

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye
Marshall Johnson
Ken Nickolai
Thomas Pugh
Phyllis A. Reha

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of Negotiated Contracts for
Switched Access Services

ISSUE DATE: July 7, 2005

DOCKET NO. P-442, 5798, 5340, 5826, 5025,
5643, 443, 5323, 5668, 4661/C-04-235

ORDER APPROVING STIPULATIONS,
DISMISSING VARIOUS COMPLAINTS,
AND PROVIDING FOR RESPONSE TO
ADDITIONAL COMPLAINT

PROCEDURAL HISTORY

On June 6, 2004, the Minnesota Department of Commerce (the Department) filed its complaint in the current case, alleging that various competitive local exchange carriers (CLECs) and interexchange carriers (IXCs) had negotiated agreements that contained untariffed rates.

On August 19, 2004, Sprint Communications Company, LP (Sprint), AT&T Communications of the Midwest, Inc. (AT&T), Eschelon Telecom of Minnesota, Inc. (Eschelon), NorthStar Access (NorthStar), MCI Worldcom Network Services (MCI) and McLeodUSA Telecommunications Services, Inc. (McLeod) filed comments arguing that the companies did not violate any laws or Orders by entering into their respective agreements.

On September 9 and 10, 2004, AT&T, the Department, Eschelon, McLeod, Focal Communications Corporation of Minnesota, Inc. (Focal), MCI and Jaguar Communications (Jaguar)¹ filed reply comments.

On November 24, 2004, the Department filed additional comments indicating that further investigation has revealed the existence of numerous additional agreements between CLECs and IXCs providing for the payment of untariffed access rates.

On March 30, 2005, the Department filed a Stipulation and Agreement (Stipulation) that was

¹ While Jaguar Communications is not a party in this proceeding, Jaguar filed comments indicating that AT&T and Sprint have refused to pay Jaguar's tariffed access rates and instead have requested Jaguar to sign a pre-negotiated contract with non-disclosure provisions. Jaguar urged the Commission to void the negotiated agreements between the CLECs and IXCs and order the IXCs to pay the corresponding tariffed rates.

signed by seven [Arizona Dialtone, Inc. (Arizona Dialtone), Eschelon, Focal, Global Crossing Telecommunications (Global Crossing), Integra Telecom of Minnesota (Integra), McLeod and Sprint] of the ten parties named in the Complaint. AT&T, MCI and NorthStar did not sign the Stipulation and Agreement.

On April 4, 2005, the Department filed additional comments indicating that it has been investigating a second group of agreements involving untariffed access rates. Among agreements being investigated are agreements between AT&T as the IXC and NOS Communications, Inc. (NOS Communications) and XO Communications, Inc. (XO Communications) as CLECs. The Department stated that while NOS and XO Communications were not part of the initial complaint, they have signed the Stipulation. The Department indicated that if the Stipulation is approved, the Department will consider the investigation of NOS and XO Communications complete.

On April 4, 2005, MCI, Inc., signed the Stipulation on behalf of itself and its subsidiaries.

On April 15, 2005, the Commission sent a notice soliciting comments regarding issues raised by the March 30, 2005 Stipulation and the Department's April 4, 2005 Additional Comments.

On April 19, 2005, KMC, Telecom, Inc. signed the Stipulation.²

On April 20, 2005, NorthStar Access signed a separate Stipulation with the Department (NorthStar Stipulation), explaining that a separate stipulation was appropriate for it since the March 30, 2005 Stipulation did not fit the circumstances associated with the contract between NorthStar Access and AT&T.

On April 25, 2005, Eschelon, MCI, Focal, Integra, KMC, McLeodUSA, XO Communications and the Department filed comments recommending Commission approval of the Stipulation and dismissing the signatories to the Stipulation from the Complaint.

On April 25, 2005, AT&T filed comments opposing the approval of the Stipulation.

