
The Pricing of Unbundled Network Elements )  
And the Resale of Service by Incumbent Local )  
Exchange Carriers )

WC Docket No. 03-173

**OPPOSITION OF THE VERIZON TELEPHONE COMPANIES<sup>1/</sup>  
TO AT&T CORP.'S MOTION TO PERMIT DATA REQUESTS**

**SUMMARY AND INTRODUCTION**

The Commission should not grant AT&T's extraordinary request to allow it to serve discovery on Verizon and the three other Regional Bell Operating Companies. Private discovery is not permitted in notice and comment rulemaking proceedings, like this one, and there is no reason for the Commission to depart from that practice here. Nor, in any event, is the information AT&T seeks relevant to the issues the Commission must decide in this rulemaking. Indeed, the data AT&T seeks would in many cases not even be relevant to the factual issues a state commission must decide in a UNE pricing case, because no party proposes basing UNE cost studies on the level of detail that AT&T seeks. However, if the Commission were to permit discovery, one thing is clear: Verizon and others must be permitted an opportunity to conduct discovery with respect to AT&T's and other CLECs' data, because such data would be equally if not more relevant to this proceeding.

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<sup>1/</sup> The Verizon telephone companies ("Verizon") are the affiliated local telephone companies of Verizon Communications, Inc. These companies are listed in Attachment A hereto.

**I. THE COMMISSION SHOULD NOT DEPART FROM ITS STANDARD RULE AND ALLOW PRIVATE DISCOVERY IN THIS NOTICE AND COMMENT RULEMAKING.**

As even AT&T must concede, its request to issue discovery in the midst of this rulemaking proceeding is virtually without precedent. Private discovery is an adjudicatory tool, and as both the Administrative Procedure Act (“APA”) and the Commission’s rules make clear, private discovery is not an appropriate component of the rulemaking process. The APA affords parties no greater a participatory role in rulemaking than “submission of written data, views, or arguments with or without opportunity for oral presentation.” 5 U.S.C. § 553(c). The Commission’s rules likewise provide only for participation through “submission of written data, views, or arguments, with or without opportunity to present the same orally in any manner.” 47 C.F.R. § 1.415(a).

While AT&T argues that the Commission generally has discretion to “fashion[] its own procedures,”<sup>2/</sup> the Commission, in exercising that discretion, has “heretofore held . . . that discovery is not available . . . in rulemaking proceedings.”<sup>3/</sup> Instead, the Commission has found that “[t]he procedures now followed in such [rulemaking] proceedings adequately provide for the disclosure of relevant facts.”<sup>4/</sup> And the Commission has explained that permitting private parties to serve data requests in a rulemaking lies far beyond the “ultimate and necessary

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<sup>2/</sup> AT&T Corp.’s Motion to Require Incumbent Local Exchange Carriers to Respond to Data Requests, filed in WC Docket No. 03-173, Mar. 16, 2004, at 2 n.1 (“AT&T Motion”) (quoting *City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 664 (D.C. Cir. 1984)).

<sup>3/</sup> *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 1977 WL 5712 (D.C. Cir. Apr. 20, 1977).

<sup>4/</sup> Report and Order, *Amendment of Part 1 of the Rules of Practice and Procedure to Provide for Discovery Procedures*, 11 F.C.C.2d 185, ¶ 5 (1968).

boundaries” of discovery.<sup>5/</sup> Thus, as even AT&T acknowledges, neither the APA nor the Commission’s rules prescribe *any* discovery procedures (or rights) for rulemaking proceedings.<sup>6/</sup>

The rules do not permit discovery precisely because “[i]nformal rulemaking<sup>7/</sup> was . . . designed to avoid the procedural quagmires that had ensnared formal rulemaking and adjudication.”<sup>8/</sup> The development of an evidentiary record in an informal rulemaking thus is an ongoing, uncomplicated process. All parties have an opportunity to submit filings during almost the entire course of a notice and comment rulemaking,<sup>9/</sup> and staff and the parties generally cooperate to ensure that the record is complete and that there is sufficient relevant information in the record from which a decision can be made.

