

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott	Chair
Edward A. Garvey	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayner	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of the Complaint of AT&T  
Communications of the Midwest, Inc. Against  
Qwest Corporation

ISSUE DATE: June 18, 2002

DOCKET NO. P-421/C-01-391

ORDER ASSESSING PENALTIES

**PROCEDURAL HISTORY**

On the same date herein the Commission issued its ORDER ACCEPTING AND ADOPTING ALJ'S REPORT WITH TWO MODIFICATIONS in which the Commission accepted and adopted the Administrative Law Judge's (ALJ's) conclusion that Qwest knowingly and intentionally violated its Interconnection Agreement with AT&T as well as state and federal law in its response to AT&T's request for testing of Qwest's network.

In that Order, the Commission modified the ALJ's findings as to the period of the violation and found a knowing and intentional violation on the part of Qwest for the period from January 12, 2001 through May 11, 2001. Further, the Commission did not accept the ALJ's recommendation as to the amount of penalty to be assessed but reserved judgment on this issue.

At the hearing on April 4, continued on April 9, 2002, the Commission directed the parties to supplement the record on certain specific items related to penalties set forth in Minn. Stat. § 237.462 subd. 2(b) as well as comment on certain questions raised by Commissioner Garvey.

On April 19, 2002, comments on penalties were filed by the Department of Commerce (DOC), AT&T and Qwest.

On April 19, 2002, Eschelon Telecom, Inc. (Eschelon) submitted an affidavit of J. Jeffrey Oxley.

On April 30, 2002, DOC, AT&T and Qwest filed reply comments.

This matter came before the Commission on May 14, 2002.

## FINDINGS AND CONCLUSIONS

The only issue addressed in this Order is the assessment of penalties.

### **I. The Legal Standard**

Minn. Stat. § 237.462, Subd 2 provides that the Commission may assess a penalty of between \$100 and \$10,000 per day for each violation.

Minn, Stat. § 237.462, Subd. 2(b) directs the Commission, in determining the amount of penalty, to consider:

- (1) the willfulness or intent of the violation;
- (2) the gravity of the violation, including the harm to customers or competitors;
- (3) the history of past violations, including the gravity of past violations, similarity of previous violations to the current violation to be penalized, number of previous violations, the response of the person to the most recent previous violation identified, and the time lapsed since the last violation;
- (4) the number of violations;
- (5) the economic benefit gained by the person committing the violation;
- (6) any corrective action taken or planned by the person committing the violation;
- (7) the annual revenue and assets of the company committing the violation, including the assets and revenue of any affiliates that have 50 percent or more common ownership or that own more than 50 percent of the company;
- (8) the financial ability of the company, including any affiliates that have 50 percent or more common ownership or that own more than 50 percent of the company, to pay the penalty; and
- (9) other factors that justice may require, as determined by the commission. The commission shall specifically identify any additional factors in the commission's order.

Minn. Stat. § 237.462 also provides:

Subd. 3. Burden of proof. The commission may not assess a penalty under this section unless the record in the proceeding establishes by a preponderance of the evidence that the penalty is justified based on the factors identified in subdivision 2.

Subd. 4. Contents of order. An order assessing an administrative penalty under this section shall include:

- (1) a concise statement of the facts alleged to constitute a violation;
- (2) a reference to the section of the statute, rule, or order that has been violated;
- (3) a statement of the amount of the administrative penalty to be imposed and the factors upon which the penalty is based; and
- (4) a statement of the person's right to review of the order.

Subd. 5. Penalty stayed. A penalty imposed under this section shall not be payable sooner than 31 days after the commission issues its final order assessing the penalty. The person subject to the penalty may appeal the commission's penalty order under sections 14.63 to 14.68. If the person does appeal the commission's penalty order, the penalty shall not be payable until either all appeals have been exhausted or the person withdraws the appeal.

## **II. The Violation**

### **A. Factual Summary<sup>1</sup>**

On or about September 14, 2000, AT&T informed Qwest that AT&T would be making a request for UNE-P testing in Minnesota. The purpose of the AT&T UNE-P<sup>2</sup> testing was for AT&T to test the Qwest-AT&T interface involved with UNE-P provisioning. The information gained from this testing and the problems corrected would be used by AT&T in evaluating and making a UNE-P offering in Minnesota.