On April 25, 2005, the Department also filed additional comments reporting three additional agreements with untariffed access rates: 1) KMC Telecom, LLC (CLEC) and Sprint (IXC); 2) MCI metro Access Transmission Services, LLC (CLEC) and Sprint; and 3) AT&T (CLEC) and MCI's various IXC subsidiaries operating in Minnesota, including: Brooks Fiber Communications of Minnesota, Inc., Intermedia Communications, LLC, MCI WorldCom, Communications, Inc., TTI National, Inc.

On May 11, 2005, the Commission met to hear oral argument regarding this matter. In the course of the proceeding the Department proposed to introduce an exhibit comparing tariffed and contract rates for CLECs. The Commission agreed to accept the late-filed exhibit on the condition that AT&T be allowed an opportunity to review the exhibit and file comments before the Commission would proceed to deliberate this matter.

² KMC was not part of the initial Complaint but does have an agreement involving untariffed access rates with Sprint.

On May 20, 2005, AT&T filed comments, including a revised Confidential Exhibit A, and on May 23, 2005, replies were filed on behalf of Eschelon, Focal Communications, Inc., Integra Telecom of Minnesota, KMC Telcom, Inc., McLeod USA Telecommunications Services, Inc., and XO Communications, Inc.

The Commission met on May 24, 2005 to consider this matter.

FINDINGS AND CONCLUSIONS

I. Proposed Stipulation and Agreement

The Stipulation and Agreement was presented as resolving all issues arising from this proceeding against any signatory with respect to switched access charges in any written agreement that has been provided to the Department. A copy of the Stipulation and Agreement is attached.³ Principal provisions of the Stipulation and Agreement may be fairly summarized as follows:⁴

1. The untariffed/unapproved access rates will be superseded by new tariffed access rates to be filed by the CLECs as described in Paragraph 1 of the Stipulation. The CLECs agreed to file new tariffed rates for intrastate switched access services pursuant to a revenue neutral formula within 20 days of the Commission's Order approving the settlement and that any discount would also be tariffed and available to all IXCs. Paragraph 1.
2. CLECs also agreed that in accordance with Minn. Rules, Part 7812.2210, subp. 5 (but only to the extent CLEC switched access rates remain regulated by the Commission and subject to a statutory tariffing requirement) that they would not offer switched access service within Minnesota on terms that are unreasonably discriminatory or contrary to their filed Minnesota tariffs and 2) that any individual case-based (ICB) pricing for switched access services would have an approved tariff pursuant to Minn. Rules, Part 7812.2210, subp. 5B. Paragraph 2.
3. The IXCs agreed to pay the tariffed rates calculated per the settlement formula and not to challenge any such rate prior to March 1, 2006. Paragraph 3.
4. IXCs further agreed not to dispute the application of any intrastate switched access rates set forth in a filed tariff or approved ICB contract by withholding, reducing or delaying payment of the amount due under the tariff or contract. Paragraph 5.

³ Attachment A.

⁴ The approved Stipulation and Agreement has, by its approved terms, the effect of a Commission Order. Section 13. In the event of any dispute regarding the meaning and scope of any provision of the Stipulation and Agreement, the language of the Stipulation and Agreement itself shall control.

5. The Stipulation did not address the status of the untariffed/unapproved access charges and the agreement on a retroactive basis, and the parties agreed that the settlement did not invalidate or declare unreasonable any multi-state contract or tariffed rate applicable in other jurisdictions or any CLEC's tariffed intrastate switched access rates in Minnesota in effect prior to the date the Commission approves the settlement. Paragraph 4.
6. The CLECs and IXC's agreed not to initiate any further legal or regulatory action to enforce the rates set forth in the agreements at issue in the proceeding with respect to the Minnesota intrastate jurisdiction. Paragraph 6.
7. While the parties do not admit to any violation of law, the Stipulation does provide for CLECs to make payments to the State Treasury in Paragraphs 7 and 14.
8. The signatory CLECs and IXC's do not admit to any violation of state law in the Stipulation. Rather, Paragraph 13 states: "This Settlement does not imply, nor does any Party to this Settlement Agreement admit, any violation of law, rule or Commission Order. Upon its approval by the Commission, this Settlement Agreement will have the force and effect of a Commission Order."
9. Parties to the Stipulation agreed to jointly request that the Commission enter an Order approving the Settlement Agreement and dismissing with prejudice the Complaint against any party to the Agreement with respect to switched access charges in any written agreement that has been provided to the Department. Paragraph 8.
10. The Parties agreed that the settlement does not provide any third party with any remedy, right or privilege. Paragraph 11.