By contrast, introducing the notion of private discovery into this rulemaking as AT&T proposes would be procedurally complex. It would compel the Commission to resolve a myriad of procedural issues, including the following questions: which parties may serve discovery;

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<sup>5/</sup> Memorandum Opinion and Order, *Rules and Policies to Facilitate Public Participation and Reregulation of the Various Communications Industries in the Public Interest*, 61 F.C.C.2d 1112 ¶ 58 (1976) (declining to authorize discovery against licensees prior to designation for hearing in contested application proceedings).

<sup>6/</sup> 5 U.S.C. § 553; 47 C.F.R. § 1.415.

<sup>7/</sup> FCC notice and comment rulemakings (like the one at hand) are informal rulemakings pursuant to section 553 of the APA. 5 U.S.C. § 553; *see also id.* §§ 556, 557.

<sup>8/</sup> Thomas O. McGarity, *Some Thoughts On ‘Deossifying’ the Rulemaking Process*, 41 Duke L.J. 1385, 1398 (1992).

<sup>9/</sup> Parties may make *ex parte* filings with the Commission throughout the proceeding until the Sunshine Agenda period of informal rulemaking proceedings, which typically is seven days prior to the public meeting during which the Commission announces its determination. *See* 47 C.F.R. § 1.1206(a); Memorandum Opinion and Order, *Policies and Procedures Regarding Ex Parte Communications During Informal Rulemaking Proceedings*, 93 F.C.C.2d 1250 ¶ 2 (1983) (“adopt[ing] the general policy of permitting but requiring disclosure of *ex parte* presentations in most informal rulemaking proceedings”); *see also Sierra Club v. Costle*, 657 F.2d 298, 401 (D.C. Cir. 1981) (encouraging *ex parte* contacts in informal rulemaking proceedings.)

which parties must respond to discovery; which parties have a right to see the discovery produced in response to other parties' requests; how many requests to permit; whether parties have exceeded their limit by filing compound questions; which requests are appropriate; which questions must be narrowed or denied entirely; what time period should be allowed for responding; whether to permit extensions; whether the responses are sufficient; whether claims of privilege are or are not appropriate; whether the burden of producing the requested data is excessive; whether to permit follow-up discovery; and whether to grant or deny motions to compel.

The TELRIC rulemaking proceeding raises sufficiently complex *substantive* issues already. Adding these procedural discovery issues to the mix will unnecessarily complicate this proceeding, especially given the Staff's timetable for seeking to resolve the proceeding by this fall.<sup>10/</sup> As the Commission noted in refusing to grant discovery in a far more straightforward rulemaking proceeding concerning whether state rate regulation of CMRS providers in Hawaii was warranted, "[w]e have granted parties every opportunity for formal and informal input, but permitting motion practice and discovery . . . would burden the Commission to the extent that we could not meet our statutory deadline."<sup>11/</sup>

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<sup>10/</sup> FCC Wireline Competition Bureau Senior Deputy Chief Jeff Carlisle has said that the FCC will release an order in the TELRIC proceeding "in the fall time frame." See 24 Communications Daily No. 33 (Feb. 19, 2004).

<sup>11/</sup> Order, *Petition of Public Utilities Commission, State of Hawaii, for Authority to Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii*, 10 FCC Rcd 2359, 2368 ¶ 37 (1995); see also Report and Order, *Amendment of Part 1 of the Rules of Practice and Procedure to Provide for Discovery Rules*, 11 F.C.C.2d 185, ¶ 4 (1968) ("Intelligent selection should be made of the particular procedure or combination of procedures which will prove most effective and *expeditious* in a particular set of circumstances.") (emphasis added); Thomas O. McGarity, *Some Thoughts on "De-Ossifying" the Rulemaking Process*, 41 Duke L.J. 1385, 1398 n.59 (1992) ("Agencies that elect to make broad policy through informal rulemaking would not be subject to time-consuming discovery . . .").

The Commission has exercised generalized rulemaking authority thousands of times without the type of burdensome discovery and carrier-specific level of detail AT&T proposes. There is no reason to depart from that practice here.

