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OAH No. 12-2500-17084-2  
MPUC Dkt. No. 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 Action Against AT&T  
Regarding Negotiated Contracts for  
Switched Access Services

**RECOMMENDATION ON MOTION  
FOR SUMMARY DISPOSITION,  
FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND RECOMMENDATION**

This matter is before Administrative Law Judge Steve M. Mihalchick on the request of the Commission to recommend a penalty and to clarify the status of AT&T's trade secret claims. The record closed on April 10, 2007 with the receipt of the last brief following hearings on November 14 and 15, 2006.

Linda S. Jensen, Assistant Attorney General, 445 Minnesota Street, Suite 1400, Saint Paul, MN 55101, appeared on behalf of the Department of Commerce. Rebecca DeCook, Moye White LLP, 1400 16<sup>th</sup> Street, 16 Market Square, Sixth floor, Denver, CO 80202, appeared on behalf of AT&T. Lesley Lehr, Gray Plant Mooty, 500 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402-3796, appeared on behalf of Verizon Business Services, formerly MCI Inc. Joan C. Peterson, Corporate Counsel, 200 South Fifth Street, Room 2200, Minneapolis, MN 55402 and Larry D. Espel, Greene Espel, 200 South Sixth Street, Suite 1200, Minneapolis, MN 55402 appeared on behalf of Qwest.

**STATEMENT OF THE ISSUES**

1. Whether AT&T has violated Minnesota statutes and rules in its provision of intrastate switched access services to MCI subsidiaries.
2. What penalties or other remedial action should the Commission assess or take against AT&T based on AT&T's knowing and willful failure to file its 2004 switched access service agreement with MCI?
3. Should trade secret protections apply to AT&T's 2004 switched access service agreement with MCI and to various other documents and testimony that became part of the record in this docket?

Based upon the record, the Administrative Law Judge makes the following

## FINDINGS OF FACT

1. On June 16, 2004, the Department filed a Verified Complaint and Request for Commission action in this docket. In the Verified Complaint, the Department alleged that AT&T<sup>[1]</sup> and other carriers were engaging in illegal price discrimination and concealing the illegal practices from regulators by using unfiled pricing agreements.

2. On July 7, 2005, the Commission approved a settlement with all the parties except AT&T. Thereafter, in October 2005, the Department filed an Amended Verified Complaint against AT&T in which the Department alleged that AT&T's CLEC violated Minnesota statutes and rules in its provision of intrastate switched access services to MCI subsidiaries, including MCI Network Services. On November 16, 2005, AT&T filed its Answer denying that it had violated any statutes or rules in its provision of intrastate switched access services to MCI Network Services or its subsidiaries.

3. By order dated January 24, 2006, the Commission reviewed the Department's Amended Verified Complaint and AT&T's Answer and determined that it had jurisdiction over AT&T's CLEC's provision of intrastate telecommunications services under the Minnesota Telecommunications Act, Minnesota Statutes Chapter 237. In the January 24th Order, the Commission referred the matter to OAH for a contested case proceeding on the following issues:

The issues in this case are whether AT&T has violated Minnesota statutes and rules in its provision of intrastate switched access services to MCI subsidiaries and, if it has, what remedial action the Commission should take.

The parties shall address the above issues in the course of contested case proceedings. They may also raise and address other issues relevant to the Complaint.<sup>[2]</sup>

4. On February 27, 2006, Qwest Corporation filed a Petition to Intervene in this matter, and by Order dated March 16, 2006, the Administrative Law Judge admitted Qwest as a party. On March 20, 2006, Verizon (formerly MCI Inc.) was added as a non-party participant.<sup>[3]</sup>

5. On March 31, 2006, the Department filed a Motion for Summary Disposition.

6. On June 26, 2006, the ALJ issued his Recommendation on Motion for Summary Disposition recommending that the Department's Motion for Summary Disposition be granted in part as to the following claims:

a. That AT&T knowingly and intentionally violated Minn. Stat. § 237.74 or a rule or order of the Commission adopted or issued under

Minn. Stat. § 237.74, for which AT&T is subject to enforcement under Minn. Stat. § 237.74, subd. 11.

b. That AT&T violated Minn. Rules 7812.2210, subs. 2, 3, and 5, which require rates to be uniform and not unreasonably discriminatory, by offering, charging, and collecting for switched access services, rates that have not been tarified or otherwise approved by the Commission.

c. That AT&T has refused to provide a service to an IXC in accordance with AT&T's applicable tariffs, price lists, contracts, and Commission rules and orders, in violation of Minn. Stat. § 237.121, subd. (a)4 and Minnesota Rule 7812.2210, subp. 9.

d. That AT&T violated Minnesota Rule 7810.0500, subp. 1, by failing to have its rates on file with the Commission in accordance with the rules governing the filing of tariffs as prescribed by the Commission;

e. That the rates and terms that AT&T provides to MCI under the Second Unfiled Agreement are unreasonably discriminatory under Minn. Stat. § 237.74, subd. 2.

f. That AT&T's rates, tolls, tariffs or price lists, charges, or schedules with respect to MCI are unreasonable and unjustly discriminatory; and the Commission may therefore require "termination of the discrimination," as authorized under Minn. Stat. § 237.74, subd. 4(e).

g. That AT&T violated Minn. Stat. § 237.07, subd. 1, by providing to MCI under the Second Unfiled Agreement specific rates, charges and other terms regarding AT&T's provision of intrastate switched access service, and by failing to file with the Department these specific rates, charges or terms offered by AT&T.

h. That AT&T engaged in discrimination by knowingly or willfully charging, demanding, collecting, and receiving the untariffed rates for intrastate switched access service under the terms of its unfiled Agreement with MCI, while offering, charging, demanding, collecting, or receiving tarified rates for intrastate switched access service with regard to other IXCs under similar circumstances, in violation of Minn. Stat. § 237.09, subd. 1.

i. That AT&T engaged in discrimination by offering or providing to a customer intrastate switched access service on a separate, stand-alone basis, but not pursuant to tariff to all similarly situated persons in violation of Minn. Stat. § 237.09, subd. 2.

j. That AT&T knowingly and intentionally violated applicable provisions of Minn. Stat. Ch. 237, Commission orders, and rules of the Commission adopted under Minn. Stat. Ch. 237, and that AT&T is subject

to enforcement as set forth in Minn. Stat. §§ 237.16, 237.461 and 237.462.

7. As part of his June 26, 2006 recommendation, the Administrative Law Judge ordered that the findings listed in paragraphs 6.a. through 6.j., above, be incorporated into this final report. The June 26 Recommendation also ordered that this matter proceed to hearing on the issue of what remedial and enforcement action the Commission should take in response to AT&T's knowing and intentional violations of applicable provisions of Minn. Stat. Chap. 237, Commission orders, and rules of the Commission adopted under Minn. Stat. Ch. 237.<sup>[4]</sup>

8. The Administrative Law Judge's June 26, 2006, Recommendation on Motion for Summary Disposition is incorporated into this final Report. It is attached hereto as Attachment A.

9. The "penalty phase" hearings were held on November 14 and 15, 2006. Final post-hearing briefs were submitted on April 10, 2006.

10. Throughout these proceedings, AT&T has repeatedly invoked trade secret protections to protect from disclosure any information or statement which would reveal the underlying content or nature of its contract with MCI which is at the center of this docket, or any of the other contracts to which it was a party and which have been held to be relevant and admissible in this proceeding.

11. AT&T's claims for trade secret protection have been upheld throughout the proceedings pending a final recommendation by the ALJ regarding those claims.<sup>[5]</sup>

12. In addition to the findings of knowing and intentional violations of applicable statutes and rules as set forth in paragraphs 6.a. through 6.j., above, the Administrative Law Judge makes the following findings regarding penalties and treatment of claimed trade secret data.

13. 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.<sup>[6]</sup>

14. The Department initiated an investigation in this matter to determine whether AT&T has engaged in a practice of entering into unfiled agreements that violated Minnesota law and Commission rules and orders. On June 16, 2004, the Department filed a Complaint and Request for Commission Action regarding several unfiled agreements, pursuant to which several CLECs had agreed to provide AT&T's IXC with switched access services at rates that were different from the CLECs' tariffed rates.<sup>[7]</sup>

15. In response to Department Information Requests (IRs), MCI Network Services disclosed two agreements it had with AT&T that AT&T had never filed or disclosed to the Department.<sup>[8]</sup>

16. Under the terms of the first unfiled agreement (First Unfiled Agreement), AT&T's IXC agreed to purchase from MCI Worldcom Communications intrastate switched access services for its IXC operations at unique prices that were different from the tariffed rates of MCI Worldcom Communications. Under the terms of the second unfiled agreement (Second Unfiled Agreement), AT&T's CLEC agreed to sell intrastate switched access service at a unique price, other than AT&T's tariffed rate, to various MCI Interexchange carrier subsidiaries operating in Minnesota. Neither of these agreements, nor the unique prices and terms offered in them, were filed with the Commission, Department, or with the Office of the Attorney General-Residential Utilities Division (OAG-RUD), or otherwise tariffed by MCI or AT&T.<sup>[9]</sup>

17. AT&T pressured numerous other CLECs into selling their switched access services to it at a discounted rate. Pressure tactics included AT&T's IXC withholding payment on obligations incurred by it for local access services until the CLEC involved agreed to accept lower rates for the services.<sup>[10]</sup>

18. AT&T has consistently taken steps to ensure that the existence and terms of these agreements would not become public. These steps have included requiring that parties wishing to negotiate with AT&T sign confidentiality agreements prohibiting them from revealing even the fact that they are or were in negotiations with AT&T and strict confidentiality provisions within the agreements.<sup>[11]</sup>

19. AT&T's CLEC's failure to file its agreement with MCI prevented other IXCs from availing themselves of the lower rates AT&T's CLEC offered MCI for local access exchange services.<sup>[12]</sup>

20. Although AT&T has engaged in conduct in the past which has included failing to file agreements regarding switched access services and discouraging other parties from filing such agreements to which AT&T was a party, there have been no findings of violations of Minnesota or other states' laws arising from this specific conduct.

