

**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

**REPLY OF AT&T CORP. TO OPPOSITIONS OF
INCUMBENT LOCAL EXCHANGE CARRIERS TO
AT&T's MOTION TO REQUIRE RESPONSES TO DATA REQUESTS**

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April 7, 2004

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AT&T Corp. submits this reply to the oppositions of SBC Communications Inc. ("SBC"), BellSouth Corporation ("BellSouth"), Qwest Communications International Inc. ("Qwest"), and the Verizon Telephone Companies ("Verizon") to AT&T's "Motion to Require Incumbent Local Exchange Carriers to Respond to Data Requests," filed March 16, 2003 ("Motion").¹ The Bells' oppositions confirm the critical need for production of the data identified by AT&T.

The Commission plainly has the discretion to authorize discovery in rulemaking proceedings where, as here, the policy issues before the Commission turn on specific factual issues that can be resolved only by examining data within the exclusive custody and control of one or more parties. In the particular circumstances of this case, not allowing for appropriate factual discovery would be arbitrary and capricious. The Bells advocate a costing methodology

¹ Although the Bells filed their respective Oppositions with the Commission on March 26, 2004, at least one of the Bells served AT&T with its Opposition by first-class mail. For that reason, and in light of the Commission's requirement that any response to various oppositions "be set forth in a single pleading," the instant Reply is timely filed today. *See* 47 C.F.R. §§ 1.4(g)-(i), 1.45(c).

that purportedly relies on the “real-world” quantities, asset counts, routings, configurations and other attributes of the Bells’ existing networks. The Commission cannot make an informed assessment of the practicability of implementing these proposals without knowing whether the Bells in fact possess reliable data on their “actual” cost attributes. Moreover, the Bells’ claim of undue burden is an indictment not of these discovery requests, but of the Bells’ own cost proposal. The discovery required under the Bells’ “actual” cost standard in an actual UNE pricing case before a state commission would be far more detailed and extensive than the stripped-down illustrative data requests that AT&T has posed here. If these questions are overly burdensome, then actual litigation under the Bells’ proposed standard, which would require greater detail by several orders of magnitude, clearly would be hopelessly impracticable.

Perhaps the most telling aspect of the Bell oppositions, however, is their confirmation of one of the *ultimate* points that AT&T has sought to establish through discovery: that much of the “actual” cost data needed to implement the Bells’ “actual forward looking cost standard” are nonexistent. BellSouth concedes, for example, that approval of the Bells’ proposed costing methodology would merely be the starting point for the task of “gathering” and “assembling” the data to “implement that methodology.” BellSouth Opp. at 4. And Qwest admits that “the ILECs’ data may not be comprehensive in every respect,” and that “actual” data for some costs may not be “available” or “reliable.” Qwest Opp. at 1, 5. These are crucial admissions. As the Supreme Court found only two years ago in upholding the TELRIC standard, the inaccuracy and unreliability of the Bells’ cost records—likened by the Bells’ own spokesmen to “dime-store novels and other works of fiction”—has been an obstacle to past proposals for embedded or “actual” cost ratemaking schemes in UNE price regulation. *See Verizon Communications Inc. v. FCC*, 535 U.S. 467, 518, 512 (2002) (quoting Peter Huber *et al.*). The same conclusion is still warranted in this proceeding.

A. Discovery In Rulemaking Proceedings Is Not Only Permitted But Required When Necessary To Resolve Issues Raised By The Parties.

The Bells argue that discovery should be denied because (1) the Commission's rules explicitly authorize discovery only in adjudications, and (2) discovery is not the "standard" practice in notice-and-comment rulemakings. SBC Opp. at 1, 3-5; BellSouth Opp. at 1-2; Qwest Opp. at 2; Verizon Opp. at 1-3. These claims miss the point. The issue here is not whether discovery is "standard practice" in rulemaking proceedings generally, but whether it is warranted in the particular circumstances of this case. On this issue, the Bells have nothing to say.

The Bells do not dispute that the Commission has the authority to allow discovery in rulemaking proceedings, and that the Commission has in fact exercised this authority when the circumstances warranted. *See* Motion at 1-3 & nn.1-2 (citing cases). In authorizing private parties to conduct discovery in a rulemaking proceeding, for example, the Commission has stated:

Many petitioners contend that we erred in permitting discovery in the hearing phase, alluding to 47 C.F.R. section 1.311 which specifies that discovery is available only in adjudicatory proceedings. Upon careful review of all the petitioners' contentions, *we see no legal or equitable bar to our extension of discovery rights to this proceeding. We believe it falls well within our broad discretion in formulating appropriate procedures in this case to extend discovery rights to the parties and doing so will conduce to effective and expeditious resolution of the issues.* No party is prejudiced thereby, misled, or denied and procedural rights to which they are otherwise entitled.