**II. THE DATA REQUESTED BY AT&T ARE NOT NECESSARY TO ALLOW THE COMMISSION TO ASSESS VERIZON'S PROPOSALS.**

AT&T's motion should be denied in any event because the discovery it requests is irrelevant to the resolution of the issue that is at the heart of this proceeding.<sup>12/</sup> AT&T seeks a voluminous amount of discovery concerning, *inter alia*, the manufacturer, model number, and acquisition and install dates for "each piece of equipment or other asset" in fifteen New York wire centers; "each expenditure" Verizon has made in the past three years relating to any aspect of the network in those wire centers; "each investment or upgrade" Verizon intends to make over the next five years, including information regarding the precise date of that planned upgrade, the location of each upgrade or investment, and the "specific change in capacity or functionality" that may result; the number of copper pairs in each copper sheath in each wire center; and the number of strands of fiber in every single fiber cable in every single relevant wire center. AT&T Motion, AT&T Data Requests to Verizon Nos. 1(a), 2(a), 3(a)-(e), 5(a)(vi). But these requests miss the central point of this proceeding, which is how the UNE pricing rules should be reformed to be more "theoretically sound," send more "accura[te] . . . pricing signals" to ILECs and CLECs alike, and induce efficient facilities investment.<sup>13/</sup> AT&T's request for a count of the

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<sup>12/</sup> Verizon is not identifying here its specific objections to AT&T's discovery requests. If the Commission were to permit AT&T to serve discovery on Verizon, Verizon would file its objections at that time.

<sup>13/</sup> Notice of Proposed Rulemaking, *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, 18 FCC Rcd 18945, 18947-48 ¶¶ 4, 3 (2003) ("NPRM").

number of copper wires in a particular wire center has nothing to do with answering this fundamental theoretical question.

AT&T claims that the data it seeks *are* critical to the Commission's resolution of this proceeding because incumbents' network data "are insufficient to permit a determination of UNE prices under the Bells' 'more real-world' methodology" — AT&T Motion at 4— or, more precisely, to the methodology that the Commission itself proposed in the *NPRM*.<sup>14/</sup> But this claim, which AT&T also made throughout its comments (and which MCI repeated in its recent *ex parte*)<sup>15/</sup> is wrong, and it is not a legitimate basis for the wild goose chase AT&T asks the Commission to endorse here. As Verizon has shown, UNE costs can readily be based on the ILECs' verifiable, transparent, and often publicly available data.<sup>16/</sup> The incumbents' publicly-filed ARMIS reports are a verifiable source of data concerning critical inputs such as operating and depreciation expenses, for example. Incumbents similarly maintain network routing data concerning customer locations and distribution terminal locations. Prices for facilities such as cables, digital loop carrier systems, and switching equipment are recorded in contracts and other objective, verifiable documents. Furthermore, industry-wide, well-accepted engineering guidelines (which AT&T acknowledges it has obtained in various UNE proceedings, *see* AT&T

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<sup>14/</sup> See *e.g.*, *NPRM* at 18948 ¶ 4 (seeking comment on "an approach that bases UNE prices on a cost inquiry that is more firmly rooted in the real-world attributes of the existing network, rather than the speculative attributes of a purely hypothetical network.").

<sup>15/</sup> See, *e.g.*, Comments of AT&T Corp., filed in Docket No. 03-173, Dec. 16, 2003, at 29-30 ("AT&T Comments"); Letter from John R. Delmore, MCI, to Marlene H. Dortch, FCC, *ex parte* presentation at 10 (Mar. 16, 2004) (claiming that "[t]here are no 'actual costs' on ILECs' books").

<sup>16/</sup> See, *e.g.*, Reply Comments of the Verizon Telephone Companies, filed in Docket No. 03-173, Jan. 30, 2004, at 25-28 ("Verizon Reply Comments").

Motion at 6) are a key source of data for UNE cost study inputs. Indeed, Verizon has been using such data as a basis for its UNE cost studies for years.

There accordingly is no merit to AT&T's claim that the incumbents lack the data necessary to perform UNE cost studies that measure real-world, forward-looking costs. In fact, AT&T's own pleading belies these claims: For example, while AT&T claims that the Commission must permit AT&T's discovery in order to assess whether Bells "have sufficient line count data in their possession," AT&T Motion at 8, AT&T acknowledges in the same breath that precisely such data have been provided by SBC, Verizon, and Qwest in previous UNE rate proceedings, AT&T Motion at 8. And AT&T concedes that it typically obtains the ILECs' engineering guidelines in discovery, which are a key component in the inputs used in the ILECs' UNE cost studies. *See* AT&T Motion at 6. Although, as we show below, much of this data has no relevance to *any* party's proposal for how UNE costs should be measured, it constitutes decisive evidence that AT&T's claim that the ILECs lack data concerning the real world network is simply wrong.