21. In the *PrairieWave* docket, the Department of Commerce conditioned its support of a settlement between AT&T and PrairieWave on statements that the parties "had no undisclosed side agreements pertaining to compensation for intrastate access services" and the parties' "continued avoidance of any unfiled, side agreements pertaining to compensation for intrastate access services."<sup>[13]</sup>

22. In 1999, the Federal Communications Commission found that AT&T Corporation was violating federal law by withholding payments to CLECs in order to pressure them to reduce their switched access rates.<sup>[14]</sup>

23. Similarly, the Iowa Supreme Court held that AT&T could not simply withhold switched access payments because it was unhappy with the rates that CLECs were charging.<sup>[15]</sup>

24. The Second Unfiled Agreement, which committed AT&T's CLEC to sell switched access services to MCI at below-tariffed rates, was signed by an official of AT&T Corp.<sup>[16]</sup>

25. The Second Unfiled Agreement AT&T Corp. and MCI was in effect for 552 days.<sup>[17]</sup>

26. AT&T Corp. entered into the Second Unfiled Agreement, in which AT&T's CLEC offered switched access services to MCI's IXC at below-tariffed rates, as part of a reciprocal arrangement in which MCI's CLEC agreed, in the First Unfiled Agreement, to offer switched access services to AT&T's IXC at below-tariffed rates.<sup>[18]</sup>

27. At the time that AT&T Corp. and MCI entered into the First and Second Unfiled Agreements, MCI was going through bankruptcy. The two Unfiled Agreements resolved disputes between AT&T Corp. and MCI regarding costs of switched access services provided and purchased by both companies. The Unfiled Agreements were essentially extensions of agreements between the two companies regarding switched access fees which had been in place since at least 1998.<sup>[19]</sup>

28. After the Department settled its claims against MCI with an agreement in which MCI's CLEC agreed to stop charging untariffed rates for its switched access service, AT&T began paying tariffed rates to MCI. Following that agreement, on about June 15, 2006, AT&T billed MCI for an adjustment between AT&T's CLEC's tariffed switch access service rates and its rates under the Second Unfiled Agreement. That amount reflects the significant savings realized by both companies as a result of the two Unfiled Agreements.<sup>[20]</sup>

29. Since June 15, 2006, AT&T has continued to charge MCI the tariffed rate for switched access services.<sup>[21]</sup>

30. AT&T Corp., the parent company for AT&T Communications of the Midwest, Inc., reported annual revenues of over \$63 billion on assets of over \$270 billion and net income of \$7.356 billion for the year 2006.<sup>[22]</sup>

31. AT&T has asserted trade secret designations for the following:

a. Hearing Exhibit 12, an agreement between AT&T and MCI filed in the context of the MCI bankruptcy proceeding;

- b. Hearing Exhibit 13, the Second Unfiled Agreement;
- c. Hearing Exhibits 16 through 26, correspondence and e-mails among various AT&T and MCI personnel regarding and consisting of negotiations leading up to Exhibits 12 and 13;
- d. Portions of the Nonpublic Trade Secret version of Hearing Transcript, volume 2, from the November 15, 2006 hearing in this docket;
- e. Portions of the March 20, 2007 Brief of the Department of Commerce in this docket; and
- f. Portions of the March 20, 2007 Comments of Qwest Communications in this docket.

Based upon the forgoing Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. By offering switched access services to MCI under the Second Unfiled Agreement, AT&T knowingly and intentionally violated Minn. Stat. §§ 237.07, subd. 1, 237.09, subds. 1 and 2, 237.121, subd. (a)(4), 237.74, subd. 2, and Minn. R. 7810.0500, subp.1, 7812.2210, subps. 2, 3, 5 and 9.
2. The violations specified in paragraph 1, above, are subject to enforcement mechanisms and penalties set forth in Minn. Stat. §§ 237.16, 237.461, 237.462, 237.74, subd. 4(e), and 237.74, subd. 11.
3. The enforcement mechanisms and penalties set forth in Minn. Stat. §§ 237.16, 237.461 and 237.462 and effective in June, 2004, at the time this action was filed are applicable to this decision regardless of their repeal in 2006.
4. The trade secret protections of Minn. Stat. § 13.37, subd. 1(b), do not apply to the Second Unfiled Agreement, which was required to be publicly filed at the time the parties agreed to it.
5. Because portions of Hearing Exhibits 12 and 16-26 meet the definition of trade secrets as set forth in Minn. Stat. § 13.37, subd. 1(b), and are not otherwise required to be publicly filed, they are appropriately protected by the trade secret designation.
6. The portions of the March 20, 2007, Department of Commerce's Brief and the March 20, 2007, Comments of Qwest Communications for which AT&T requested trade secret protection do not qualify for such protection pursuant to section 13.37, subd. 1(b), because they summarize testimony which was already part of the public record in this docket.

7. Portions of the hearing transcript and any other document or testimony in this docket specifying the terms of the Second Unfiled Agreement which have been protected as trade secret are not eligible for trade secret protections pursuant to section 13.37, subd. 1(b), because all of the terms of the Second Unfiled Agreement are required to be filed and public.

Based on these Findings of Fact and Conclusions, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

#### **It is hereby respectfully recommended that:**

1. AT&T be ordered to pay \$1,000 per day for 552 days, or a total of \$552,000 in penalties pursuant to Minnesota Statutes § 237.462 for knowingly and intentionally failing to file competitive local exchange carrier (CLEC) tariffs as required by Minnesota Statutes §§ 237.121, subd. (a)(4), 237.07, subd. 1, and Minnesota Rules, parts 7812.2210, subp.9, and 7810.0500, subp. 1; and for discriminating in its provision of intrastate services as prohibited by Minnesota Statutes §§ 237.74, subd. 2, and 237.09, subds. 1 and 2; and Minnesota Rules part 7812.2210, subps. 2, 3 and 5.

2. The Second Unfiled Agreement (also known as Exhibit 13) between AT&T and MCI be stripped of its trade secret protection and be made a part of the public record in this docket and filed with the Department as it would have been had AT&T filed it as required in 2004.

3. Hearing Exhibits 12 and 16-26 of the record in the penalty phase of this docket be granted trade secret protections as proposed by AT&T, with the public versions of those exhibits filed with the public record of this docket and the non-public versions filed with the non-public portion of the record.

4. The following testimony from the hearing in the penalty phase of this docket be stripped of its trade secret protection and made a part of the public record:

a. November 15, 2006, hearing transcript, nonpublic version, volume 2, page 40, lines 19 through 24.

b. November 15, 2006, hearing transcript, nonpublic version, volume 2, page 56, lines 12 through 16.

c. November 15, 2006, hearing transcript, nonpublic version, volume 2, page 75, lines 24 through 25; and page 76, lines 1 through 11.

5. AT&T's motion to protect as trade secrets certain portions of the Department of Commerce's March 20, 2007, Post-Hearing Brief and the Qwest's March 20, 2007, Post-Hearing Comments be denied.

Dated: June 1, 2007

/s/ Steve M. Mihalchick

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STEVE M. MIHALCHICK  
Administrative Law Judge

Reported: Transcript: 2 volumes (plus one non-public volume)

### **NOTICE**

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, and the Rules of Practice of the Public Utilities Commission and the Office of Administrative Hearings, any party adversely affected by this Report, may file exceptions to it within 20 days of the mailing date hereof. Exceptions should be filed with the Executive Secretary, Minnesota Public Utilities Commission, 350 Metro Square, 121 - 7th Place East, St. Paul, Minnesota 55101. Exceptions must be specific and stated and numbered separately. Proposed Findings of Fact, Conclusions and Order should be included, and copies thereof shall be served upon all parties. If desired, a reply to exceptions may be filed and served within ten days after the service of the exceptions to which reply is made. Oral argument before a majority of the Commission will be permitted to all parties adversely affected by the Administrative Law Judge's recommendation who request such argument. Such request must accompany the filed exceptions or reply. An original and 15 copies of each document should be filed with the Commission.

The Minnesota Public Utilities Commission will make the final determination of the matter after the expiration of the period for filing exceptions, or after oral argument, if held. Further notice is hereby given that the Commission may, at its own discretion, accept or reject the Administrative Law Judge's recommendation and that the recommendation has no legal effect unless expressly adopted by the Commission as its final order.

### **MEMORANDUM**

#### **Background**

#### **Applicability of Penalty Provision**

AT&T has raised the question of which penalty provisions apply in this matter. Minn. Stat. §§ 237.461, subd. 3, and 237.462 in its entirety were repealed effective August 1, 2006, through sunset provisions.<sup>[23]</sup> While it is true that those provisions are no longer in effect, they were in effect on June 16,

2004, when the Department filed its Verified Complaint and Request for Commission action in this docket; and in October 2005, when the Department filed its Amended Verified Complaint against AT&T.

Minn. Stat. § 645.35, Effect of Repeal, states:

The repeal of any law shall not affect any right accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the law repealed. Any civil suit, action, or proceeding pending to enforce any right under the authority of the law repealed shall and may be proceeded with and concluded under the laws in existence when the suit, action, or proceeding was instituted, notwithstanding the repeal of such laws; or the same may be proceeded with and concluded under the provisions of the new law, if any, enacted.

Minnesota courts have held that, unless a statutory repeal contains language which explicitly bars section 645.35 from operating, then it automatically attaches to the operation of a statutory repeal.<sup>[24]</sup> In this case, the legislature simply stated an effective date for repeal of the statute. There is no additional language which would affect operation of section 645.35. Therefore, under the plain language of section 645.35, this “proceeding . . . shall . . . be proceeded with and concluded under the laws in existence when the . . . proceeding was instituted . . .” and all of sections 237.461 and 237.462 apply.

Minn. Stat. § 237.462 permits the Commission, after a proceeding under section 237.081, to assess monetary penalties for knowing and intentional violations of “sections 237.09, 237.121, and 237.16 and any rules adopted under those sections.” As stated in paragraph 6 of the Procedural History and Background, above, the ALJ has recommended that the Commission find that AT&T violated parts of sections 237.09, 237.121, 237.16 and Minn. R. parts 7812.2210, subs. 2, 3, 5 and 9; and 7810.0500, which were promulgated under the authority of section 237.16. Therefore, it is appropriate to assess penalties under section 237.462.

### **Analysis of Penalty Factors**

When assessing a penalty pursuant to section 237.462, the Commission must consider the following factors:

- (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, 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.

This section permits the Commission to assess a penalty of between \$100 and \$10,000 per day for each violation.