In the Matter of California Water and Telephone Co., 23 F.C.C.2d 840, ¶ 7 (1970) (emphasis added).

The Commission has recognized its discretion to authorize discovery in rulemaking proceedings in numerous other decisions, some of which AT&T described in its Motion.² Tellingly, the Bells' oppositions do not even mention these decisions. And SBC and

² *See, e.g.*, Motion at 2 & n.2; *In the Matter of International Record Carrier's Scope of Operations in the Continental United States, Including Possible Revisions to the Formula*

Qwest tacitly concede that the Commission has authorized discovery in some rulemaking proceedings.³

The very decisions cited by the Bells underscore this fact. For example, the *Hawaii Order* cited by Verizon recognized the “well established” discretion “accorded regulatory agencies in ordering their procedures, when specific matters are not expressly subjected to the requirements of formal rulemaking or adjudicative process by statutory requirement.”⁴

Prescribed Under Section 222 of the Communications Act, 68 F.C.C.2d 1145, ¶ 11 (1978) (reaffirming that use of discovery procedures in rulemakings is a matter within Commission’s discretion); *In the Matter of Petition of Offshore Telephone Co., Pursuant to Section 201(a) of the Communications Act of 1934, as amended, for Establishment of Charges For Through Interstate Communications Service and Division of Such Charges With South Central Bell Telephone Co. and American Telephone and Telegraph Co.*, 68 F.C.C.2d 63, ¶ 8 (1978) (holding that presiding judge in rulemaking has discretion to order discovery “to ensure that the record contains information essential to a rulemaking decision”). See also *In the Matter of Representing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, 5 FCC Rcd. 3533 (1990) (authorizing discovery in proceedings that were, “in essence,” rulemakings). The Commission has also permitted parties to serve “information requests” in proceedings where its discovery rules are not applicable, where such requests would promote “a narrowing of the issues, the updating of material, and the compilation of a full and fair record.” See e.g., *In the Matter of ITT World Communications, Inc. – Required Rate of Return*, 82 F.C.C.2d 282, 290 n.12 (1980); *In the Matter of American Telephone & Telegraph Company – Petition for Modification of Prescribed Rate of Return*, 73 F.C.C.2d 689, 694 n.12 (1979).

³See SBC Opp. at 4 (discovery is not available “in the vast majority” of rulemaking proceedings); Qwest Opp. at 2 (discovery “generally is not utilized” in rulemaking proceedings).

⁴See Verizon Opp. at 4 n.11, citing *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, ¶ 37 (1995) (“*Hawaii Order*”) (citations omitted). The Commission denied the request for discovery at issue in the *Hawaii* proceeding because it was under a statutory deadline to complete within 12 months its review of separate applications filed by eight States to determine whether State rate regulation of CMRS providers was warranted. *Hawaii Order* ¶¶ 2, 37. By contrast, the Commission is under no statutory deadline in the instant rulemaking proceeding. If anything, the *Hawaii Order* undercuts the Bells’ suggestions that their unsubstantiated assertions about their proposed methodology should be taken at face value. Although the *Hawaii Order* denied the request for discovery of the data underlying an affiant’s testimony, it found that the absence of such data from the record “substantially discounts the weight to be accorded [the affiant’s] analysis,” and ruled that the parties sponsoring the affidavit must provide such data to the Commission if they wished that analysis to be considered. *Id.* ¶¶ 37-38.

The reliance of SBC and Verizon on the decision of a panel of the D.C. Circuit in *Bilingual Bicultural Coalition* (“*Bilingual I*”) is equally misplaced.⁵ *Bilingual I* held that the Commission was *required* to permit discovery in the license renewal proceedings at issue, even though the Commission’s rules did not provide for it, because the petitioners had raised allegations sufficient to challenge the broadcast stations’ denials of discriminatory practices – and, therefore, had made a *prima facie* case that approval of the renewal applications contravened the public interest. The panel held that the Commission “must act on facts” and, in the face of the petitioners’ showing, had “lacked essential data to make a reasoned judgment about whether the public interest had been served in the past or about what was required in the future.” *Bilingual I*, 1977 WL 5712 at *2.