During the period from mid-September 2000 until January 11, 2001, there were continuing discussions between AT&T and Qwest that were aimed at moving forward with the testing. Beginning January 12, 2002, however, Qwest took deliberate steps to put unnecessary hurdles and

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<sup>1</sup> The Commission adopted the February 22, 2002, Findings of Fact and Conclusions of Law of the ALJ with two exceptions as set forth in its ORDER ACCEPTING AND ADOPTING ALJ'S REPORT WITH TWO MODIFICATIONS, June 18, 2002.

<sup>2</sup> UNE-P is a method for a Competitive Local Exchange Carrier (CLEC) to provide competitive local exchange service. Under UNE-P, the CLEC purchases from the Incumbent Local Exchange Carrier (ILEC) a specific group of unbundled network elements, including the loop, the network interface device, a switch port, switching functionality and transport. With this platform of unbundled network elements, the CLEC can provide basic local exchange service to residential and small business customers.

delays into moving forward with the testing process. Qwest's actions had the effect of precluding the testing that AT&T required. Finally, on May 11, 2001, Qwest agreed to proceed with the testing plan as specified by AT&T.

### **B. Law and Statutes Violated**

In the period between January 12, 2001 and May 11, 2001, Qwest knowingly and intentionally violated:

- 1) Minn. Stat. 237.121(a)(4) which prohibits a telephone company from refusing to provide a service, product, or facility to a telecommunications carrier in accordance with a contract;
- 2) Minn. Stat. § 237.121 (a)(1) which prohibits a telephone company from failing to disclose necessary information;
- 3) Section 14.1 of the Interconnection Agreement between AT&T and Qwest setting forth Qwest's obligation to engage in cooperative testing; and
- 4) the Interconnection Agreement and Section 251 (c)(1) of the 1996 Telecommunications Act (the Act)<sup>3</sup> requiring Qwest and AT&T to act in good faith.

### **C. The Penalty Imposed**

The Commission, in this Order, will impose a penalty of \$7500 per day for the period from January 12, 2001 through May 11, 2001. The factors upon which this penalty is based will be discussed below.

### **D. Right to Review**

The parties have a right to judicial review of the final decision of the Commission under Minn. Stat. § 237.25 as well as Minn. Stat. § § 14.63 to 14.68. See Minn. Stat § 237.462, subd. 5. The parties may also ask the Commission for reconsideration of its final decision under Minn. Rules Part 7829.3000.

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<sup>3</sup> Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of title 47, United States Code).

### **III. Factors Considered by the ALJ in Assessing a Penalty**

The ALJ found that:<sup>4</sup>

- 1) The violations were knowing and intentional.
- 2) The violations were serious in that Qwest's conduct delayed by several months AT&T's ability to enter the local service market using UNE-P. This harmed AT&T financially and also harmed Minnesota consumers by delaying significant competition in the local service market.
- 3) There was one significant violation, a continuing pattern of conduct, and several lesser individual violations consistent with that pattern.
- 4) Qwest's conduct was for the purpose of protecting its entry into the long-distance market through the Section 271<sup>5</sup> process. Long-distance will provide very substantial revenue to Qwest.
- 5) Qwest ultimately agreed to cooperate in AT&T's UNE-P test, but only after AT&T had initiated this complaint proceeding.
- 6) Qwest has enormous assets, but is suffering revenue problems in the current economy. It has the financial ability to pay significant penalties.
- 7) Qwest's actions would be appropriate in a competitive market. But this is a regulated market where Qwest's actions are subject to the Telecommunications Act of 1996 (the Act) and state law. Its actions were anti-competitive and cannot be condoned under the Act and state law.

ALJ's Conclusions of Law, ¶ 15.

### **IV. The Parties' Positions Regarding Penalties**

#### **A. DOC**

##### **1. Willfulness of the Violation**

The DOC stated that, based on the Findings of Fact and Conclusions of the ALJ as adopted by the Commission, Qwest's actions were willful and intentional with regards to the AT&T test request. It argued that Qwest's conduct was the very type of anti-competitive behavior that the Commission should punish. It was the DOC's opinion that the maximum penalty could be assessed based on this factor alone.