II. Signatories to the Stipulation

As of the date the Commission deliberated this matter, five of the six CLECs named in the Department's complaint (Arizona Dialtone, Eschelon, Focal, Integra, McLeod) and three of the four IXC's named in the complaint (Sprint, Global Crossing, and MCI, Inc. on behalf of itself and its IXC subsidiaries in Minnesota⁵) had signed the Stipulation.

The CLEC that did not sign the Stipulation (NorthStar Access) has signed a separate Stipulation with the Department, which is addressed in Section VII of this Order.

The IXC that did not sign the Stipulation is AT&T. Its objections to the Stipulation are addressed below in Section V.

In addition to the parties and agreements identified in the Department's original complaint, NOS and XO Communications (CLECs) signed the Stipulation regarding a subsequently identified untariffed rates agreements with AT&T (the IXC); KMC Telecom, LLC (a CLEC) signed the

⁵ MCI, Inc.'s IXC subsidiaries in Minnesota include Brooks Fiber Communications of Minnesota, Inc., Intermedia Communications, LLC, MCI WorldCom, Communications, Inc., TTI National, Inc.)

Stipulation regarding another such agreement with Sprint (the IXC); and MCImetro Access Transmission Services, LLC (a CLEC) signed the Stipulation regarding such an agreement with Sprint (the IXC).

III. Party Positions Regarding the Stipulation

On April 25, 2005, Eschelon, MCI, Focal, Integra, KMC, McLeodUSA, XO Communications and the Department filed comments recommending Commission approval of the Stipulation and dismissing the signatories to the Stipulation from the Complaint.

On the same day, AT&T filed comments opposing the approval of the Stipulation.

As of the hearing date on this matter, then, all of the companies, except AT&T, had signed the Stipulation and the Department had indicated that it would consider its investigation of the signatories to the Stipulation complete if the Stipulation was approved.

IV. Commission Analysis and Action Regarding the Stipulation

A. Summary

The Stipulation and Agreement is in the nature of a settlement. Minn. Stat. § 237.076 authorizes the Commission to accept a settlement upon a finding that it is in the public interest and is supported by substantial evidence.

Having reviewed the record and heard the parties' oral arguments on this matter, the Commission finds that the proposed Settlement is in the public interest and supported by substantial evidence. Accordingly, the Commission will approve the Settlement and require its implementation.

B. Public Interest Analysis

A significant achievement of the Settlement is that the CLECs' new tariffed rates for switched access service will be lower than the currently tariffed rates. While reducing the rates for switched access service is not the primary objective of this docket, the CLECs' new tariffed rates are for the most part significantly lower than their currently tariffed rates. As a consequence, all the IXCs operating in Minnesota except for the IXCs who have been enjoying even lower access rates due to the confidential, off-tariff agreements identified in this docket will receive the benefit of the new, lower tariffed rates achieved by this Settlement.

More importantly, the Settlement ends a period of unproductive contention between IXCs and CLECs regarding the payment of tariffed switched access rates, a period marked by the creation of untariffed switched access rate agreements identified in this docket. The Settlement creates stability regarding payment of tariffed or Commission-approved ICB rates. Highlights of that period of stability include:

- The signatory IXCs agreed to pay the tariffed rates calculated as described in the Agreement prospectively from the date the Commission approves the Settlement Agreement unless a different rate is negotiated and approved by the Commission as an ICB rate.

- The signatory IXCs agreed that, unless provided for in a carrier's tariff or contract, they would not dispute the application of any intrastate switched access rates set forth in a filed tariff or approved ICB contract by withholding, reducing or delaying payment of the amount due under tariff or contract.
- CLECs and IXCs further agreed not to initiate any further legal or regulatory action to enforce rates set forth in the agreements at issue in this proceeding with respect to the Minnesota jurisdiction.