Because of the inadequacy of the record, the *Bilingual I* decision reversed the Commission’s decision to approve the license renewal applications without allowing the petitioners to conduct discovery. While acknowledging that the Commission had held that discovery was not available in license renewal proceedings and “in rulemaking proceedings,” the panel of the court stated:

The Commission views its decision not to allow discovery in these cases as a policy decision wholly within its sound discretion. We disagree. Of course the Commission has discretion and must determine its policies, but in an area as vital as racial discrimination the dynamics of the problem require it to decide on adequate information. *The bona fides of stations seeking to avoid a contested renewal hearing must be factually tested if reasonable grounds exist, as in these instances, to believe that the station’s employment is discriminatory. The very notion of discretion assumes an informed mind* and one who decides without adequate facts cannot be heard to take refuge in the protected area that the law allows for one who reaches an informed rational judgment.

⁵See SBC Opp. at 4 n.4 and Verizon Opp. at 2 n.3, citing *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 1977 WL 5712 (D.C. Cir., Apr. 20, 1977) (“*Bilingual I*”).

Id. at **2 n.2, 3-4. For these reasons, the panel held that the petitioners were entitled to “an opportunity “to probe the station’s initial representation [of nondiscrimination] . . . through appropriate interrogatories.” *Id.* at *4.

In *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 627-628 (D.C. Cir. 1978) (“*Bilingual I*”), the D.C. Circuit, ordering rehearing *en banc*, vacated *Bilingual I*. The D.C. Circuit emphasized in *Bilingual II*, however, that the Commission must authorize discovery where it is necessary to ensure a complete record, irrespective of the scope of the Commission’s discovery rules. Indeed, in one of the license renewal proceedings at issue, the court held that the Commission “had insufficient information to find that license renewal was in the public interest,” and therefore was required on remand to “get the facts concerning [the station’s] alleged employment discrimination.” *Bilingual II*, 595 F.2d at 624, 633. The court held if the Commission did not conduct its own inquiry of the facts on remand, it was *required* to afford discovery to the private petitioners. *Id.* at 634.⁶

B. The Commission Cannot Make An Informed Assessment Of The Bells’ “Actual” Cost Proposals Without Knowing Whether The Bells In Fact Possess Reliable Data On Their “Actual” Networks.

The Bells’ challenges to the relevance to AT&T’s data requests have an air of unreality. *See* SBC Opp. at 8 (asserting that the discovery sought by AT&T “would be of little use to the Commission”); BellSouth Opp. at 2 (same). *See also* SBC Opp. at 2-3 (denying that the Bells’ proposed costing methodologies would rely on data about the Bells’ “actual” or

⁶ *Bilingual II* thus makes clear that the Bells gain nothing by asserting that the Commission’s option of posing its own data requests to the parties obviates the need for allowing discovery by AT&T. *See, e.g.*, SBC Opp. at 1, 5-6. AT&T has no objection if the Commission wishes to sponsor the data requests itself rather than having them propounded by AT&T. Until the data identified as relevant by AT&T are actually requested, produced by the Bells, and made available to all of the parties, however, the Commission cannot lawfully consider the Bells’ pricing proposals.

embedded network characteristics); BellSouth Opp. at 2-3 (same); Qwest Opp. at 5 (same); Verizon Opp. at 8 (same).

The record is clear. The Commission's Notice of Proposed Rulemaking specifically proposed the adoption of a methodology that relies more on the "real-world" attributes of the Bells' networks. *See, e.g., NPRM* ¶ 52. And the Bells have taken this proposal to extraordinary lengths.

Verizon's economic testimony illustrates most starkly the Bells' proposed reliance on the attributes of their existing networks. "The ILEC's actual forward-looking costs can best be measured by basing UNE prices on the ILEC's existing network, including the configuration of that network, its operational characteristics, and mix of technologies the ILEC will use to supply UNEs." Shelanski (Verizon) Decl. ¶ 16. The "existing network" is then "revalu[ed]" by determining the "actual costs that would be incurred to put in place the ILEC's existing network today." *Id.* ¶ 21; *see also* Kahn-Tardiff (Verizon) Decl. ¶ 33 (rates should be based on "the replacement cost of the current network, accounting for the amounts of equipment and the mix of vintages that it contains"); Verizon Comments at 29-30 (arguing that regulatory precedent supports use of "incumbents' actual networks" as measure of "forward-looking costs").