### **Willfulness or Intent**

As stated at Finding 6 of the Procedural Background and History, above, the Recommendation on Motion for Summary Disposition in this matter includes explicit findings on willfulness or intent.<sup>[25]</sup> AT&T Corp., a huge corporation which routinely does business across the United States and around the world, cannot be heard to say that it did not know – nor even inquire – about the requirement that it file with the State the off-tariff switched access service rate agreement it had with MCI. As a CLEC doing business in Minnesota, AT&T was obligated to file the agreement and presumed to know its obligations under the law. The best defense that AT&T was able to present in the face of its willful failure to live up to its legal obligations was the testimony of its lead negotiator that he “did not think” about whether such a step was necessary.<sup>[26]</sup> That is a wholly inadequate defense.<sup>[27]</sup>

Furthermore, the evidence showed that AT&T has a pattern of doing all it can to prevent agreements such as the Second Unfiled Agreement from becoming known. First, AT&T requires other companies with whom it negotiates to sign an agreement prohibiting them from even revealing that they are negotiating a possible switched access service charge contract.<sup>[28]</sup> Second, the switched access service agreement itself contains language maintaining the confidentiality of the agreement, even preventing filing with the state or federal government any of the substance of the agreement without notifying AT&T and including it in making further arrangements for protection of the agreement.<sup>[29]</sup>

Finally, AT&T has fought, and continues to fight, to protect the agreement based on a trade-secret designation.<sup>[30]</sup> It is clear from AT&T's behavior that it never intended any part of its agreement with MCI to be made available to the public. The choice not to file the agreement was no oversight or misunderstanding of the law. It was a deliberate attempt to hide its actions from competitors, consumers, and regulators.

### **Gravity, Including Harm to Competitors or Customers**

In choosing to hide the Second Unfiled Agreement, AT&T harmed competitors and customers. In addition, it undermined the integrity of the process established in statute and rule for making switched access rates fair and public, accessible to similarly-situated customers. As the Department's witness stated, "A regulatory agency cannot pursue compliance issues if there is no information that discloses a potential violation even exists."<sup>[31]</sup>

Similarly, by failing to file the Second Unfiled Agreement, AT&T deprived competitors of the opportunity to take advantage of similar rates, or even to challenge the exclusivity of AT&T's agreement with MCI:

[AT&T's] behavior reduced any opportunity for the market to react rationally. All that a competitor of AT&T may know is that it is having difficulty competing. There is inadequate information for competitors to figure out why this is occurring. In forming its secret agreement with MCI for the provision of access service at untariffed rates, AT&T knowingly erected a barrier to effective competition in the market for long distance services.<sup>[32]</sup>

This interference with competition ultimately hurts consumers. The combination of undermining the system established by the legislature and public policy as reflected in Department rules in Minnesota and the damage done to competition and consumers amounts to a grave violation deserving significant consequences to AT&T.

### **History of Past Violations**

The Department and Qwest have emphasized previous actions against AT&T Corp. by the Federal Communications Commission and the state of Iowa based on AT&T's IXC's pattern of refusing to pay CLECs for switched access services when AT&T believed that the CLECs' rates were unreasonably high. The Minnesota Commission addressed a similar situation with AT&T in the *PrairieWave* docket, and there was evidence of the same conduct by AT&T's IXC with respect to other CLECs in this docket.<sup>[33]</sup> On one hand, none of these is a result of a past failure to file a contract between AT&T's CLEC and MCI or any other IXC for off-tariff switched access rates.

On the other hand, and despite AT&T's arguments that AT&T's CLEC and AT&T's IXC are somehow different entities, neither of whose conduct should reflect on the other, the fact is that both the CLEC and the IXC are arms of AT&T Midwest Communications, Inc., which is in turn an affiliate of AT&T Corp. While the violations at issue in this docket are limited to the single agreement concerning charges for services offered by AT&T's CLEC, all of the actions in Minnesota were taken by AT&T Midwest Communications, Inc., and the Second Unfiled Agreement itself was signed by an officer of AT&T Corporation.

Thus, while this particular violation concerns only an obligation which AT&T's CLEC failed to fulfill, both AT&T's and AT&T Corp.'s history of misconduct are relevant here. The Second Unfiled Agreement was just another piece of the strategy puzzle whose overall picture was of a tenacious and persistent battle by AT&T Corp. to avoid paying tariffed switch access service rates to CLECs. This history should be considered in determining the penalties to be assessed.

### **Number of Violations**

In the June 26, 2006 Recommendation on Motion for Summary Disposition, the ALJ recommended that the Commission find violations of four different statutes and five different provisions contained within two rules. This would amount to nine separate violations on which a penalty could be based. Another way of calculating the number of violations is that each violation falls into one of two categories: a) failure to file a tariff; and b) discrimination in rate offerings. In the Qwest Unfiled Agreements docket, the Commission assessed penalties based on the number of unfiled agreements.<sup>[34]</sup> Similarly, in the settlement with the other CLECs in this docket, penalty amounts were based on the number of agreements each company had failed to file.<sup>[35]</sup> Therefore, it is appropriate to consider this one violation.

### **Economic Benefit Gained**

AT&T argues that its CLEC actually lost money under the terms of the second Unfiled Agreement, because that agreement required it to sell its services to MCI at below-tariffed rates.<sup>[36]</sup> The Department does not dispute that statement.<sup>[37]</sup> AT&T did not enter into the second Unfiled Agreement simply to offer MCI an economic windfall. AT&T benefited from the second Unfiled Agreement because it was one half of two reciprocal agreements, mirror images of one another. In the First Unfiled Agreement, AT&T, acting as the IXC to MCI's CLEC, reaped the benefit of the same discounted off-tariff switched access rates that MCI received from AT&T's CLEC in the Second Unfiled Agreement. AT&T's CLEC is not a separate corporation from AT&T's IXC. They are both part of AT&T Communications of the Midwest. And while AT&T may show a negative balance in its CLEC column, the balance was positive in its IXC column.<sup>[38]</sup> Only

by looking at the two Unfiled Agreements together is it possible to understand AT&T's reasons for agreeing to the Second Unfiled Agreement.

AT&T argued that its motivation for entering into the Second Unfiled Agreement was simply to settle disputes related to MCI's bankruptcy proceeding. These disputes were centered on switched access services agreements. These reciprocal agreements between AT&T Corp. and MCI had a history that existed before and after the bankruptcy and were distinct from the bankruptcy itself. The two companies had entered into many such agreements in Minnesota and around the country.<sup>[39]</sup> The evidence shows that AT&T realized a significant economic benefit by entering into the two reciprocal agreements with MCI.<sup>[40]</sup> Given this history, it is plain that AT&T's motives had little, if anything, to do with settling specifically in the context of the MCI's bankruptcy proceeding. AT&T was motivated by the economic benefits it reaped to enter into reciprocal agreements with MCI for switched access services at below-tariffed rates.

### **Corrective Action Taken or Planned**

On June 15, 2006, AT&T back-billed MCI for an adjustment representing the difference between AT&T's CLEC's current tariffed switched access rate and the contract rate in the Second Unfiled Agreement. AT&T took this step once MCI agreed in its settlement with the Department to stop charging AT&T untariffed rates. In other words, when MCI acceded to the Department's requirement that it charge AT&T the higher, tariffed rate, AT&T responded in kind to MCI. Interestingly, AT&T did not adjust the rate it was charging based on the ALJ's Recommendation for Summary Disposition in this proceeding, which was not issued until June 26, 2006. Instead, AT&T made its decision for understandable economic reasons. AT&T has continued to charge MCI its tariffed rates since June, 2006.<sup>[41]</sup> Once it was no longer getting a special deal from MCI, it stopped offering its special deal to MCI. Not only does this undermine the notion that AT&T's decision was actually "corrective action" in the sense that it shows an understanding of wrongdoing and a desire to correct that wrongdoing, it also strengthens the impression that AT&T's actions were driven solely by economic benefit all along.

AT&T continues to resist taking the significant corrective action of acknowledging that the second Unfiled Agreement should be filed. AT&T argues that, because it has essentially "undone" that agreement by back-billing MCI, it should be able to keep the agreement secret.<sup>[42]</sup> Nothing in the applicable statutes or rules states that a switched access tariff need only be filed for the period of time in which it is effective. Having ignored those statutes and rules during the time in which the agreement was in effect, AT&T should not now be able to continue to keep secret its tactics. Nothing in AT&T's behavior in this proceeding has been formulated to inspire confidence that AT&T understands that it did wrong and will endeavor to avoid doing wrong in the future, particularly when such wrong-doing would increase its profits.

## **Annual Revenue and Assets of the Company and Financial Ability to Pay the Penalty**

In 2006, AT&T, the parent company for AT&T Communications of the Midwest, reported over \$63 billion in annual revenues (up from \$43 billion in 2005) on assets of over \$270 billion (compared to \$145 billion in 2005). Net income was reported at \$7.356 billion (up from \$4.786 in 2005).<sup>[43]</sup> AT&T is financially robust and able to pay any penalty which the Commission may choose to impose.

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

Each side points to and away from other dockets in arguing that the penalties here should be large or small. AT&T points out that the other CLECs had relatively small penalties imposed upon them and argues that it should be treated similarly. The Department compares AT&T's behavior to Qwest's in P421/C-01-391, quoting the PUC's statement accompanying its June 18, 2002, Penalty Order, 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."<sup>[44]</sup>

AT&T submitted an extensive chart with its Post Hearing Brief in this matter, showing why it should not be compared to Qwest in its *Unfiled Agreements* docket.<sup>[45]</sup> Without attempting to make a qualitative comparison of AT&T and Qwest, it is clear that quantitatively AT&T's actions do not rise to the level that Qwest's did. There were twelve agreements at issue in the Qwest docket. There is only one agreement here. The total number of violation days in the Qwest docket was 5,722. In this docket, the total number of violation days is 552. In addition, the Qwest docket dealt with violations of federal as well as state laws. In the Qwest docket, the Commission assessed penalties of \$10,000 per day for the two unfiled agreements that had the greatest anti-competitive and discriminatory negative impact; and \$2,500 per day for the remaining 10 unfiled agreements, for a total of \$25.95 million in penalties. Penalties assessed against AT&T in this matter should not rise to the level of the penalties assessed against Qwest in its *Unfiled Agreements* docket.