The settlement also promotes fair and open competition by assuring that all IXCs will have access to the same tariffed rates or, if the CLEC proposes to offer ICB rates, that those rates will be pursuant to a Commission-approved tariff that states the conditions under which the unique price is available. Such an arrangement assures that ICB rates will be fairly available to all who meet the conditions that justify the ICB rate. This promotes fair and open competition by limiting the power of the largest IXCs to disadvantage smaller IXCs by securing rates that reflect their negotiating power rather than characteristics that truly justify lower rates.

C. AT&T's Objections to the Settlement

The only IXC objecting to the Settlement is AT&T. AT&T's objections to the Commission's acceptance of the Settlement Agreement are not persuasive.

First, AT&T asserted that the rates proposed in the Settlement were not just and reasonable but provided no evidence of that except that the proposed rates would be higher than the rates AT&T and certain other IXCs had been paying pursuant to their negotiated agreements. The Commission finds, however, that the formula and the resulting revenue neutral rates achieved by the settlement are fair and reasonable. For many IXCs, the new tariffed rates will be lower than the tariffed rates they are currently paying and, moreover, they come with the pro-competition assurance that no IXC is getting a lower rate unless warranted pursuant to ICB pricing.

Second, AT&T asserted that the Settlement's proposed rates are anti-competitive and unreasonably discriminatory because the proposed access rate for terminating calls is higher than the access rate for originating calls.

The relevance of AT&T's claim is unclear. Moreover, it is factually inaccurate. For seven of the eight CLECs whose proposed rates are shown on Attachment A of the Settlement, the proposed originating and terminating rates are the same. In one instance, the proposed access rate for terminating calls is negligibly higher (\$0.00000010 higher) than the access rate for originating calls.

Third, AT&T argued that the Settlement Agreement was not in the public interest because, it asserted, the proposed tariffed access rates would result in increased long distance rates for numerous Minnesota customers.

It is not clear that there is an automatic pro-rata cause-effect relationship between switched access rates and the long distance rates AT&T charges. However, assuming that changed access rates result in some change in long distance rates, AT&T's argument ignores the fact that numerous Minnesota long distance customers may experience lower long distance rates due to the Settlement because they are customers of IXCs who have not been party to a negotiated agreement involving untariffed rates and will now be paying reduced tariff rates for switched access service.

Fourth, AT&T argued that the parties' settlement (Stipulation and Agreement) would improperly interfere with settlement agreements voluntarily entered into at arms' length by two businesses, settlements that are encouraged under Minnesota law and Commission policy. The settlement of issues achieved in the Stipulation and Agreement, however, is entitled to equal or greater deference than the settlements that AT&T refers to (between AT&T and several CLECs) since it has been submitted to the Commission, commented upon by the parties, and reviewed by the Commission.

Fifth, AT&T objected that the Settlement encourages CLECs to breach lawful and enforceable contracts.

AT&T's argument, however, is not against the Stipulation and Agreement but with the CLECs that have signed the Stipulation and Agreement. AT&T's position appears to be that the CLECs signing the Stipulation and Agreement are committed to a course of action that will breach valid and lawful contracts with IXCs and AT&T as an IXC in particular. AT&T, of course, is in no position to raise the rights that signatory IXCs may have under contracts since the signatory IXCs have agreed they will not seek to have those contracts performed. As to its own six contracts with CLECs for the provision of switched access service at untariffed rates, AT&T essentially is asking the Commission to examine and act on contract law claims that are not fully developed and for which this Commission may not be the appropriate forum.

Sixth, AT&T asserted that the Settlement violated Minnesota law by requiring CLECs and IXCs to obtain prior approval of CLEC tariffs and contracts. AT&T was apparently referring to the settlement's provisions regarding ICB pricing.⁶ In that regard, Section 2(b) of the Settlement states:

. . . if used for switched access services, [ICB pricing] will have an **approved** tariff on file . . . [Bracketed material and emphasis added.]