The other Bells would also permanently anchor network element rates to the costs of reproducing their existing networks. For example, while BellSouth claims to "support[] the retention of a forward-looking cost method" that "retain[s] a long-run orientation," BellSouth Comments at 2-3, its experts testify that UNE rates should be based on the "cost of a replacement network that assumes existing network routes and plant and equipment locations," NERA (BellSouth) Decl. ¶ 50. If the existing network is populated with obsolete technology, the Commission must assume that this is a "judicious" and efficient result. *Id.* ¶¶ 51-52 & n.42.

Qwest likewise proposes to base UNE rates on “the actual network characteristics of the incumbent provider.” Qwest Comments at 15-18; *see also* Weisman (Qwest) Decl. ¶ 20. The results of this approach would be presumed reasonable; and this presumption could be rebutted only by showing that a more efficient technology or design has been “deployed on a scope and scale comparable to that of the ILEC.” Qwest Comments at 15-22, 36-38; *see also* Weisman (Qwest) ¶¶ 37-43. Because the only local carriers operating on a “scope and scale comparable to that of” one Bell are the other incumbent Bells, the opportunity to rebut the efficiency presumption is illusory.

SBC asks the Commission to “abandon the premise that each aspect of [the] carrier’s network will reflect the cutting-edge efficiency of a perfectly competitive market or anything resembling it.” SBC Comments at 25. Instead, in SBC’s view, “efficiency” means only “the more realistic efficiency of the ubiquitous networks built up over time and operated by the ILECs whose ‘costs’ are at issue.” *Id.* Hence, an incumbent’s “actual network” is “the only reasonable means for measuring actual forward-looking costs.” *Id.* at 26; *see also* Aron-Rogerson (SBC) Decl. at 43 (rates should be based on “the ILEC’s actual network and the actual level of efficiencies . . . that it has achieved”).

The Bells’ proposed reliance on their actual network attributes is underscored further by the Bells’ proposed inputs:

- The “route configuration and average loop length” found in the incumbents’ “existing network” should be taken as given, without considering whether “carriers building facilities today could deploy a network with a more efficient configuration.” Shelanski (Verizon) Decl. ¶ 50; *accord*, BellSouth Comments at 14, 22-23; NERA (BellSouth) Decl. ¶¶ 70-71; Qwest Comments at 30-32; SBC Comments at 56-58; Aron-Rogerson (SBC) 18-19; Verizon Comments at 40; Shelanski (Verizon) Decl. ¶ 50.
- Technology assumptions should replicate the technology mix in the existing network. BellSouth Comments at 24; Qwest Comments at 37; SBC Comments at 58-59; Verizon Comments at 41-42. Thus, the “existing” mix of “loop technologies” should be deployed even if “an entrant could provide

service more efficiently” using a different configuration. Shelanski (Verizon) Decl. ¶ 48.

- The “structure mix” found in the incumbents’ “existing network” should also be taken as given without considering whether “carriers building facilities today could deploy a network with a more efficient configuration.” Shelanski (Verizon) Decl. ¶ 50; *accord*, Qwest Comments at 34-36; SBC Comments at 61-63.
- “Actual fill inputs in ILEC cost studies” should be deemed “dispositive” regardless of whether they represented efficient levels of spare capacity. NERA (BellSouth) Decl. ¶ 78; *accord*, BellSouth Exh. 1 (principle 14); SBC Comments at 4-5, 64-65; Shelanski (Verizon) Decl. ¶ 51-53.
- The best measure of the amount of structure sharing achievable in an efficient network is the “actual” amount of sharing in the embedded network. BellSouth Exh. 1 (principle 14); Verizon Comments at 46-47.
- The expenses recovered from UNE prices should equal the incumbent carriers’ current level of expenses. Qwest Comments at 53; SBC Comments at 76; Verizon Comments at 57-59.
- Nonrecurring charges too must reflect existing practices without regard to current best practices. The Commission should allow recovery of the incumbent carriers’ “actual” or “out-of-pocket” NRCs, and should presume that current practices are efficient. BellSouth Comments at 47; NERA (BellSouth Decl.) ¶¶ 100-02; Qwest Comments at 55; SBC Comments at 79-83; Verizon Comments at 77-81; Shelanski (Verizon) Decl. ¶¶ 55-61.