The Department argues that AT&T is distinguishable from the other CLECs with which the Department settled in this docket. In their settlement with the Department, the CLECs who had not filed their off-tariff switched access service agreements agreed to pay \$400 per unfiled agreement for CLECs with under \$500,000 in Minnesota intrastate annual revenues or \$5,000 per unfiled agreement for CLECs with over \$500,000 in such revenues.<sup>[46]</sup> There are important differences between the settling CLECs and AT&T. The most significant difference is that AT&T was the driving force behind the other CLECs'

unfiled agreements. As discussed above, AT&T forced CLECs to negotiate below-tariffed switched access rates by withholding payments to the CLECs, then required them to sign pre-negotiation confidentiality agreements and included language in the switched access rates contracts which was generally understood to prohibit filing of those contracts. All of this greatly advantaged AT&T and disadvantaged the CLECs. AT&T's CLEC was not similarly disadvantaged because it worked in concert with AT&T's IXC, assuring AT&T's IXC reduced switched access rates from MCI.

In addition, the other CLECs were settling parties. While it is true that AT&T's CLEC had the right to litigate rather than settle this matter, it is also true that settlements generally include softened consequences for settling parties, since they are compromises. This is not a compromise. It is a penalty being assessed in the light of findings of violations of the law. Therefore, the Commission should assess the penalties according to the factors set forth in the applicable statute. It need not do so in the spirit of compromise.

### **Penalty Determination**

In reviewing all of the factors above, the Administrative Law Judge recommends that a penalty of \$1,000 per day be assessed against AT&T's CLEC for failing to file the Second Unfiled Agreement, for a total penalty of \$552,000. This is a significant penalty, reflecting especially the damage done to the integrity of the tariff system and the regulatory processes in place in Minnesota. It reflects the findings of willfulness as well as concerns that AT&T apparently fails to recognize the gravity of its actions as it attempts to continue to hide the terms of its unfiled agreements. Finally, this penalty recognizes, in a broader context, AT&T's actions and motives but does not penalize AT&T for unfiled agreements or other actions that are not properly before the ALJ at this time.

### **Trade Secret Issues**

### **Disputed Materials**

There are a number of documents and some testimony which are the subjects of trade secret disputes in this docket. The Department and Qwest argue in favor of making some or all of the disputed materials public. AT&T and MCI maintain that these materials should continue to be protected by their claimed trade secret designations. Specifically, the trade secret status of the following materials remains in dispute:

Hearing Exhibit 12: February, 2004 Settlement Agreement between MCI and AT&T Corp. filed with and approved by the United States

Bankruptcy Court for the Southern District of New York in Case No. 02-13533.

Hearing Exhibit 13: February, 2004 Switched Access Service Agreement between MCI and AT&T Corp., also known as the Second Unfiled Agreement.

Hearing Exhibits 16 through 26: Correspondence and e-mails among various AT&T and MCI personnel dating from March, 2002 through February, 2004

Portions of Nonpublic Trade Secret version of Hearing Transcript, volume 2, from November 15, 2006 hearing in this docket.

Portions of March 20, 2007 Brief of Department of Commerce in this docket.

Portions of March 20, 2007 Comments of Qwest Communications in this docket.

## **Second Unfiled Agreement**

The document at the center of this case is the Second Unfiled Agreement, which is also Hearing Exhibit 13. Up to this point, the ALJ has maintained the trade secret designation which AT&T and MCI have requested for that document. Given the other recommendations contained in this report, the ALJ now recommends that the Commission remove the trade secret designation from Exhibit 13 and make the Second Unfiled Agreement public, as it should have been all along. Specifically, it is most important that the rates contained in the February, 2004 Second Unfiled Agreement between AT&T and MCI be made public.

AT&T and MCI make a number of arguments in support of their position that the Second Unfiled Agreement should be protected with a trade secret designation. AT&T first maintains that the bankruptcy court in MCI's 2004 bankruptcy proceeding retains jurisdiction to determine whether the Second Unfiled Agreement may be made public because that agreement was a material term of the bankruptcy settlement agreement and was the subject of the confidentiality provision approved by the bankruptcy court.

Next, AT&T argues that requiring that the Second Unfiled Agreement be made public confuses the substantive ruling in this docket with the trade secret designation which is an entirely separate issue.

AT&T also claims that it should be permitted to keep the Second Unfiled Agreement secret because it has essentially revoked the agreement by back-billing MCI for the difference between AT&T's CLEC's tariffed switched access rates and the rates it received under the Second Unfiled Agreement; and because MCI has continued, since June, 2006, to pay AT&T's CLEC's tariffed rates.

Finally, AT&T asserts that, because the Second Unfiled Agreement is national in scope, and applies to both intrastate and interstate services, disclosure of the agreement in Minnesota will "destroy the bargained-for and Court-approved confidentiality of the Agreement outside of Minnesota."<sup>[47]</sup> AT&T's contentions are not convincing.

Handling of materials in the possession of the Department, Administrative Law Judge or Commission is governed by the Minnesota Government Data Practices Act which defines trade secrets as:

a formula, pattern, compilation, program, device, method, technique or process (1) that was supplied by the affected individual or organization, (2) that is the subject of efforts by the individual or organization *that are reasonable under the circumstances* to maintain its secrecy, and (3) that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.<sup>[48]</sup>

This definition is essentially the same as the definition in the Minnesota Uniform Trade Secrets Act, Minn. Stat. Chap. 325C. The definition of "trade secrets" puts into sharper focus the problem with AT&T's and MCI's arguments that the Second Unfiled Agreement is entitled to trade secret protection. As the Department and Qwest point out, and as the Administrative Law Judge has found in the Recommendation on Motion for Summary Judgment, Minnesota law requires that an off-tariff switched access service agreement be filed and that such an agreement be made available for review upon a person's request.<sup>[49]</sup> Given the strong statutory and rule language requiring filing of rates and public access to the filings, AT&T's and MCI's efforts to maintain the secrecy of the Second Unfiled Agreement are not "reasonable under the circumstances." Therefore, the Agreement cannot qualify for trade secret status under the language of the applicable statute.<sup>[50]</sup>

Nor should AT&T and MCI be permitted to hide behind the bankruptcy court in their efforts to keep the Second Unfiled Agreement secret. The bankruptcy court's connection to that agreement is marginal. There is no

evidence that the bankruptcy court ever saw the Second Unfiled Agreement or was made aware that the Agreement was (or even might be) required to be publicly filed. AT&T and MCI filed an agreement with the bankruptcy court (which is Hearing Exhibit 12 in this docket) but the agreement they filed is not the Second Unfiled Agreement. The agreement approved by the bankruptcy court makes reference to the "2004 Contracts: and defines them as "new 2-year bi-lateral switched access contracts" but does not contain the rates which MCI and AT&T will charge one another under those contracts, or much other information about them. Given this very slight connection between the bankruptcy court and the Second Unfiled Agreement, there is no reason to believe that the jurisdiction of the bankruptcy court prevents the Commission from ordering that the agreement must be filed publicly pursuant to state law.

The argument that the Department and Qwest have somehow mistakenly conflated the issues of liability for failure to file the Second Unfiled Agreement with the trade secret issue is incorrect. As discussed above, the filing requirement, along with the requirement that filed tariffs be available for inspection by the public, was part of the basis for finding that AT&T violated the law. Those same statutes and rules foreclose any reasonable argument AT&T might have that the Second Unfiled Agreement should be protected by the trade secret provisions. AT&T had no reasonable basis to believe that it should be exempt from the filing requirement. There are many reasons that vendors of services might want to keep their rates secret from the competition; or that purchasers of services might not want their competition to know the details of the good deals they are getting. Permitting telecommunications companies to decide when they want to keep rate information a secret would undermine the clear legislative policy, spelled out repeatedly in statute and rule, that open competition best serves the public interest.

AT&T's contention that it has, in essence, undone the Second Unfiled Agreement and therefore should be able to keep it protected is also unconvincing. AT&T's belated actions do not undo all of the harm that occurred from AT&T's failure to file the agreement in the first place. The Second Unfiled Agreement should have been filed at the time the parties entered into it. It was implemented and had an impact during the years in which it was effective. Other CLECs, IXC's and customers whose rates or service might have been affected by the Second Unfiled Agreement all have an interest in being able to learn the substance of the Agreement.<sup>[51]</sup> The playing field was not level for 552 days. It may be level now but all of the other players who were not able to compete equally during that time should be allowed to know why and to use that knowledge in any way they legitimately can to alleviate any injuries they might have suffered.

Finally, there can be little sympathy for MCI and AT&T's complaint that failure to grant trade secret protection to the Second Unfiled Agreement will "destroy the bargained-for and Court-approved confidentiality of the Agreement

outside of Minnesota.” This Agreement should never have been confidential. AT&T and MCI violated the law and they simply will have to deal with the consequences, wherever and however they are felt.<sup>[52]</sup>

### **Exhibits 12 and 16 through 26**

The Department and Qwest generally argue that Hearing Exhibits 12 and 16 through 26 should not be protected because they were part of an illegal scheme between AT&T and MCI, the requests for protection are overbroad, and AT&T and MCI have failed to make the justification for trade secret protection required under the statute.<sup>[53]</sup> While it is true that the failure to file the Second Unfiled Agreement violated state laws, the mere negotiation of the contract did not. Therefore, the argument of illegality, as it applies to documents other than the Second Unfiled Agreement itself, is not sufficient to deny trade secret protections to these documents. Much of the trade secret designation in these documents is overly broad. But second-guessing AT&T’s redactions of these documents is not a productive use of the Administrative Law Judge’s, or the Commission’s, time. As long as the Second Unfiled Agreement is made public, the public interest is served. Some of the details of the negotiations, such as traffic flow between the carriers, etc., are reflected in Exhibits 12 and 16-26, and are clearly trade secrets. Other details, such as negotiation strategy, may arguably be trade secrets. Parsing the redactions submitted by AT&T will not make available information which will clearly serve the public interest. Finally, AT&T was somewhat tardy in presenting its justifications for its trade secret claims, but it did spell them out in its January 2, 2007 motion papers. There has been ample opportunity for the two sides to exchange written arguments about the trade secret disputes.

In arguing that Exhibits 12 and 16 through 26 should not be protected, Qwest seems to be saying that that means that the non-public versions of those documents cannot be considered by the Administrative Law Judge or the Commission as this docket proceeds through the administrative hearing process. As AT&T points out, that is a misplaced concern. This is not an evidentiary ruling. The un-redacted versions of Exhibits 12 and 16 through 26 have already been received into evidence and considered by the Administrative Law Judge and will be available to the Commission for review in making the final decision in this matter. The appropriate decision-makers will be able to review all of the materials that are part of the record in this docket to evaluate the competing claims in deciding the issues before them.