Similarly, AT&T's claim that the RBOCs' data are unreliable and that "the Bells do not have reliable data on the configurations and compositions of their outside plant," AT&T Motion at 5, is inconsistent with the CLECs' (including AT&T's) own repeated use of precisely such data in their own UNE cost studies. For example, in California and Washington, CLECs sought and then used Verizon's data with respect to customer addresses, line counts, and types of

services, in populating their own UNE cost models.<sup>17/</sup> And CLECs regularly rely on Verizon's annual expense data.<sup>18/</sup>

AT&T also seeks to justify its data requests by suggesting that the information it seeks is necessary in order to determine fact-specific questions such as whether the incumbents' "actual" fills are as claimed." AT&T Motion at 7. But such questions are not relevant to this proceeding. Verizon, certainly, has not advocated that the Commission endorse specific inputs such as fill factors, but instead that the Commission clarify that costs must be based on *Verizon's* actual network data. Whether Verizon's evidence, including whatever data it produces, in fact supports a specific input is a question the state fact finder is well-suited to determine in the course of an actual UNE arbitration. And it is a question that can be answered only on the basis of whatever data the ILEC chooses to bring forward to support the specific UNE input in question, which might or might not be the data or types of reports AT&T seeks here.

Indeed, in many cases, the data that Verizon expects to introduce in support of its UNE cost studies will *not* be the data AT&T requests here, making AT&T's fishing expedition even less relevant. For example, as noted above, AT&T asks Verizon to produce, with respect to "each piece of equipment or other asset in the study area," the "location, . . . manufacturer, model number, acquisition date, and install date," as well as "the value of the asset, and the basis on which the value was determined," and detailed information relating to the current and planned use and possible upgrade of all equipment for the next five years. AT&T Data Request to

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<sup>17/</sup> See, e.g., Declaration of Robert A. Mercer in Support of Opening Comments of Joint Commentors, CA Docket No. R.93-04-003/I.93-04-002, 7-8, 10-11 (filed Nov. 3, 2003).

<sup>18/</sup> See, e.g., Joint Declaration of Thomas L. Brand and Art Menko in Support of Joint Commentors' Opening Comments, CA Docket No. R.93-04-003/I.93-04-002, ¶¶ 38-40 (filed Nov. 3, 2003).

Verizon No. 1(a), (c). But this minute level of detail is irrelevant to any cost model. Indeed, as AT&T *itself* argued, “[n]o cost model . . . could mirror[ ] the real world or real networks in atomistic detail.” AT&T Comments at 28. In most cases, Verizon’s UNE cost studies are built from more generalized cost data and are informed by Verizon’s engineering guidelines, which form the basis for the design and development of the real-world network. Since neither Verizon nor AT&T appears to be proposing to base UNE costs on the level of detail AT&T seeks here, forcing Verizon to shoulder the burden of producing that data in this proceeding serves no relevant purpose and is simply an attempt to derail the Commission’s proceeding.

AT&T also is wrong that its requests are “reasonable in scope,” and avoid “any undue burden on the Bells.” AT&T Motion at 5. Quite the opposite is true. For example, AT&T seeks detailed information including the manufacturer, the model number, the acquisition and install date, the plans for continued use, the value, and the need for augmentation or upgrade for every single network asset in Verizon’s network in 15 different wire centers. AT&T Data Request to Verizon No. 1. AT&T also asks Verizon to describe, for every expenditure Verizon has made in the past three years or intends to make in the next five years, “the unit price (*e.g.*, dollars per hour, cost per unit), net of any discounts received by Verizon, and number of units (installation hours, testing hours, number of DLC line cards) associated with the expenditure.” AT&T Data Request to Verizon No. 2(a). Responding to these requests would require an enormous amount of time and expense and would generate reams of paper.<sup>19/</sup> In light of the fact that the data

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<sup>19/</sup> To help put this in perspective, discovery in the California UNE proceeding, already has required Verizon to produce over 46,000 pages of discovery — a figure that does not even include huge amounts of data that have been submitted electronically — and is still ongoing. While discovery in that state involved more wire centers and more interrogatories, the point is that responding to network-related data requests is cumbersome and time consuming.