In short, the Bells’ proposed costing methodology would do precisely what SBC now disclaims: “measur[e] every single actual network route, account[] for every single piece of equipment, add[] up its costs, and call[] the result a ‘UNE cost study.’” *Cf.* SBC Opp. at 8. Even the Bells admit in their Oppositions that their proposed methodology would rely primarily (if not entirely) on the “real-world” attributes of their existing networks.⁷ Hence, data requests that seek

⁷*See, e.g.*, SBC Opp. at 6 (“formal discovery concerning the real world data the ILECs seek to use in their UNE cost studies *is* more than appropriate in state UNE cost proceedings, where actual models and actual ILEC data are at issue”) (emphasis in original); *id.* at 8 (UNE cost studies, under SBC’s proposed methodology, will “start with reality” and use inputs “informed by the ILEC’s real-world experience”); BellSouth Opp. at 2 (advocating “a forward-looking methodology, reflective of real-world attributes”); Qwest Opp. at 3 (proposing rebuttable presumption that “the ILECs’ actual expenses” are those of an efficient carrier); *id.* at 5 (stating that Qwest’s proposed methodology assumes that the existing network would be rebuilt with efficient technologies and practices “that are actually deployed,” and “where such real world data exists, that data would be used”); Verizon Opp. at 6 (“UNE costs can readily be based on the

to verify whether the Bells actually have data enumerating these particular attributes (and, if so, whether the data are complete and reliable) are plainly relevant to the issue of whether that methodology should be adopted in the first place.

The relevance of AT&T's data requests goes beyond the Bells' reliance on embedded cost information. The Bells, perhaps embarrassed by the implications of their proposed cost standard, propose to supplement the use of embedded or reproduction cost data with data on what the Bells actually plan to spend over the next three or five years going forward. Thus, SBC concedes that, where use of reproduction costs could not even pass the red-face test (e.g., where the incumbent networks continue to employ analog switches), perhaps slight departures from the strict reproduction cost standard might be allowed. SBC Comments at 32. Similarly, Verizon and SBC suggest that some (but not all) of the network changes that they are planning in the next few years might be reflected in the "revalued" network. Shelanski (Verizon) Decl. ¶ 22; SBC Comments at 31.⁸ And BellSouth proposes a "blended" approach that would allow incumbents to recover *both* the costs of all upgrades planned by the incumbent over an "objective time horizon (e.g., three to five years)"—*i.e.*, the technologies "that will actually be deployed as new facilities and equipment are needed to meet growth or as existing facilities/equipment are replaced," BellSouth Comments at 19—and the costs of the equipment "not being upgraded," including assets whose costs are sunk, *id.* at 15-16. If the Commission is

ILECs' verifiable, transparent, and publicly-available data"); *id.* at 8 (Verizon has advocated that "costs must be based on *Verizon's* actual network data") (emphasis in original).

⁸ See SBC Comments at 27 ("UNE rates set under this [forward-looking actual cost] approach would reflect the present cost of building and maintaining the ILEC network as it will be constituted (excluding any obsolete facilities) at the midpoint of a three-year "planning period" of network evolution ... "); and Exhibit A, "The Economics of UNE Pricing," by SBC affiants Debra J. Aron and William Rogerson at 43 ("To deal with the fact that some types of equipment used in the network are no longer commercially available, this rule would have to be modified to allow for functionally equivalent equipment that is currently available to be substituted for equipment that is no longer available.")

to give any weight to the Bells' three- or five-year spending plans as a measure of any component of the cost of UNEs, other parties are entitled to discover whether those spending plans actually exist, what account or expense categories they cover, and what accuracy (if any) those plans have had as a predictor of the Bells' actual spending.

BellSouth's invitation to the Commission to ignore these data issues until *after* adopting a costing methodology is equally wrongheaded. *See* BellSouth Opp. at 2 (asserting that "the determination of a methodology precedes the collection of data"). The asserted superiority of the Bells' "actual forward looking cost" methodology over TELRIC rests in large part on the supposed existence of data on the Bells' "actual" costs. If the data do not exist (or are inaccurate), then the supposed advantage of the Bell's methodology collapses.

This is not merely a theoretical possibility. Even the Bells' own lawyers have acknowledged the inaccuracy and unreliability of the Bells' "actual" cost records: "[b]y the early 1980s, the Bell System had accumulated a vast library of accounting books that belonged alongside dime-store novels and other works of fiction." *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 518 (2002) (quoting Peter Huber *et al.*) Moreover, as the Supreme Court further noted, this lack of accurate and verifiable data has long been regarded as a serious obstacle to the adoption of embedded or "actual" cost ratemaking schemes:

To the extent that the traditional public-utility model generally relied on embedded costs, similar sorts of complexity in reckoning were exacerbated by an asymmetry of information, much to the utilities' benefit. *See supra*, at 486-487, 499. And what we see from the record suggests that TELRIC rate proceedings are surprisingly smooth-running affairs, with incumbents and competitors typically presenting two conflicting economic models supported by expert testimony, and state commissioners customarily assigning rates based on some predictions from one model and others from its counterpart.