AT&T submitted properly marked public and non-public versions of Exhibits 12 and 16 through 26 with its January 2, 2007 motion papers. Those exhibits should all become part of the records (public and non-public) in this docket and handled according to the Minnesota Government Data Practices Act and the Commission’s Revised Trade Secret Procedures and related rules.

## **Testimony from November 15, 2006 Hearing Transcript**

At several different times during the November 15, 2006 hearing in the penalty portion of this docket, witnesses testified to the specific rate which AT&T was charging MCI for switched access services under the Second Unfiled Agreement. That testimony was marked "Trade Secret" at the time and a nonpublic transcript was produced for the purpose of protecting that information. If trade secret protections are removed from the Second Unfiled Agreement, then the trade secret designation should also be removed from the testimony specifying switched access rates, as follows:

1. November 15, 2006 hearing transcript, nonpublic version, volume 2, page 40, lines 19 through 24.
2. November 15, 2006 hearing transcript, nonpublic version, volume 2, page 56, lines 12 through 16.
3. November 15, 2006 hearing transcript, nonpublic version, volume 2, page 75, line 24 through page 76, line 11.

## **Briefs and Comments Submitted by Department of Commerce and Qwest**

On March 23, 2007, after the Department and Qwest submitted their post-hearing briefs on March 20, 2007, AT&T submitted a motion requesting that certain portions of the Department's brief and Qwest's comments be designated as trade secrets. AT&T asserts that the Department and Qwest each make statements in their respective documents that summarize or quote a document which is protected by trade secret designations and that those statements should therefore also be protected.

The Department and Qwest each responded, opposing AT&T's motion and pointing out the specific places in the public hearing transcript where AT&T's witness testified to the specific substance of the statements which the Department and Qwest described in their respective post-hearing filings.<sup>[54]</sup> The Department and Qwest argue that AT&T cannot now protect information which is already part of the public hearing record.

The Department and Qwest are correct in stating that AT&T's witness testified at length on the public record about each of the statements to which AT&T is now objecting. AT&T did not object to the public status of the testimony at the time of the hearing, or even in its March 23 motion. AT&T has made no efforts to make protect these particular statements. Although some of the same information is also contained in some of the documents which have trade secret protections, that does not preclude the Department or Qwest from discussing those documents in summary fashion, especially here, where AT&T's own

witness has already done so in an open hearing. AT&T's motion to protect the statements in the Department's brief and Qwest's comments should be denied.

### **Recommendations for Further Action**

Finally, the ALJ recommends that the Commission consider commencing an investigation into the question whether AT&T procured the interstate connection fee (ISCF) through a fraud on the Commission. This is a serious charge and deserves serious consideration. As the evidence has unfolded in this docket, the following facts have come to light:

1. Following numerous unsuccessful attempts working with the Commission and the legislature to force CLECs to lower their local access exchange rates, AT&T requested and received a special "In-State Connection Fee (ISCF)" intended to help AT&T recoup some of its costs of paying the local access exchange rates. The Commission approved this fee, which is a charge of \$1.95 per month (\$23.40 per year) for each AT&T long-distance customer.<sup>[55]</sup>
2. At no time during the process of requesting and receiving approval for the ISCF did AT&T reveal that it had unfiled agreements with MCI and others permitting AT&T to pay less than the tariffed amount about which it complained, although the higher, tariffed amount was the basis for its request for permission to collect the ISCF.<sup>[56]</sup>
3. AT&T's failure to file its agreements with various CLECs prevented the Commission from considering all of the relevant facts as it decided whether to permit AT&T to impose the ISCF on consumers, harming both the integrity of the Commission process and the consumers who were forced to pay a fee imposed on them based on incomplete information.<sup>[57]</sup>

These facts cannot be part of the formal findings in this recommendation, because issues regarding AT&T's IXC's agreements with the other CLECs have been settled and are no longer part of this docket. Yet the possibility that AT&T's failure to provide the Commission with the information about the off-tariff switched access service rates it was paying might have resulted in the Commission approving a consumer fee it might not have approved otherwise is shocking. If this is what occurred, AT&T should face consequences for its actions beyond those addressed in this report.

S.M.M.

**Attachment A**

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 Action Against AT&T  
Regarding Negotiated Contracts for  
Switched Access Services

**RECOMMENDATION ON MOTION  
FOR SUMMARY DISPOSITION**

This matter came before Administrative Law Judge Steve M. Mihalchick on the Department of Commerce's motion for summary disposition. Oral argument on the motion was heard on May 24, 2006, and the record closed on that day.

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. Lesley Lehr, Gray Plant Mooty, 500 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402-3796, appeared on behalf of Verizon Business Services, formerly MCI Inc. Joan C. Peterson, Corporate Counsel, 200 South Fifth Street, Room 2200, Minneapolis, MN 55402, appeared on behalf of Qwest.

Based on the memoranda and file herein, and for the reasons set forth in the accompanying Memorandum,

**IT IS HEREBY RECOMMENDED THAT:**

2. The Department's Motion for Summary Disposition be GRANTED as to the following claims:

a. That AT&T knowingly and intentionally violated Minn. Stat. § 237.74 or a rule or order of the Commission adopted or issued under Minn. Stat. § 237.74, for which AT&T is subject to enforcement under Minn. Stat. § 237.74, subd. 11.

b. That AT&T violated Minn. Rules 7812.2210, subps. 2, 3, and 5, which require rates to be uniform and not unreasonably discriminatory, by offering, charging, and collecting for switched access services, rates that have not been tarified or otherwise approved by the Commission.

c. That AT&T has refused to provide a service to an IXC in accordance with AT&T's applicable tariffs, price lists, contracts, and

Commission rules and orders, in violation of Minn. Stat. § 237.121, subd. (a)4 and Minnesota Rule 7812.2210, subp. 9.

d. That AT&T violated Minnesota Rule 7810.0500, subp. 1, by failing to have its rates on file with the Commission in accordance with the rules governing the filing of tariffs as prescribed by the Commission;

e. That the rates and terms that AT&T provides to MCI under the Second Unfiled Agreement are unreasonably discriminatory under Minn. Stat. § 237.74, subd. 2.

f. That AT&T's rates, tolls, tariffs or price lists, charges, or schedules with respect to MCI are unreasonable and unjustly discriminatory; and the Commission may therefore require "termination of the discrimination," as authorized under Minn. Stat. § 237.74, subd. 4(e).

g. That AT&T violated Minn. Stat. § 237.07, subd. 1, by providing to MCI under the Second Unfiled Agreement specific rates, charges and other terms regarding AT&T's provision of intrastate switched access service, and by failing to file with the Department these specific rates, charges or terms offered by AT&T.

h. That AT&T engaged in discrimination by knowingly or willfully charging, demanding, collecting, and receiving the untariffed rates for intrastate switched access service under the terms of its unfiled Agreement with MCI, while offering, charging, demanding, collecting, or receiving tariffed rates for intrastate switched access service with regard to other IXCs under similar circumstances, in violation of Minn. Stat. § 237.09, subd. 1.

i. That AT&T engaged in discrimination by offering or providing to a customer intrastate switched access service on a separate, stand-alone basis, but not pursuant to tariff to all similarly situated persons in violation of Minn. Stat. § 237.09, subd. 2.

j. That AT&T knowingly and intentionally violated applicable provisions of Minn. Stat. Ch. 237, Commission orders, and rules of the Commission adopted under Minn. Stat. Ch. 237, and that AT&T is subject to enforcement as set forth in Minn. Stat. §§ 237.16, 237.461 and 237.462.

**IT IS HEREBY ORDERED THAT:**

3. The foregoing Recommendations that summary disposition be granted shall be incorporated into the ALJ's final Report.

4. This matter will proceed to hearing as scheduled on the issue of what remedial and enforcement action the Commission should take in response to AT&T's knowing and intentional violations of applicable provisions of Minn. Stat. Chap. 237, Commission orders, and rules of the Commission adopted under Minn. Stat. Ch. 237.

5. The Department shall prefile its direct testimony by July 28, 2006.

Dated: June 26, 2006

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

## MEMORANDUM

### Background

On June 16, 2004, the Department filed a Verified Complaint and Request for Commission action in this docket. In the Verified Complaint, the Department alleged that AT&T and other carriers were engaging in illegal price discrimination and concealing the illegal practices from regulators by using unfiled pricing agreements. On July 7, 2005, the Commission approved a settlement with all the parties except AT&T. Thereafter, in October 2005, the Department filed an Amended Verified Complaint against AT&T in which the Department alleged that AT&T violated Minnesota statutes and rules in its provision of intrastate switched access services to MCI subsidiaries, including MCI Network Services. On November 16, 2005, AT&T filed its Answer denying that it had violated any statutes or rules in its provision of intrastate switched access services to MCI Network Services or its subsidiaries.

By order dated January 24, 2006, the Commission reviewed the Department's Amended Verified Complaint and AT&T's Answer and determined that it had jurisdiction over AT&T's provision of intrastate telecommunications services under the Minnesota Telecommunications Act, Minnesota Statutes Chapter 237. In the January 24th Order, the Commission referred the matter to OAH for a contested case proceeding on the following issues:

The issues in this case are whether AT&T has violated Minnesota statutes and rules in its provision of intrastate switched access services to MCI subsidiaries and, if it has, what remedial action the Commission should take.

The parties shall address the above issues in the course of contested case proceedings. They may also raise and address other issues relevant to the Complaint.<sup>[58]</sup>

On February 27, 2006, Qwest Corporation filed a Petition to Intervene in this matter, and by Order dated March 16, 2006, the Administrative Law Judge admitted Qwest as a party. On March 20, 2006, Verizon (formerly MCI Inc.) was added as a non-party participant.

On March 31, 2006, the Department filed a Motion for Summary Disposition alleging that the undisputed facts demonstrate that AT&T violated numerous Minnesota statutes and rules in its provision of intrastate switched access services to MCI subsidiaries and did so knowingly and intentionally. On April 17, 2006, Qwest and MCI each filed replies to the Department's Motion. On May 12, 2006, AT&T filed its Response to the Department's Motion and to Qwest's Reply.