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<sup>4</sup> Adopted by the Commission in its ORDER ACCEPTING AND ADOPTING ALJ'S REPORT WITH TWO MODIFICATIONS, June 18, 2002.

<sup>5</sup> Section 271 of the 1996 federal Telecommunications Act sets forth the conditions to be met by Regional Bell Operating Companies (RBOCs) in order to enter interLATA long distance markets.

## **2. Gravity of Violation/Harm to Customers or Competitors**

The DOC recognized that the harm to consumers and to competitors by Qwest's behavior is not easily quantifiable. Even though AT&T ultimately got the testing it requested, the DOC argued that the anti-competitive behavior itself is per se harmful to competition, and therefore to consumers, and should be recognized.

## **3. History of Past Violations**

The DOC believes that the Commission need not focus on this factor in assessing a penalty in this case. The DOC argued that the Commission could assess the maximum penalty without a record of past violations.

## **4. The Number of Violations**

The DOC argued that there was one violation that was not only willful and intentional but went on for 120 days. The statute provides for a per day/per violation assessment of penalties and the DOC argued that the maximum penalty for one violation should be assessed against Qwest for the time period of anti-competitive behavior adopted by the Commission.

## **5. Economic Benefit to Violating Party**

The DOC argued that the reason Qwest would not conduct the test requested by AT&T was to protect its own economic interests, specifically with regard to its 271 agenda. It was not going to conduct a test for AT&T that provided AT&T additional data that could be used to oppose Qwest's 271 agenda. The DOC argued that when assessing penalties the Commission should rely heavily on the fact that Qwest was attempting to protect its own economic interests at the expense of its obligation to open its network to competitors.

## **6. Corrective Action by the Violator**

The DOC argued that although Qwest did eventually agree to conduct the test, there was a cost to AT&T in terms of time and effort. The DOC viewed Qwest's agreement to conduct the test in May of 2001 as only thinly "corrective."

## **7. Financial Ability to Pay the Penalty**

The DOC argued that Qwest should pay the maximum penalty under the law. The ALJ's findings that Qwest had "the financial ability to pay significant penalties" are well supported in the record, the DOC argued, and should be considered by the Commission in assessing the maximum penalty.

## **8. Other Factors that Justice May Require**

The DOC stated that Qwest's tactics in this docket warrant consideration, under this factor, by the Commission for penalty assessment. It argued that Qwest created false premises for rejecting the AT&T request, failed to disclose a principal decision maker, Mr. Davis, and failed to disclose relevant e-mails from Mr. Davis in response to AT&T's discovery requests. The DOC argued that these actions demonstrated an intent to keep relevant information from the Commission. Such actions, the DOC argued, compromise the integrity of the Commission's complaint and hearing process and should be given considerable weight in assessing a penalty.

### **B. AT&T**

AT&T requested that Qwest be fined the maximum penalty of \$10,000 per day for the 120 day period set forth by the Commission. AT&T stated it supported the DOC's position that the record already developed in this case is sufficient to enable the Commission to determine a penalty amount based on the relevant statutory factors. AT&T had the following comments on the statutory factors to be considered:

#### **1. The Gravity of the Violation**

AT&T stated that the company believed that the record compiled by the ALJ fully supports a maximum penalty against Qwest. It argued that Qwest's offenses merit the maximum penalty because Qwest has broken the most fundamental prerequisites of competition: 1) allowing testing of systems that support interconnection; 2) negotiating in good faith; and 3) disclosing information that makes competitive local service possible.

#### **2. Economic Benefit Gained**

AT&T argued that Qwest put its 271 initiative ahead of everything else because it has a lot to gain by doing so. Qwest stands to gain enormous revenue in the long distance market if its 271 initiative succeeds.

#### **3. Corrective Action Taken**

Other than agreeing to do the testing, Qwest has not taken any action to correct its behavior.

#### **4. The Size of Qwest's Revenue and Assets**

AT&T stated that the purpose of the statute is to punish and deter violations of state law. Given Qwest's enormous revenue and assets only the maximum penalty can act as a deterrent to Qwest. This factor alone calls for a severe penalty.