Without needing to determine in this Order whether Minnesota law requires CLECs and IXCs to obtain prior approval of CLEC tariffs and contracts for ICB pricing, the Commission notes that the signatories' voluntary agreement to be bound by the provisions of Section 2(b) does not violate Minnesota law. AT&T cites no law prohibiting the parties from agreeing to obtain prior Commission approval of ICB tariffs and contracts. Agreement to seek prior approval of such rates does not offend the meaning or purposes of the ICB rate.

V. Department Complaint Against AT&T as an IXC

A. The Department's Complaint

In its initial complaint filed June 6, 2004, the Department asserted that four large IXCs, including AT&T, violated conditions associated with their certificates of authority by contracting with certain CLECs to pay lower, untariffed rates for switched access service. The Department stated that the Commission's October 15, 1985 Order in the 212 Docket⁷ and its November 2, 1987 Order

⁶ Settlement Paragraphs 2 (b) and 3.

⁷ See *In the Matter of a Consolidated Proceeding to Investigate the Provision of Intrastate InterCity Telecommunications Services Within the State of Minnesota*, P-442, P-442, P-443, P-444, P-421, P-433/NA-84-212, FINDINGS OF FACT, CONCLUSIONS OF LAW

in the 582 Docket⁸ established conditions associated with their certificates, including payment of switched access services at tariffed rates. The Department stated that if large IXCs are able to exert market power to receive lower switched access rates without demonstrating that there are cost differences justifying the lower rates, smaller IXCs will have more difficulty competing.

All the IXCs identified by the Department in its complaint except AT&T signed the Stipulation Agreement reviewed and approved in Section IV of this Order. As to the IXCs that signed the Stipulation, therefore, the Department's complaint will be dismissed, as provided in the Stipulation Agreement.

B. AT&T's Position

With respect to its negotiated contracts with six CLECs involving untariffed rates, AT&T objected that the Department failed to establish the existence of any legal obligation or duty requiring AT&T to purchase access services exclusively from tariffs. AT&T stated that the Department cited no requirements in AT&T's certificates or the two Orders cited (see Footnotes 6 and 7) imposing such an obligation on AT&T.

Additionally, with respect to its contract with Northstar, AT&T noted that this contract was not an agreement that established access rates varying from Northstar's tariffed Minnesota intrastate access rates. AT&T argued the Northstar contract is therefore materially different from the other contracts addressed in the complaint and should be dismissed.

AT&T asserted that none of the Department's other allegations applied to AT&T since as a customer of the CLECs' access services it had no obligation to assure that the contract rates were not unreasonably discriminatory or that the rates were offered to other similarly situated IXCs. Likewise, AT&T contended, it has no filing obligations under Minn. Rules, Part 7812.2210.

C. The Commission's Analysis and Action

Without addressing the merits of the Department's and AT&T's competing claims regarding the Department's complaint against AT&T as an IXC, the Commission finds that the principal concern inspiring the Department's complaint is addressed adequately by the Stipulation and Agreement approved in Section IV. In the Stipulation, the CLECs who have contracted with AT&T to provide switched access service at untariffed rates have agreed to discontinue that practice and to henceforward provide switched access service exclusively at tariffed rates. As a result, the Department's complaint against AT&T as an IXC is, in effect, moot. Accordingly, the Commission will not pursue this complaint further and will dismiss it.

AND ORDER (October 15, 1985).

⁸ See *In the Matter of a Summary Investigation into IntraLATA Toll Access Compensation for Local Exchange Carriers Providing Telephone Service Within the State of Minnesota*, Docket No. P-999/CI-85-582, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER AND ORDER INITIATING SUMMARY INVESTIGATIONS (November 2, 1987).

VI. Department Allegations/Complaint Regarding AT&T as a CLEC

A. The Department's Allegations

In its April 25, 2005 comments, the Department charged AT&T with violating Minn. Stat. § 237.07, Minn. Stat. § 237.09, and Minn. Rules, Part 7812.2210, subd. 5. The Department cited an agreement between AT&T acting as a CLEC and MCI's subsidiaries acting as IXCs.⁹ The Department alleged that AT&T as a CLEC charged MCI subsidiaries (IXCs) untariffed switched access rates.