### **Standard for Summary Disposition**

Summary disposition is the administrative law equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.<sup>[59]</sup> The Office of Administrative Hearings has generally followed the summary judgment standards developed in the courts in considering motions for summary disposition of contested case matters.<sup>[60]</sup>

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. A genuine issue is one that is not sham or frivolous. To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.<sup>[61]</sup> If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.<sup>[62]</sup>

### **Undisputed Facts**

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 initiated an investigation in this matter to determine whether AT&T has engaged in a practice of entering into unfiled agreements that violated Minnesota law and Commission rules and orders. On June 16, 2004, the Department filed a Complaint and Request for Commission Action regarding several unfiled agreements, pursuant to which several CLECs agreed to provide AT&T with switched access services at rates that were different from the CLECs' tariffed rates.

In response to Department Information Requests (IRs), MCI Network Services disclosed two agreements it had with AT&T that AT&T had never filed or disclosed to the Department. Under the terms of the first unfiled agreement, AT&T agreed to purchase from MCI WorldCom Communications intrastate switched access services for its IXC operations at unique prices that were different from the tariffed rates of MCI WorldCom Communications. Under the terms of the second unfiled agreement, AT&T, in its CLEC capacity, agreed to sell intrastate switched access service at a unique price, other than AT&T's tariffed rate, to various MCI Interexchange carrier subsidiaries operating in Minnesota. Neither of these agreements, nor the unique prices and terms offered in them, were filed with the Commission, Department, or with the Office of the Attorney General-Residential Utilities Division (OAG-RUD), or otherwise tariffed by AT&T.

### **Allegations and Argument**

In the instant complaint, the Department alleges that AT&T's second unfiled agreement with MCI violated Minnesota law and Commission rules because AT&T charged untariffed access rates to MCI. The Amended Verified Complaint alleges that, by doing this, AT&T knowingly and intentionally violated the following statutes and rules:

Minn. Stat. § 237.07;

Minn. Stat. § 237.09, subds. 1 and 2;

Minn. Stat. § 237.121(a)(4);

Minn. Stat. § 237.16;

Minn. Stat. § 237.461;

Minn. Stat. § 237.462;

Minn. Stat. § 237.74;

Minn. Rule 7812.2210, subps. 2, 3, 5, and 9;

Minn. Rule 7810.0500, subp. 1.

The Department seeks monetary penalties under Minn. Stat. §§ 237.461, 237.462, and 237.74.

The main issue in this case is whether AT&T violated Minnesota laws and Commission rules by not filing its Agreement with MCI. AT&T argues that switched access service is not a local service, and it maintains that while it does have to file tariffs, it does not have to file contracts or agreements such as the one it had with MCI.

Minnesota Statutes Chapter 237 establishes standards for local service. The extent to which telecommunications carriers are subject to the provisions of Chapter 237 is set forth in Minn. Stat. § 237.035. Minn. Stat. § 237.035 provides as follows:

(a) Telecommunications carriers are subject to regulation under this chapter only to the extent required under paragraphs (b) to (e).

(b) Telecommunications carriers shall comply with sections 237.121 and 237.74.

(c) Telecommunications carriers shall comply with section 237.16, subdivisions 8 and 9.

(d) To the extent a telecommunications carrier offers local service, it shall obtain a certificate under section 237.16 for that local service.

(e) In addition, a telecommunications carrier's local service is subject to this chapter except that:

(1) a telecommunications carrier is not subject to rate-of-return or earnings investigations under section 237.075 or 237.081; and

(2) a telecommunications carrier is not subject to section 237.22.

The Department maintains that it and the Commission have always understood Minn. Stat. § 237.035(e) to mean that the telecommunications carriers' local service should be regulated under 237 in the same manner as telephone companies' local service is regulated under Chapter 237. According to the Department, AT&T, as a telecommunications carrier, is subject to all of the provisions of Chapter 237 that govern local service. The Department points out that the Commission's January 24th Notice and Order for Hearing stated that AT&T's local service is subject to Chapter 237 by virtue of 237.035(e).<sup>[63]</sup> Likewise, the Department maintains that the Commission has repeatedly held that the provisions of Chapter 237 that set the standards for local service of "telephone companies" also apply to telecommunications carriers' local services.<sup>[64]</sup> Finally, the Department asserts that the Commission recently unequivocally stated that Minn. Stat. §§ 237.07 and 237.09 apply to the local service of telecommunications carriers under terms of Minn. Stat. § 237.035(e).<sup>[65]</sup>

AT&T, on the other hand, argues that CLECs are not broadly subject to all of the provisions of Chapter 237. AT&T points out that in 1995, the Legislature adopted new legislation designed to permit competition in the local services market by new local services providers or competitive local exchange providers (CLECs). The Legislature incorporated these new local services providers or CLECs into the definition of "telecommunications carriers" in Section 237.01,

subdivision 6. The Legislature also adopted new provisions related to the local services market through the enactment of Minn. Stat. §§ 237.035, 237.26, and 237.74. According to AT&T, these three sections address the scope of regulation for “telecommunications carriers.” In addition, AT&T contends that Minn. Stat. § 237.035 provides that telecommunications carriers are subject only to the provisions Sections 237.121, 237.74, and 237.16, subd. 8 and 9. Thus, AT&T argues that it is not subject to Minn. Stat. §§ 237.07 and 237.09, provisions that govern “telephone companies” as opposed to “telecommunications carriers.”

Based upon this history, AT&T also maintains that CLEC operations are subject to the regulatory scheme set forth in the CLEC rules (7811 and 7812) but not the litany of “telephone utility” statutes that traditionally apply to LECs that the Department suggests should apply. In addition, AT&T points out that its CLEC certification order was issued prior to the Commission’s adoption of the CLEC Rules. In its certification order, the Commission stated specifically that AT&T’s authority, service offerings and terms and conditions of service will be subject to the Commission’s local competition rules that were under development. For all of these reasons, AT&T disputes the Department’s claim that the traditional “LEC” regulatory statutes apply to CLECs.

Finally, AT&T argues that to the extent that Minn. Stat. § 237.35(e) applies, it is limited to CLEC’s local service and does not apply to access service. AT&T contends that access service does not fall within the definition of local service. Access service is a service provided to interexchange carriers (IXCs) that permit IXCs to originate and terminate long distance services to their customers. It is not a service offered by CLECs to their retail customers and, AT&T asserts, it has no relationship to the local exchange services CLECs provide to their customers.

## **Analysis**

The Administrative Law Judge concludes that, pursuant to Minn. Stat. § 237.035(e), AT&T and its activity at issue in this docket are subject to the provisions of Chapter 237. Section 237.035(e) provides that “a telecommunications carrier’s local service is subject to this chapter ...” and that “telecommunications carriers shall comply with section 237.16, subdivisions 8 and 9.” In addition, Minn. Stat. § 237.16, subd. 13, makes it clear that local service providers are subject to all of the provisions of Chapter 237 until the Commission completes the process of establishing local service rules.<sup>[66]</sup> Moreover, the Commission directly addressed this issue in AT&T’s Certificate of Authority application to provide local service, when it stated “Minn. Stat. § 237.035(e) provides that a telecommunications carrier’s local service will be subject to Minn. Stat. Ch. 237, with the exception of rate of return investigations and depreciation requirements.”<sup>[67]</sup>

The Administrative Law Judge is also not persuaded by AT&T’s argument that switched access is not a local service within the meaning of Minn. Rule

7812.2210 or Minn. Stat. § 237.035(e). Minnesota Rule 7812.0100, subp. 33, defines “local service” to mean “dial tone, access to the public switched network, and any related services provided in conjunction with dial tone and access, including services that may be required under part 7812.0600.”<sup>[68]</sup> Minn. Stat. §§ 237.761 and 237.773, and Minn. Rule 7810.0100, subp. 23, expressly provide that local exchange services include local switched access services. Minn. Stat. § 237.761, subds. 2(1) and 3(3), for example, enumerates rates that are regulated by the Commission and it states that “price-regulated services” include services that are: “essential for providing local telephone service and access to the local telephone network” including, specifically “switched network access service.”

In addition, Minn. Rule 7810.0100, subp. 23, which applies to all carriers in Minnesota, defines “local exchange service” to mean “telecommunication service provided within local exchange service areas in accordance with the tariffs. It includes the use of exchange facilities required to establish connections between stations within the exchange and between stations and the toll facilities serving the exchange.” The Administrative Law Judge concludes that switched access services are local services within the meaning of Minnesota Rule 7812.2210 and Minn. Stat. § 237.035(e)

Based on these conclusions, each specific allegation contained in the Amended Complaint will be addressed below.

### **1. Whether AT&T Violated the Filing Requirements of Minn. Stat. § 237.74, subd. 1**

Under Minn. Stat. § 237.74, subd. 1, AT&T is required to file with the Department its tariff or price list for each service on or before the effective date of the tariff or price list, containing the rules, rates, and classifications used by it in its telephone business. It is undisputed that AT&T entered into two unfiled Agreements with MCI but did not file the terms with the Department as a unique price list or tariff term. Instead, AT&T filed and maintained a separate tariff under which AT&T provided less favorable terms to other carriers that did not reach a unique agreement with AT&T.

AT&T argues that Minn. Stat. § 237.74, subds. 2 and 3, permits telecommunications carriers to enter into contracts and the contracts may contain volume discounts and other customer-specific pricing. AT&T argues that nothing in Minn. Stat. § 237.74, subd. 1, requires that such contracts for special customer-specific pricing be filed with the Commission or in any way incorporated into a company’s tariff.

Minn. Stat. § 237.74, subd. 1, requires AT&T to file either a tariff or a price list for each service it provides. To read into this provision, as AT&T argues, an exception for stand-alone contracts would allow carriers to circumvent the rate filing requirement by entering into unfiled agreements and would render the

tariffing obligations meaningless. Moreover, Minn. Rule 7812.2210, subp. 5, specifically requires a tariff filing for unique pricing. The Administrative Law Judge concludes that by not filing its unique MCI rates, AT&T violated Minn. Stat. § 237.74, subd. 1. The facts are not in dispute and the Administrative Law Judge recommends that the Department's motion for summary disposition with respect to this allegation be GRANTED.