Verizon Communications, 535 U.S. at 522. Even Qwest, which opposes AT&T’s discovery requests, acknowledges that “the Commission has a legitimate need to ensure that sufficient data exist to implement a proponent’s proposed methodology.”⁹

Beyond these arguments, the Bells do little more than beg the question. They assert, for example, that AT&T’s data requests are unnecessary because the data and databases already maintained by the Bells are accurate and complete enough to support the Bells’ proposed methodology.¹⁰ AT&T has offered substantial evidence, however, that the Bells’ “actual” cost data are too incomplete and unreliable to serve as a basis for setting UNE rates. *See* Motion at 3 & n. 4. And the Bells have conceded that their data are not complete or totally reliable.¹¹

⁹ Qwest Opp. at 1-2. *See also id.* at 2-3 (“the Commission has a legitimate need to ensure that proposals to modify the Commission’s UNE pricing methodology can be implemented”). Rather than agree to respond to the discovery requests, however, Qwest merely states its “intention” to “present evidence showing that there are sufficient data and information to present its proposal” at some unspecified point “[i]n the course of this proceeding.” Qwest Opp. at 3. Qwest’s “trust me” approach is too little and too late. Qwest had the opportunity to present such “evidence” in its opening and reply comments. Having failed to do so on either occasion, Qwest has waived any right to object to the efforts of other parties to subject Qwest’s claims to empirical testing.

¹⁰ *See, e.g.*, SBC Opp. at 9-10 ; Verizon Opp. at 6-7; SBC Reply Comments at 54-55; BellSouth NERA Reply Decl. ¶¶ 33, 35; Qwest Reply Comments at 30-31. Verizon Reply Comments at 25-26; Motion at 3 n.3 (quoting Bells’ assertions). SBC contends, for example, that the declaration of its witness, William Palmer, provided a “detailed rebuttal of arguments . . . that the RBOCs do not have all the data and cost models necessary to accommodate” their proposed costing methodology. SBC Opp. at 9 n.12. Mr. Palmer’s declaration, however, simply sets forth a number of highly generalized assertions regarding the availability of data, and recites the types of data and databases that the Bells maintain. *See* Declaration of William C. Palmer attached to SBC’s Reply Comments filed January 30, 2004, ¶¶ 13-15, 18-19, 29-32 (“Palmer Reply Decl.”). Furthermore, Mr. Palmer acknowledges that his testimony regarding the practices of Bells other than SBC is based on his “understanding” and “discussions with other ILECs,” rather than on direct personal experience with those Bells. *Id.* ¶¶ 29-31. He submitted no empirical data or documentation to support any of his assertions.

¹¹ *See* BellSouth Opp. at 4 (“Once the Commission adopts a methodology, data will then be assembled to implement that methodology. . . . BellSouth will do whatever is necessary to implement the methodology the Commission prescribes”); Qwest Opp. at 1, 5 (“[T]he ILECs’ data may not be comprehensive in every respect To the extent such data is not available, or is found to be unreliable, Qwest’s proposal would allow the state commission to rely on other data or assumptions to establish the value for a given input”); SBC Opp. at 8 (under SBC’s proposed methodology, cost models “may indeed have to ‘fill in gaps’ where the relevant inputs do not describe every detail of the relevant design or cost”).

Indeed, they propose that huge portions of these data will be synthesized (or hypothesized) from their business or engineering plans and “guidelines.”¹² Under these circumstances, whether the Bells’ “actual” data are really taken from actual business records rather than synthesized or extrapolated from planning guidelines, other aspirational standards, or management guesstimates is a question that cannot be accepted on faith, but must be tested through disclosure. And the ability of the supposed data sources to generate results are complete, accurate and reliable must be tested through disclosure as well.

SBC’s further assertion that the data requests are unnecessary because the record “already consists of many thousands of pages of comments, declarations, and factual analyses” (SBC Opp. at 5) is equally meretricious. The current record does not answer the questions raised in AT&T’s data requests—as the Bells’ vehement efforts to avoid answering the questions confirm.