## **5. Qwest Could be Penalized for Multiple Violations**

AT&T argued that there were at least three discrete violations which warrant punishment under the statute: 1) willfully refusing to perform cooperative testing 2) violating its duty of good faith, and 3) refusing to disclose information that would allow AT&T to compete. Because there were three discrete violations, AT&T argued that Qwest could be assessed the maximum for each violation. Fining Qwest \$10,000 per day for a single violation for the period set forth is therefore not truly the maximum penalty and would be generous to Qwest in these circumstances.

### **C. Qwest**

Qwest stated that Minnesota law provides that penalties may be assessed and argued that given the record in this case, the Commission should use its discretion and impose no penalty.

#### **1. The Gravity of the Violation**

Qwest stated that Minn. Stat. § 237.462 requires an assessment of whether there has been harm to the competitor or to customers. Qwest argued that AT&T was not adversely affected by Qwest's actions because AT&T was neither willing nor able to conduct UNE-P testing during the period of time Qwest was purportedly delaying the process.

Qwest may not have immediately assented to the unique style of testing that AT&T was demanding, but that does not rise to the level of a grave violation justifying the fine proposed.

Qwest argued that there has been no harm to consumers in that the UNE-P market in Minnesota today is the same as before AT&T completed its testing. It is the same as it would have been if AT&T conducted the UNE-P test in January, 2001 or even September, 2000. Because there has been no harm to consumers, no penalty should be assessed under this factor.

#### **2. Corrective Action Taken**

Qwest argued that once the Commission's preference became clear, Qwest worked diligently to perform the requested testing.

#### **3. Economic Benefit**

Qwest argued that there is no evidence in the record to support AT&T's implication that Qwest's position on the testing accelerated the Section 271 approval process and therefore Qwest has realized some economic benefit.

#### **4. Other Factors**

Qwest argued that the fact that six other state commissions have validated the very approach that Qwest took in this instance is powerful "other evidence" that Qwest should not be penalized for attempting to ensure that AT&T had some reasonable purpose for the test.

## **V. Commission Action**

The Commission, in its ORDER ACCEPTING AND ADOPTING ALJ'S REPORT WITH TWO MODIFICATIONS accepted and adopted the ALJ's Findings of Fact and Conclusions of Law. In accepting the ALJ'S report, the Commission adopted, among other things, the conclusion that Qwest violated terms of the interconnection agreement with AT&T as well as state and federal law. The Commission concurs with the ALJ and finds that such violations of law warrant a penalty.

The Commission has reviewed the record, including the filings by the parties specifically on penalty issues, in light of the factors the statute directs it to consider in setting penalty amounts. Minn. Stat. § 237.462, subd.2. Having completed this review, the Commission will assess a penalty of \$7500 per day for the period from January 12, 2001 through May 11, 2001. The Commission bases this penalty on the following considerations:

### **A. Willfulness or Intent of the Violation**

The Commission in its ORDER ACCEPTING AND ADOPTING ALJ'S REPORT WITH TWO MODIFICATIONS adopted, among other things, the ALJ's conclusions that Qwest committed a knowing, intentional and material violation of its obligation to engage in cooperative testing under the Interconnection Agreement with AT&T by its refusal to conduct the UNE-P testing requested by AT&T. The ALJ specifically found that beginning January 12, 2001, Qwest took deliberate steps to put unnecessary hurdles and delays into the negotiation process.<sup>6</sup>

The ALJ also found that such action by Qwest constituted a knowing and intentional refusal to provide a service, product or facility to a telecommunication carrier in accordance with a contract under Minn. Stat. § 237.121(a)(4). The Commission agrees with the ALJ that the violations by Qwest were knowing and intentional violations of law.

The ALJ also concluded that Qwest failed to act in good faith and committed knowing, intentional, and material violations of its obligations to act in good faith under the Interconnection Agreement by the following conduct: a) creating a specious position to support its refusal to conduct AT&T's UNE-P test, when that refusal was actually based on Qwest's retail business interests; b) imposing its position regarding its testing obligations upon AT&T, whether specious or correct, without informing AT&T, by delaying AT&T's opportunity to challenge that position, by concealing its true intent to allow only certification testing, and by attempting to avoid and by delaying the UNE-P test by engaging AT&T in long and unnecessarily difficult negotiations over UNE-P testing that Qwest never intended to allow...; and c) sending the letter of August 29, 2001, to AT&T making false and misleading statements.<sup>7</sup> The Commission agrees with the ALJ that Qwest actions were in bad faith.