## **2. Whether AT&T Violated the Filing Requirements of Minnesota Rule 7812.2210, subps. 2 and 3**

Under Minnesota Rule 7812.2210, subps. 2 and 3, AT&T is required to file with the Commission six copies of a comprehensive tariff that contains all the rules, rates, and classifications, including all amendments thereto, and also file one copy with the Department and one copy with the Office of the Attorney General-Residential Utilities Division (OAG-RUD). It is undisputed that AT&T entered into an unfiled Agreement with MCI but did not file the terms with the Department, OAG-RUD, or Commission as a unique price list or tariff term. Instead, AT&T filed and maintained a separate tariff under which AT&T provided less favorable terms to other carriers that did not reach a unique agreement with AT&T

As discussed above, AT&T argues that wholesale switched access services are not "local services" and therefore its Agreement with MCI is not subject to the requirements of Minnesota Rule 7812.2210, subp. 2 and 3, which mandates filing requirements for each "local service offering."<sup>69</sup> Accordingly, AT&T contends that nothing in Rule 7812.2210 requires it to file its contracts for non-local services, such as the MCI access services Agreement at issue here.

The Administrative Law Judge has concluded that switched access services are local services, within the meaning of Minnesota Rule 7812.2210. Subparts 2 and 3 of that Rule require AT&T to file either a tariff or a price list for each service. By not filing its MCI rates, AT&T violated Minnesota Rule 7812.2210, subps. 2 and 3. The facts are not in dispute and the Administrative Law Judge recommends that the Department's motion for summary disposition with respect to these allegations be GRANTED.

## **3. Whether AT&T violated Minnesota Rule 7812.2210, subp. 9, and Minn. Stat. § 237.121 (a)(4)**

Pursuant to Minnesota Rule 7812.2210, subp. 9, and Minn. Stat. § 237.121(a)(4), AT&T may not refuse to provide a service, product, or facility to a telephone company or telecommunications carrier in accordance with its applicable tariffs, price lists, or contracts and with the Commission's rules and orders. The Department contends that AT&T has refused to provide switch access service to MCI and other telecommunications carriers in accordance with the Commission's rules and orders.

AT&T argues that Minn. Stat. § 237.121 clearly contemplates that a telecommunications carrier may provide service under a tariff or contract. AT&T maintains that it has provided MCI service in accordance with the terms of its Agreement, and it has provided service to other providers in accordance with its tariffs. Because it has provided service in accordance with its tariff and Agreements, AT&T maintains that the Department cannot establish that it violated Section 237.121 or Rule 7812.2210, subp. 9.

Again, the facts are not in dispute. AT&T failed to provide services in accordance with its applicable tariffs and with the Commission's rules and orders. The Administrative Law Judge recommends that the Department's motion for summary disposition with respect to these allegations be GRANTED.

#### **4. Whether AT&T violated Minnesota Rule 7810.0500, subp. 1**

Pursuant to Minnesota Rule 7810.0500, subp. 1, each telephone utility must have its tariff on file with the Commission in accordance with the rules governing the filing of tariffs as prescribed by the Commission. "Telephone utility" is defined to mean "any person, firm, partnership, cooperative organization, or corporation engaged in the furnishing of telecommunication service to the public under the jurisdiction of the commission."<sup>[70]</sup> The Department maintains that AT&T meets the broad definition of a "telephone utility." Because it did not have its comprehensive tariff or the terms of its Agreement with MCI on file with the Commission in accordance with the rules governing the filing of tariffs as prescribed by the Commission, the Department contends that AT&T has violated Minnesota Rule 7810.0500, subp. 1.

AT&T argues that Minnesota Rule 7810.0500 does not apply to it. According to AT&T, the Commission has been very clear that the rules governing CLECs are set forth in Minn. Rule 7812.2210. AT&T asserts that when the Commission adopted Minn. Rule 7812.2210, it stated in its Statement of Need and Reasonableness (SONAR) that the intent of this section was "to specify that the Commission would exercise its regulatory authority over CLECs only to the extent provided for in, or necessary to implement the requirements of, Chapter 7811 or 7812 as appropriate."<sup>[71]</sup> Accordingly, AT&T contends that there is no legal basis for the assertion that Minn. Rule 7810.0500 applies. Moreover, AT&T maintains that, like Minn. Stat. § 237.74, nothing in Minnesota Rule 7810.0500 requires it to file contracts such as the ones it had with MCI.

Minnesota Rules Chapter 7812 references the applicability of Minnesota Rules Chapter 7810 to CLECs. For example, Minn. Rule 7812.0700, subp. 1, states that "local services provided by a local service provider (LSP) must meet the standards in ... applicable commission orders and rules, including parts 7810.0100 to 7810.6100 or their successor parts." The Administrative Law Judge concludes that Minn. Rule 7810.0500 does apply to AT&T, and that AT&T violated subpart 1, by failing to have its tariff on file with the Commission. The

facts are not in dispute and the Administrative Law Judge recommends that the Department's motion for summary disposition on this allegation be GRANTED.

**5. Allegation that AT&T violated Minn. Stat. § 237.74, subd. 2, and Minn. Rule 7812.2210, subp. 5**

The Department also argues that by offering preferential rates to MCI that it did not file with the Department, OAG-RUD, or the Commission, AT&T violated Minn. Stat. § 237.74, subd. 2, and Minnesota Rule 7812.2210, subp. 5. Both Minn. Stat. § 237.74, subd. 2, and Minnesota Rule 7812.2210, subp. 5, prohibit telecommunications carriers from offering services upon terms or rates that are "unreasonably discriminatory." Although carriers are permitted to enter into volume discount contracts with customers and offer unique pricing terms under Minn. Stat. § 237.74, subds. 2 and 3, the Department argues that if the rates and terms are not filed as required under Minn. Stat. § 237.74, subd. 1, and Minnesota Rule 7812.2210, the rates and terms are unreasonably discriminatory. In other words, the Department maintains that in order for a carrier to reasonably discriminate, it must file its rates as required and meet the conditions set forth at Minnesota Rule 7812.2210, subp. 5, otherwise the rates and terms are per se unreasonably discriminatory.

AT&T argues that the Department has presented no evidence to establish that its Agreement with MCI is unreasonably discriminatory and that the price difference is not justified. According to AT&T, the Department has simply stated that there is a price difference between the rates AT&T charged MCI and the rates it filed, and therefore the rates in the Agreement are unreasonably discriminatory. AT&T points out that Minn. Stat. § 237.74, subds. 2 and 3, permit AT&T to enter into contracts and the contracts may contain volume discounts and other customer unique pricing terms. AT&T contends that the fact that it did not file its terms with MCI is not enough to establish that its price differences are not justified. Instead, AT&T argues that the Department must establish that other "similarly situated" IXC customers qualified for the unique pricing or special term and did not get it, or that the Agreement with MCI did not fall within the category of contracts permitted under Minnesota law.

The Administrative Law Judge is persuaded that by offering unique pricing to MCI that it did not file as a tariff, AT&T engaged in unreasonable discrimination in violation of Minn. Stat. § 237.74, subd. 2, and Minnesota Rule 7812.2210, subp. 5. Minnesota Rule 7812.2210, subp. 5, permits CLECs, like AT&T, to offer telecommunications service within the State only if the rates are uniform and the terms and rates are not "unreasonably discriminatory." Although the term "unreasonable discrimination" is not defined, the only exceptions permitted to the uniform rate requirement are listed at Minnesota Rule 7812.2210, subp. 5A. Thus, a CLEC's ability to reasonably discriminate with respect to its rates and terms is limited to these six specific exceptions; anything else, is unreasonable discrimination. Moreover, Subpart 5A provides that a CLEC may only qualify for

one of these exceptions if it first files its unique price offering with the Commission under Rule 7812.2210, subp. 2.<sup>[72]</sup>

Contrary to AT&T's argument, the Department does not have to present evidence to establish that the rate in its Agreement with MCI is unreasonable or unjustified. AT&T's Agreement with MCI does not meet the limited exceptions to the prohibition against discrimination allowed under subpart 5A. Because AT&T did not offer uniform rates and failed to file its unique price arrangement as a tariff, AT&T engaged in unreasonable discrimination in violation of Minn. Rule 7812.2210, subp. 5, and Minn. Stat. § 237.74, subd. 2, as a matter of law. There are no fact issues in dispute. The Administrative Law Judge recommends that the Department's motion for summary disposition on this allegation be GRANTED.

#### **6. Allegation that AT&T violated Minn. Stat. § 237.07, subd. 1**

Minn. Stat. § 237.07, subd. 1, requires every telephone company to file with the Department a specific rate, toll, or charge for every noncompetitive service, and a price list for every kind of service subject to emerging competition, used by it in the conduct of the telephone business, including switched access service. AT&T failed to file with the Department the unique rates that it used in its Agreements with MCI. As discussed above, AT&T argues that only specific provisions of Chapter 237 apply to it and that this provision is not one of them. The Administrative Law Judge, however, has concluded that CLECs are subject to all of the provisions of Chapter 237. Because the facts are not in dispute, the Administrative Law Judge further concludes that AT&T violated Minn. Stat. § 237.07, subd. 1, by failing to file its unique rates with the Department. The Administrative Law Judge recommends that the Department's motion for summary disposition with respect to this allegation be GRANTED.

#### **7. Allegation that AT&T violated Minn. Stat. §§ 237.09, 237.16, 237.461 and 237.462**

Minn. Stat. § 237.09, subd. 1, prohibits a carrier from knowingly and willfully demanding, collecting, or receiving from a carrier less compensation for intrastate switched access service than it does from any other carrier for local service under similar circumstances. Subdivision 2 prohibits companies from offering or providing intrastate switched access service to one carrier on a separate, stand-alone basis unless that service is offered pursuant to tariff to all similarly situated persons, including all telecommunications carriers and competitors.

The Department argues that AT&T's actions in entering into an agreement with MCI, and charging MCI less for intrastate switched access service than it charged other carriers constitutes a violation of Minn. Stat. § 237.09, subd. 1. In addition, the Department contends that by offering and providing intrastate switched access service to MCI on a unique separate basis, not pursuant to tariff

under which the rate was offered to all similarly situated carriers, AT&T violated Minn. Stat. § 237.09, subd. 2.

Finally, the Department argues that this illegal activity on the part of AT&T was knowing, intentional and willful within the meaning of Minn. Stat. §§ 237.74, 237.09, subd. 1, 237.16, 237.461, and 237.462. The Department asserts that AT&T purposefully filed a tariff regarding intrastate switched access service and purposefully executed a contract with MCI for the sale of intrastate switched access with terms that were different from the tariff. Such conduct amounts to AT&T knowingly and intentionally engaging in illegal activity.