AT&T seeks are not relevant in the first place, compelling Verizon to shoulder the excessive burden of responding would be particularly unfair.

Finally, to the extent the Commission were to permit discovery in this proceeding at all, data that are in AT&T's and other CLECs' possession would be equally if not substantially more relevant to this proceeding than the data that AT&T seeks from Verizon and the other RBOCs. AT&T and the CLECs generally defend the current TELRIC methodology as the proper framework for UNE pricing and argue that the UNE rates under TELRIC today are a fair or even conservatively low assessment of efficient, forward-looking UNE costs. Since the CLECs typically should be unencumbered by a pre-existing network and any "embedded inefficiencies," their network costs and data could be an extremely informative benchmark to which current UNE rates and cost model inputs could be compared. Accordingly, Verizon should be equally entitled to know, for example, the price, manufacturer and model number for each piece of equipment or other asset in a representative sample of the AT&T's wire centers, just as AT&T requests here. As the D.C. Circuit has just recognized, the CLECs' own costs — which they reluctantly if ever produce in individual UNE rate proceedings — would certainly be relevant to analyzing whether current "TRIC-compliant" UNE rates are well below the prices of an efficient competitor in a competitive market.<sup>20/</sup> Indeed, the CLECs' adamant insistence in their TRIC comments that their own data are irrelevant suggests that that data might actually demonstrate TRIC's dissociation from reality.<sup>21/</sup>

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<sup>20/</sup> See *United States Telecom Assoc. v. FCC*, 359 F.3d 554, 586 (D.C. Cir. 2004) (noting the "anomal[y] that CLECs do not themselves provide [their own entrance facilities], presumably doing so at the costs associated with 'the most efficient telecommunications technology currently available,' the TRIC standard") (citation omitted).

<sup>21/</sup> See Declaration of Joseph P. Riolo, attachment to Comments of AT&T Corp., at ¶¶ 68-69 (contending that even if a new entrant could somehow build a network today that could serve the

Information about the CLECs' past and especially future expenditures and network plans, broken down by data and equipment — the same data AT&T seeks here — would also be very relevant to the Commission's assessment of the proper risk assumptions that should be made when determining the cost of capital and depreciation inputs in UNE cost studies. For example, AT&T's plans to install its own facilities, whether switches or fiber loops, or its plans to convert to a true VoIP service model, would be extremely relevant to assessing the degree to which incumbents face a substantial risk of stranded investment and revenue loss due to the CLECs' planned bypass of the wireline network. Accordingly, should the Commission wish to open this proceeding to private discovery, Verizon should be entitled to seek this data from AT&T and the other CLECs. While discovery should not be permitted at all, there can certainly be no principled basis to permit only the discovery that AT&T proposes to serve on the RBOCs.

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same level of demand as an incumbent's ubiquitous network, the resulting fill would be irrelevant in the CLECs' eyes, because it would necessarily "reflect . . . inefficiencies.").

## CONCLUSION

For the reasons set forth above, the Commission should deny AT&T's request, and should clarify that private discovery will not be permitted in this rulemaking proceeding.

Respectfully submitted,



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*Counsel for Verizon Telephone Companies*

March 26, 2004

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States  
GTE Midwest Incorporated d/b/a Verizon Midwest  
GTE Southwest Incorporated d/b/a Verizon Southwest  
The Micronesian Telecommunications Corporation  
Verizon California Inc.  
Verizon Delaware Inc.  
Verizon Florida Inc.  
Verizon Hawaii Inc.  
Verizon Maryland Inc.  
Verizon New England Inc.  
Verizon New Jersey Inc.  
Verizon New York Inc.  
Verizon North Inc.  
Verizon Northwest Inc.  
Verizon Pennsylvania Inc.  
Verizon South Inc.  
Verizon Virginia Inc.  
Verizon Washington, DC Inc.  
Verizon West Coast Inc.  
Verizon West Virginia Inc.

## CERTIFICATE OF SERVICE

I, Carole Walsh, do hereby certify that on this 26th day of March, 2004, copies of the Opposition of the Verizon Telephone Companies to AT&T Corp.'s Motion to Permit Data Requests were served by overnight courier or hand delivery upon the following parties:

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