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<sup>6</sup> See ALJ's Findings of Fact and Conclusions of Law, Finding No. 72.

<sup>7</sup> See *id.* Conclusions of Law ¶ 14.

Further, the ALJ stated, and the Commission agrees, that Qwest did not fail to act in good faith when it attempted to determine for itself its obligations under the interconnection agreement. However, Qwest's determination that it could refuse to engage in the cooperative testing requested by AT&T unless it was satisfied that AT&T was using that testing for market entry was not simply a mistaken interpretation of its obligation under the Interconnection Agreement. It was not supported by the terms of the Interconnection Agreement but was a position developed and used by Qwest to prevent AT&T from developing data that AT&T could use to present to regulatory officials in opposition to Qwest's 271 applications.<sup>8</sup> The Commission recognizes that this was a further example of bad faith on Qwest's part.

### **B. Gravity of the Violation, Including the Harm to Customers or Competitors**

The violation was grave in that it goes to the very heart of competition, which is facilitating network access by competitors. Qwest's conduct delayed AT&T's ability to enter the local market by several months, thereby causing harm to consumers by delaying competition in the local service market. Qwest's actions also caused financial harm to AT&T by delaying its market entry and forcing AT&T to use time and resources to bring the matter to the Commission for resolution. Finally, the competitive market was also harmed. Qwest's delaying the testing and causing difficulty for AT&T to get access to crucial pre-entry information that did not conform to what Qwest was willing to offer has the effect of discouraging others from entering the market. Qwest's obstructionist behavior toward AT&T presumably raised the costs of UNE-P entry in the minds of other potential competitors, discouraging investment in the Minnesota market.

Although it is clear that there was harm caused by Qwest's conduct, the exact amount of harm is not readily quantifiable.

### **C. History of Past Violations and Related Factors**

This is the first time the Commission has ruled on the merits that Qwest's conduct warrants a penalty under the competitive enforcement statute. This militates against assessing the maximum penalty. The Commission agrees with the parties that since other issues regarding Qwest's behavior are currently being addressed in current contested case proceedings under the jurisdiction of the Office of Administrative Hearings, the Commission need not focus on those issues in this proceeding.

### **D. Number of Violations**

There was one significant continuing violation arising out of one set of facts continuing over an extended period of time. Such a situation merits a significant penalty. The Commission agrees with the ALJ's recommendation to consider a penalty for only the one significant violation involving the bad faith pattern of conduct.

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<sup>8</sup> See *id.* Conclusions of Law ¶ 12.

#### **E. Economic Benefit Resulting from the Violation**

While the degree to which Qwest benefitted economically from its bad faith pattern of conduct is undetermined, Qwest provides an essential service to a largely captive market-it clearly benefits economically each time a competitor's market entry is delayed or prevented. Equally clearly, it benefits whenever it can increase the entry costs of its would-be competitors. Further the ALJ found, and the Commission concurs, that this violation was motivated at least in part by Qwest's economic interest in offering long distance service in Minnesota and other states in which it is the incumbent local carrier. Under federal law, it cannot offer long distance in those states unless its interconnection practices and procedures meet certain standards. The testing requested by AT&T carried the risk of demonstrating that Qwest was not meeting those standards. The violation at issue, therefore, was both economically motivated and more than likely resulted in economic gain for Qwest.

#### **F. Attempts to Correct Violation**

Qwest did ultimately comply with AT&T's testing request. This could be a mitigating factor in assessing penalties. However, there was no evidence presented by Qwest that it would do anything significantly different in the future if faced with a similar request. There was nothing to show that there was any change in Qwest's attitude or approach.

Qwest did eventually comply with AT&T's request. However, this was due to Qwest's recognition that compliance would be required. Since Qwest did not comply until it had become clear that the Commission would require compliance, and there was no evidence of a change in attitude or approach, significant penalties remain appropriate.