The Bells’ ARMIS data, which Verizon touts as “a verifiable source of data concerning critical inputs such as operating and depreciation expenses, for example” (Verizon

¹² See, e.g., SBC Opp. at 8 (“UNE cost studies can and should employ models that take as given the ILEC’s basic network data and that *use inputs informed by the ILECs’ real-world experience and by the engineering guidelines that dictate real-world network design and planning*”) (emphasis added); BellSouth Opp. at 3 (“Use of planning information does not mean that construction budgets and planned network upgrades dictate the cost model. Instead, the *planning period information could provide realistic design parameters* in order to constrain the modeling process so that the model would not reflect a flash-cut to an optimized, hypothetical network, and thus the model would produce costs that more closely reflect the incumbent’s (and not some non-existent, hypothetical carrier’s) forward-looking costs”) (emphasis added); Verizon Opp. at 6-7 (“industry-wide, well-accepted engineering guidelines . . . 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”); *id.* at 9 (“In most cases, Verizon’s 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”); Shelanski-Tariff (Verizon) Reply Decl. ¶ 18 (“[T]he alleged incompleteness of ILEC data does not justify using a hypothetical approach instead. Rather, the more appropriate approach is to rely on the available, objective data about the ILEC’s network to the greatest extent possible and then, *where necessary, use assumptions that account for real-world constraints and are based on actual engineering principles to fill in any gaps*”) (emphasis added); BellSouth Reply Comments at 28 (technology mix used in cost development “should reflect BellSouth’s engineering guidelines and future development plans”).

Opp. at 6), suffer from the same infirmity. Verizon does not—and cannot—identify *any* line or column in ARMIS that provides the data sought by AT&T. If ARMIS in fact provided the data, the parties would not be engaged in this dispute.

It is likewise no objection to discovery here that AT&T has obtained a *few* of the items requested here from the Bells in recent UNE proceedings before state commissions. *See* SBC Opp. at 8-9; Verizon at 7. As the Bells know perfectly well, data of this kind are virtually always claimed to be proprietary by the Bells, and thus produced under protective conditions adopted by state commissions that forbid use of the data in other proceedings.¹³

The Bells' remaining objections to the relevance or materiality of AT&T's data requests are frivolous. *See* SBC Opp. at 3; Verizon Opp. at 7-8. SBC asserts, for example, that AT&T is inconsistent in asking the Bells to produce "real-world" data while criticizing the Bells' cost models for relying on such data. *See* SBC Opp. at 3. There is no inconsistency, however, between the propositions that (1) the "actual" cost measures proposed by the Bells are economically meaningless, and (2) even if (contrary to fact) the Bell's interpretation of their "actual" cost standard corresponded with economic reality, the Bells lack the data and records needed to implement the standard.¹⁴ Both propositions are true, and AT&T is entitled to assert

¹³ These data are clearly relevant in this proceeding. The Bells have claimed to the Commission that their current fill factors are dictated by their engineering guidelines – which Verizon, in its Opposition, describes as a "key source of data for UNE cost study inputs." *See* Motion at 6; Verizon Opp. at 6-7. AT&T believes that these claims are false, and that the Bells' own engineering guidelines so demonstrate. There is no way for the Commission to know, however, without actually reviewing the guidelines themselves. Motion at 6 & n.8.

AT&T's request for line count data is equally necessary. Although Verizon, SBC, and Qwest have provided line count data to CLECs in *some* previous proceedings involving UNE rates, they have not done so in all such proceedings. Moreover, when produced, such data have often been classified by the Bells as proprietary – thereby precluding their use in this proceeding. Motion at 8 & n.13. The production of line count data by *all* of the Bells (including BellSouth) in this proceeding is therefore necessary to determine whether they actually possess such data, which are essential for an accurate determination of forward-looking costs. *Id.*

¹⁴ If, as most analysts conclude, the Bells' "actual" costs are their economic cost, then, of course, these "actual" costs would be their TELRIC.

both. *See* AT&T Reply Comments at 20-29 (arguing that the “actual” cost standard proposed by the Bells is economically unsound); *id.* at 29-32 (“in any event, verifiable data and models needed to implement” the Bell’s proposed cost standard “do not exist.”).

Verizon’s suggestion that the CLECs’ use of data from Bell records in UNE pricing cases validates the reliability of all of the Bell business records at issue here is equally without merit. *See* Verizon Opp. at 7-8 (asserting that AT&T’s challenge to the accuracy or completeness of the Bells’ cost data is “inconsistent with” the CLECs’ “own repeated use” of “precisely such data” in their own UNE cost studies). The RBOC-generated data used by AT&T and other CLECs in UNE rate cases cover only a limited subset of the determinants of the costs of UNEs: in the example offered by Verizon, those data concerned “customer addresses, line counts, and types of services” and certain expense data. *Id.* This limited subset of cost variables does not begin to encompass the range of cost inputs for which the Bells ask the Commission to rely on their own data. That the Bells indisputably possess data on *some* of the variables needed to estimate UNE costs does not begin to show that the Bells possess data on *all* of the determinants of UNE costs contemplated by the Bells’ proposed “actual” cost standard—particularly investment and expense values—let alone that those data are comprehensive, reliable and accurate.

