

	12-2500-17084-2 P-442, 5798, 5340, 5826, 5025, 5643, 443, 5323, 5668, 4661/C-04-235
--	---

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Complaint of the Minnesota Department of Commerce for Commission Access Against AT&T Regarding Negotiated Contracts for Switched Access Services	ORDER ON MOTION TO STRIKE PORTIONS OF THE TESTIMONY OF GREGORY J. DOYLE
---	--

This matter came before Administrative Law Judge Steve M. Mihalchick on AT&T's motion to strike portions of the testimony of Gregory J. Doyle. The record closed on September 22, 2006 with the receipt of the last brief on the motion.

Linda S. Jensen, Assistant Attorney General, 445 Minnesota Street, Suite 1400, Saint Paul, MN 55101, appeared on behalf of the Department of Commerce (Department). Rebecca DeCook, Holland & Hart, LLP, 8390 East Crescent Parkway, Suite 400, Greenwood Village, CO 80111, appeared on behalf of AT&T. No filing was received from Lesley Lehr, Gray Plant Mooty, 500 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402-3796, on behalf of Verizon Business Services (formerly MCI Inc.). No filing was received from Joan C. Peterson, Corporate Counsel, 200 South Fifth Street, Room 2200, Minneapolis, MN 55402, on behalf of Qwest.

Based on the memoranda and file herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge issues the following:

ORDER

1. AT&T's Motion to Strike Portions of the Testimony of Gregory J. Doyle is DENIED.
2. This matter will proceed to hearing as scheduled in accordance with the prior order in this matter issued on June 26, 2006.

Dated: October 23, 2006

/s/ Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

Background

AT&T is a telecommunications carrier that, since 1983, has been granted authority by the Commission to operate as an intrastate interexchange carrier (IXC) and, since 1996, as a competitive local exchange carrier (CLEC) providing local access services in Minnesota. The Department filed a Complaint in this docket on June 16, 2004, alleging that AT&T and other carriers were engaging in illegal price discrimination and concealing the illegal practices from regulators by using unfiled pricing agreements. The Commission approved a settlement of that Complaint with all the parties except AT&T.¹

The Department then filed an Amended Verified Complaint against AT&T alleging that AT&T violated Minnesota statutes and rules in its provision of intrastate switched access services to MCI subsidiaries, including MCI Network Services. In its answer, AT&T denied that it had violated any statutes or rules in its provision of intrastate switched access services to MCI Network Services or its subsidiaries. The matter was referred to OAH for a contested case proceeding. By Order of the Administrative Law Judge, prefiled testimony was required to be filed by the parties. The Department filed the Direct Testimony of Gregory J. Doyle in support of the Department's contentions regarding the Complaint.

The Department moved for summary disposition of this matter. On June 26, 2006, the ALJ granted the motion regarding AT&T's violation of Minn. Stat. §§ 237.07, subd. 1; 237.09, subds. 1 and 2; 237.74; 237.121, subd. (a)4; and violation of Minn. Rules 7810.0500, subp. 1, and 7812.2210, subps. 2, 3, 5, and 9. The ALJ declined to impose a penalty on summary disposition, holding that:

However, the Department's request that the Administrative Law Judge make conclusions with respect to the relief sought is denied.

¹ *ITMO Negotiated Contracts for Switched Access Services*, PUC 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 issued July 7, 2006)(04-235 Docket Settlement Order).

Generally, the issue of penalty is a factual matter that cannot be decided on summary disposition. Therefore, the issues of penalty and enforcement action will proceed to hearing.