#### **G. Annual Revenue/Financial Ability to Pay the Penalty**

The Commission agrees with the ALJ that Qwest has significant financial assets and has the financial ability to pay any penalties assessed.

#### **H. Other Factors that Justice May Require**

Qwest acted unilaterally to delay the testing AT&T requested and eventually determined not to do the testing at all, offering only to do its standard testing. Qwest, as the monopoly power making the decision to proceed in this manner was acting not only to delay AT&T's entry into the market but was effectively keeping AT&T out of the market by dictating what testing was appropriate for AT&T and giving no heed to AT&T's stated testing needs. This was clearly not an appropriate role for Qwest. Not only did it impact AT&T but it also impacted any other CLEC that wanted information that Qwest deemed was not necessary for it to have.

The Commission also notes its concern that Qwest made unilateral decisions without asking the Commission for guidance or assistance. Qwest clearly did not want the Commission involved. It made its own determination of what it was required to provide AT&T without involving the Commission. At one point in the negotiations, AT&T requested that Qwest come to the Commission for a tariff waiver. Qwest refused to ask for such a waiver and subsequently asserted the tariff as a reason for not providing the residential lines AT&T requested. The ALJ found that this reason was “bogus” because Qwest was fully aware of the regulatory process and knew that it was possible to get the waiver. Rather than seeking Commission guidance, Qwest was dictating what could and could not be done by a CLEC to enter the market. This is not acceptable.

In conclusion, the Commission will not assess the maximum penalty in this instance, recognizing that Qwest did ultimately cooperate in the testing, thereby mitigating the harm done. However the Commission finds that the serious nature of this occurrence, combined with the harm to consumers and considering the serious effect Qwest’s behavior could have on competition, compel the Commission to assess a penalty designed to have an impact on Qwest. For these reasons, the Commission will assess Qwest a penalty of \$7500 per day for the period beginning January 12, 2001 through May 11, 2001.

## **VI. Affidavit filed by Eschelon**

### **A. Background**

On April 19, 2002, in response to the Commission’s request for comments on specific factors related to the assessment of penalties, Eschelon<sup>9</sup> submitted an Affidavit of Jeffrey Oxley (the Affidavit). The purpose of the Affidavit was for Mr. Oxley to testify to facts that show harm to Eschelon, other competitive local exchange carriers, (CLECs), and customers by Qwest’s delaying AT&T’s UNE-P test.

The issue addressed by the Commission is whether the Affidavit should be entered into the record in this proceeding.

### **B. Position of Qwest**

Qwest was the only party to comment on the issue of admissibility of the Affidavit.

Qwest viewed Eschelon’s filing as an attempt by Eschelon to bring in completely new and misleading facts. Qwest argued that this was procedurally improper and denied Qwest the opportunity to develop facts in rebuttal. It argued that Eschelon’s contentions will serve only to confuse the issue.

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<sup>9</sup> Eschelon is not a party in this proceeding and has not participated in this proceeding prior to this submission.

Qwest argued that Eschelon was seeking to raise its own independent claims against Qwest which involve matters wholly distinct from the substance of the matter currently before the Commission. This was an attempt by Eschelon to circumvent procedural safeguards and the submission should be declined.

Further, Qwest argued, if the Affidavit were to be admitted, Qwest should be allowed to conduct reasonable discovery into the claims made and it should be permitted to conduct cross examination of the affiant.

**C. Commission Action**

The Commission will not allow the Affidavit filed by Eschelon, nor any responses to that filing, into the record. The filing addresses Eschelon's own experience with Qwest under provisions of an interconnection agreement between Eschelon and Qwest and is not relevant to the matter herein. Further, it attempts to introduce into the record new factual arguments which have not been developed under the procedural protections available in an adversarial proceeding. For these reasons the Affidavit will not be admitted into the record.

**ORDER**

1. The Affidavit of J. Jeffrey Oxley filed by Eschelon, and any responses to that filing, are hereby excluded from the record in this case.
2. Qwest shall pay a penalty of \$7500 per day for the period from January 12, 2001 through May 11, 2001.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

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