C. The Bells’ Claims Of Undue Burden Merely Underscore The Unworkability Of Their Proposed Cost Standard.

The Bells’ remaining objections consist largely of variations on the claim that the data requests are unduly burdensome. The Bells assert, for example, that permitting discovery would “unnecessarily complicate this proceeding” by requiring the Commission to resolve a “myriad of procedural issues,” and would transform this proceeding into a “highly litigious, document-intensive battle.” *See, e.g.,* SBC Opp. at 5; Verizon Opp. at 3-5. These objections

essentially prove AT&T's point: that developing and testing the data required to set rates under the Bells' proposed standard of "actual" costs is a hopelessly unmanageable task.

The number and scope of AT&T's data requests have been pruned to a small fraction of what AT&T or another CLEC could legitimately ask in an individual UNE pricing proceeding before a state commission. Rather than seeking complete data for the RBOCs' entire local networks, or even to a single state, AT&T has limited Data Request Nos. 1-5, which the Bells single out as overly burdensome, to only 15 wire centers within a single state for each Bell company. AT&T Motion at 4-5. Moreover, AT&T has *not* sought the level of detail needed to compute actual UNE costs or set actual UNE rates, but merely to determine whether it is *possible* to use the Bells' proposed methodology to accomplish these tasks. If the Bells truly find these requests too burdensome to answer, then *a fortiori* the burden of providing the comparable data for an entire state, with hundreds or thousands of wire centers, will clearly be unmanageable.

The Bells also argue that if AT&T were authorized to take discovery here, "there would be no logical stopping point to the rights of any other party to take discovery of any other party in this proceeding." *See* SBC Opp. at 2, 5-7; Verizon Opp. at 11. This argument is an attack on a straw man. No party other than AT&T has requested authorization to conduct discovery; and MCI, the largest CLEC after AT&T, has joined in support of AT&T's data requests rather than filing a separate set. *See* MCI *ex parte* letter filed April 1, 2004. If and when other parties later seek to conduct discovery, the Commission can consider those requests on a case-by-case basis, and limit discovery to protect parties from discovery requests that are redundant, overly burdensome, or not reasonably calculated to lead to the production of admissible evidence.¹⁵ The mere *possibility* that one or more other parties might submit discovery requests in the future, however, is no reason for denying AT&T's request here.

¹⁵ The same is true of any discovery requests that the Bells might pose to AT&T or other CLECs. *See, e.g.*, Verizon Opp. at 1, 10-11 (asserting that, if the Commission grants AT&T's discovery

CONCLUSION

For the foregoing reasons, and the reasons set forth in AT&T's March 16 Motion, the Commission should order Verizon, BellSouth, SBC, and Qwest to respond to the data requests attached to the Motion.

Respectfully submitted,

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April 7, 2004

requests, "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."); SBC Opp. at 6-7. This assertion is clearly little more than a rhetorical tit-for-tat. None of the Bells have actually moved for leave to engage in discovery, and the notion that the costs of a CLEC might be a relevant proxy for the forward-looking costs of the Bells' UNEs business is absurd on its face. As the Commission made clear in *Local Competition Order* ¶ 679, UNE prices must reflect the incumbent carriers' economies of scale and scope. Even AT&T, the largest CLEC, does not begin to approach the scale economies of any incumbent Bell company. AT&T is not engaged in the wholesale supply of UNEs to other local carriers; AT&T's retail business consists primarily of interexchange service, not local service; and AT&T's local network facilities are far more limited in scale and scope than the Bells' facilities, were built primarily to serve business customers, and thus have a very different mix of assets than the Bells' local network facilities. Nevertheless, if Verizon or any other Bell wishes to seek discovery from AT&T, they are free to ask the Commission for such relief, and AT&T will respond appropriately.

CERTIFICATE OF SERVICE

I hereby certify that copies of this pleading have been served today by e-mail, overnight FedEx, or hand delivery upon the following counsel for BellSouth, Qwest, SBC and Verizon:

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April 7, 2004