On September 7, 2006, AT&T filed a Motion to Strike Portions of the Testimony of Gregory J. Doyle. The motion alleged that the identified testimony should be stricken as beyond the scope of this proceeding, as improper evidence, and is irrelevant to the issues in this matter. AT&T also maintains that the Department is engaged in a collateral attack on the Commission's prior order.² On September 22, 2006 the Department responded that the identified testimony is relevant to establish the appropriate penalty under Minn. Stat. § 237.462, as well as providing context to the proceeding to ensure that the demonstrated misconduct is not repeated.³

Effect of the *04-235 Docket Settlement Order*

AT&T maintains that the Commission's *04-235 Docket Settlement Order* renders any further action in this proceeding moot. The Stipulation and Agreement approved by that order provided that:

- 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 the 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.⁴

AT&T did not enter the stipulation that the Department and the other IXCs and CLECs signed. The Commission characterized AT&T's position as follows.

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

² AT&T's Motion to Strike, at 3.

³ Department's Response, at 4.

⁴ *04-235 Docket Settlement Order*, at 6.

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.⁵

In approving the settlement, the Commission assessed the impact of its action on AT&T as follows:

Without addressing the merits of the Department's and AT&T's competing claims regarding the Department's complaint against the AT&T IXC, the Commission finds that the principle 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 the 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.⁶

Effect of the *05-1282 Docket Settlement Order*

A different complaint was lodged against AT&T in docket C-05-1282. In that docket, the Department alleged that AT&T's IXC operation had engaged in reciprocal agreements with CLECs that were not disclosed as required. The Department and AT&T entered into a settlement in that matter which was approved by the Commission on August 7, 2006.⁷ In the Commission's Order, the Stipulation was approved with the following:

The Stipulation promotes fair and open competition by assuring that all IXCs will have access to the same Commission-approved rates, whether in tariffs or ICB contracts. Such an arrangement assures that rates will be fairly available to all who meet the conditions that justify the 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.

⁵ *04-235 Docket Settlement Order*, at 7.

⁶ *04-235 Docket Settlement Order*, at 8.

⁷ *ITMO the Matter of the Department of Commerce's Formal Complaint and Request for Commission Action*, PUC Docket No. P-442, 5243, 5934, 5681, 6287, 5656, 5936, 6144, 5442, 5981, 5270/C-05-1282, (Order Approving Stipulations and Dismissing Complaint Against AT&T issued August 7, 2006)(*05-1282 Docket Settlement Order*).

The Commission has no wish to discourage telecommunications providers from negotiating mutually agreeable terms for conducting business: the Commission merely seeks to ensure that these agreements conform to law and are otherwise consistent with the public interest. The Commission is persuaded that the proposed Stipulation - ensuring that AT&T will not seek to evade the regulatory system ensuring nondiscriminatory rates - meets these criteria.⁸

Between the *04-235 Docket Settlement Order* and the *05-1282 Docket Settlement Order*, the issues regarding reciprocal agreements have been settled with IXCs, CLECs, and AT&T as an IXC. The only outstanding issues remain against AT&T as a CLEC. No part of either the *04-235 Docket Settlement Order* or the *05-1282 Docket Settlement Order* purports to resolve the issues of AT&T's CLEC operation participating in these reciprocal agreements. The testimony offered by the Department does not constitute a collateral attack on the Commission's prior orders. The testimony that AT&T seeks to strike merely places AT&T's actions in context with the other participants in these reciprocal arrangements. Thus, this testimony is relevant to provide background information on the scope of the agreements and whether AT&T knowingly violated the requirements to charge and pay tariffed rates for interexchange services.

The terms of the AT&T-MCI contract, which AT&T notes is the only contract at issue, may well have been affected by the terms of other agreements described in the testimony at issue. The Department is certainly entitled to show what terms were in other, similar contracts between the AT&T CLEC and other IXCs as part of the Department's case. Such testimony is relevant to the factors set out in Minn. Stat. § 237.262, subd. 2(b), to determine the appropriate penalty for statutory violations.

The Department has shown that its offered testimony is relevant to issues that remain in this proceeding. Other objections to that testimony, such as it being speculative, is better addressed through cross-examination. AT&T's motion to strike is DENIED.

S. M. M.

⁸ *05-1282 Docket Settlement Order*, at 3.