B. The Parties' Response

Subsequently, on March 30, 2005, the MCI subsidiaries signed the Stipulation Agreement that has been approved in this Order. AT&T, by contrast, objected that it did not have a chance to file comments objecting to the Department's allegations.

C. The Commission's Analysis and Action

Pursuant to the approved Stipulation Agreement, the Department's allegations against MCI will not proceed, but will be dismissed.

As to AT&T, the Commission finds that the Department's April 25, 2005 allegations against AT&T as a CLEC are within the Commission's jurisdiction and warrant investigation. Furthermore the Department's comments are in sufficient detail to inform AT&T regarding what is being alleged and to give it fair notice of what is to be responded to. Accordingly, the Commission will treat the Department's allegations as a complaint pursuant to Minn. Rules, Part 7812.2210, subp. 17 and allow AT&T to file an answer to that complaint within 20 days of this Order.

VII. NorthStar Stipulation

A. Background

Unlike the other contracts complained of by the Department in this matter, the contract between NorthStar (the CLEC) and AT&T (the IXC) results in lower access rates for AT&T by adjusting AT&T's Percent Interstate Usage (PIU). The PIU is a process developed to provide a surrogate means for determining the jurisdictional nature of long distance traffic where call detail is unavailable. Parties have disputes routinely regarding PIU factors and many federal access services tariffs provide a process to audit and/or resolve such disputes. The contract between NorthStar and AT&T resolved just such a dispute regarding the appropriate PIU to be applied to AT&T's long distance traffic with NorthStar in Minnesota.

⁹ The MCI subsidiaries in question are: Brooks Fiber Communications of Minnesota, Inc., Intermedia Communications, LLC, MCI WorldCom, Communications, Inc., TTI National, Inc.

B. Parties' Positions

After initially asserting that AT&T and NorthStar violated Minnesota law by agreeing to a specific PIU, the Department modified its recommendation by recommending that the Commission simply require NorthStar to submit a compliance filing estimating when it will be able to measure AT&T's actual PIU rather than using a negotiated PIU.

On April 20, 2005, NorthStar Access signed a separate Stipulation with the Department, explaining that a separate Stipulation was appropriate since the March 30, 2005 Stipulation did not fit the circumstances associated with the contract between NorthStar Access and AT&T. The Stipulation stated in relevant part:

Further Filings Required: NorthStar Access is to provide an estimated time frame stating when it will be able to recognize the jurisdiction of AT&T's interexchange traffic. Within 30 days of when the jurisdiction of traffic is known, NorthStar Access agrees to file a report with the Commission and Department on the actual jurisdiction of AT&T's traffic. NorthStar agrees, in lieu of using AT&T's declared PIU, to bill AT&T based on the actual recorded usage that identifies the jurisdiction of AT&T's traffic.

The stipulation also required NorthStar to charge only tariffed or Commission approved rates and dismissed NorthStar from the Complaint.

The Department filed comments stating that the Stipulation addressed its concerns.

C. Commission Analysis and Action

The Commission finds that the Stipulation between NorthStar and the Department is reasonable, in the public interest, and supported by substantial evidence. The Commission will, therefore, approve it and require its implementation.

ORDER

1. The Stipulation and Agreement filed March 30, 2005 in this matter is approved. Copy attached. Accordingly, the Department's complaint is dismissed as to all signatories. Parties to this document shall implement it according to its terms.
2. The Department's complaint against AT&T as an Interexchange Carrier (IXC) is dismissed.
3. Allegations by the Department against AT&T as a competitive local exchange carrier (CLEC) in comments filed April 25, 2005 are deemed to be a complaint pursuant to Minn. Rules, Part 7812.2210, subp. 17. AT&T will have 20 days from the date of this Order to file a response or answer.
4. The Stipulation between NorthStar and the Department dated April 20, 2005 is approved. Copy attached. Parties to this document shall implement it according to its terms.

5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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