AT&T contends that it did not engage in any intentional or knowing violations of Minnesota law and Commission rules. AT&T maintains that the Department has failed to show any active knowledge and intent on its part to do anything other than enter into an agreement to settle disputes that existed between it and MCI. According to AT&T, in order for a violation to be “knowing or intentional” the Department would have to show that AT&T knew the act it performed was wrongful.

The Administrative Law Judge concludes that the facts are not in dispute and that AT&T violated Minn. Stat. § 237.09 by purposefully entering into an agreement with MCI in which it charged MCI less for intrastate switched access service than it charged other carriers, and provided intrastate switched access service to MCI on a unique separate basis, not pursuant to tariff under which the rate was offered to all similarly situated carriers. The Administrative Law Judge also concludes that because AT&T purposefully engaged in this illegal conduct, its actions were knowing and intentional within the meaning of Minn. Stat. §§ 237.74, 237.09, subd. 1, 237.16, 237.461, and 237.462. Therefore, the Administrative Law Judge recommends that the Department’s motion for summary disposition with respect to these allegations be GRANTED.

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

S. M. M.



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June 1, 2007

Dr. Burl W. Haar, Executive Secretary  
Minnesota Public Utilities Commission  
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**Re: *In the Matter of the Complaint of the Department of Commerce  
Against AT&T Regarding Negotiated Contracts for Switched  
Access Services; OAH Docket No. 12-2500-17084-2  
MPUC No. P-442, 5798, 5340, 5826, 5025,  
5643, 443, 5323, 5668, 4661/C-04-235***

Dear Dr. Haar:

Enclosed herewith and served upon you by mail is the Administrative Law Judge's Recommendation on Motion for Summary Disposition, Findings of Fact, Conclusions of Law, and Recommendation in the above-entitled matter. Also enclosed is the official record along with the transcripts of the hearing. Our file in this matter is now being closed.

Sincerely,

/s/ Steve M. Mihalchick

STEVE M. MIHALCHICK  
Administrative Law Judge

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Encl.

cc: All Parties on ALJ's Service List as of January 23, 2007

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OAH Docket No. 12-2500-17084-2  
MPUC Docket No. P-442, 5798, 5340, 5826, 5025,  
5643, 443, 5323, 5668, 4661/C-04-235

In the Matter of the Complaint of the  
Department of Commerce Against AT&T  
Regarding Negotiated Contracts for  
Switched Access Services

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**JANUARY 23, 2007**

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**CERTIFICATE OF SERVICE**

<b>Case Title: <i>In the Matter of the Complaint of the Department of Commerce Against AT&amp;T Regarding Negotiated Contracts for Switched Access Services</i></b>	<b>OAH Docket No. 12-2500-17084-2 MPUC Docket No. P-442, 5798, 5340, 5826, 5025, 5643, 443, 5323, 5668, 4661/C-04-235</b>
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Mary Osborn certifies that on the 1st day of June, 2007, she served a true and correct copy of the **Recommendation on Motion for Summary Disposition, Findings of Fact, Conclusions of Law, and Recommendation;** by electronic mail (as indicated on the Service List) to the following individuals:

All Individuals on Official Service List	
	E-filing Confirmation No.

<sup>[1]</sup> References to AT&T are to AT&T Communications of the Midwest, which is an affiliate of AT&T Corp. (AT&T Corp.) AT&T's Competitive Local Exchange Carrier (CLEC) and AT&T's Interstate Exchange Carrier (IXC) are arms of AT&T.

<sup>[2]</sup> Docket 04-235, "Notice and Order for Hearing," January 24, 2006, at p. 2.

<sup>[3]</sup> For purposes of consistency and convenience, this Report will refer only to MCI, although it is understood that Verizon is the successor corporation.

<sup>[4]</sup> See June 26, 2006 Recommendation on Motion for Summary Disposition (June 2006 Recommendation).

<sup>[5]</sup> See February 20, 2007 Order on Motion by AT&T to Allow Additional Evidence and on Department's Challenge to AT&T's Trade Secret Designations of Certain Exhibits (Trade Secrets Order).

<sup>[6]</sup> June 2006 Recommendation, p. 5.

<sup>[7]</sup> Id.

<sup>[8]</sup> Id.

<sup>[9]</sup> Id.

<sup>[10]</sup> Hearing Exhibit 2, Direct Testimony of Gregory J. Doyle (Doyle Direct), pp. 7, 17; Hearing Exhibit 3, Rebuttal Testimony of Gregory J. Doyle (Doyle Rebuttal), pp. 2-3, 9, 10, 27, Exhibs. GJD-R-8, GJD-10 GJD-R GJD-R-4 and GJD-R-5. See *In the Matter of the Complaint of*

*PrairieWave Telecommunications, Inc. Against AT&T Communications of the Midwest, Inc.*, MPUC Docket No. P-442/C-05-1842 (“*PrairieWave*”).

<sup>[11]</sup> Doyle Direct, Ex. GJD-10; Doyle Rebuttal, p. 6.

<sup>[12]</sup> Doyle Direct, p. 10; Doyle Rebuttal, p. 20. See Reply Testimony of Natalie Baker (Baker Reply), p. 17.

<sup>[13]</sup> *PrairieWave*, MPUC Docket No. P-442/C-05-1842, Order Accepting Settlement Agreement, p. 2.

<sup>[14]</sup> *MGC Communications, Inc. v. AT&T Corp.*, FCC File. No. EAD-99-002 (July 16, 1999) (copy of decision at Doyle Direct, Ex. GJD-5).

<sup>[15]</sup> *AT&T Communications of the Midwest, Inc. v. Iowa Utilities Board*, 687 N.W.2d 554 (Ia. 2004) (copy of decision at Doyle Direct, Ex. GJD-6).

<sup>[16]</sup> Hearing Ex. 13.

<sup>[17]</sup> Doyle Direct, p. 3; March 20, 2007 Post-Hearing Brief of AT&T Regarding Penalties, p. 23.

<sup>[18]</sup> Testimony of G. Doyle (Doyle Test.), Tr. V.1, p. 50.

<sup>[19]</sup> Handal Test., Tr.v.2, pp.45-46, 56, 82-84, 104, 110.

<sup>[20]</sup> Hearing Exhibits 7A, 7B and 15. Exhibits 7B and 15 include information which is trade secret protected.

<sup>[21]</sup> Doyle Direct, pp. 14-15.

<sup>[22]</sup> 2006 AT&T Annual Report at

[http://www.att.com/Investor/ATT\\_Annual/downloads/ATT\\_2006\\_Annual\\_Report.pdf](http://www.att.com/Investor/ATT_Annual/downloads/ATT_2006_Annual_Report.pdf)

<sup>[23]</sup> See Laws 2005, 1<sup>st</sup> Sp, c.1, art.4, § 117.

<sup>[24]</sup> *State v. Chicago Great Western Railway Company*, 222 Minn. 504, 509, 25 N.W.2d 294, 297 (Minn. 1946).

<sup>[25]</sup> June 26, 2006, Recommendation on Motion for Summary Disposition, pp.1-2.

<sup>[26]</sup> Hearing Testimony of Robert Handal (Handal Test.), Tr. v.2, p.77; See Ex. 14, Reply Testimony of Robert Handal (Handal Reply), p. 2;

<sup>[27]</sup> Mr. Handal specifically stated that he was not “thinking about” whether AT&T’s lead counsel in the negotiations would know about state law requirements regarding intrastate tariffs, which were the main subject of the negotiations. *Id.*, p.77. This was despite Mr. Handal’s testimony that he was aware that intrastate tariffs are “a creature of the states.” Tr., v.2, p. 79.

<sup>[28]</sup> Handal Test., v.2, p. 96. See Ex. 2, Doyle Direct, GJD-10, Ex. 3, Doyle Rebut, GJD-R-1.

<sup>[29]</sup> Ex. 13, para. 11; Ex. 3, Doyle Rebut., pp. 6,11, GJD-R-2.

<sup>[30]</sup> February 20, 2007 Order on Motion by AT&T to Allow Additional Evidence and on Department’s Challenge to AT&T’s Trade Secret Designations of Certain Exhibits; and March 23, 2007 Motion by AT&T to Make Non-Public Certain References to Trade Secret Documents in Qwest’s Comments and the Department’s Brief.

<sup>[31]</sup> Ex. 3, Doyle Rebut, p. 3.

<sup>[32]</sup> Ex. 2, Doyle Direct, p. 10.

<sup>[33]</sup> Ex. 2, Doyle Direct, GJD-10, Ex. 3; Doyle Rebut, pp. 4-5, GJD-R-4, p. 3, GJD-R-5, p. 3.

<sup>[34]</sup> *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, Docket No. P-421/C-02-197.

<sup>[35]</sup> *In the Matter of Negotiated Contracts for Switched Access Services*, 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 (July 7, 2005).

<sup>[36]</sup> Hearing Ex. 9, Reply Testimony of Natalie Baker (Baker Reply), p. 14.

<sup>[37]</sup> Doyle Rebuttal, p. 7.

<sup>[38]</sup> Hearing Exhibits 7A, 7B and 15. Exhibits 7B and 15 include information which is trade secret protected.

<sup>[39]</sup> Handal Test., Tr.v.2, pp.56, 82-84.

<sup>[40]</sup> Hearing Exhibits 7A, 7B and 15. Exhibits 7B and 15 include information which is trade secret protected.

<sup>[41]</sup> Doyle Direct, p. 14, GJD-8 and GJD-9.

<sup>[42]</sup> March 30, 2007 Reply Brief of AT&T Communications of the Midwest Concerning Penalties, p. 45.

[43] 2006 AT&T Annual Report at

[http://www.att.com/Investor/ATT\\_Annual/downloads/ATT\\_2006\\_Annual\\_Report.pdf](http://www.att.com/Investor/ATT_Annual/downloads/ATT_2006_Annual_Report.pdf)

[44] *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, Docket No. P-421/C-02-197, p.12.

[45] March 20, 2007 Post Hearing Brief of AT&T Communications of the Midwest, Inc., Ex. 2.

[46] *In the Matter of Negotiated Contracts for Switched Access Services*, 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, p. 15 (July 7, 2005).

[47] AT&T's Motion and Brief in Support of Its December 13<sup>th</sup> Arguments and Claims of Trade Secret with Respect to Certain Documents, p.21 (January 2, 2007).

[48] Minn. Stat. § 13.37, subd. 1 (b) (2006) (emphasis added).

[49] Minn. Stat. §§ 237.121, subd. (a)(4), 237.07, subd.1, Minn. R. 7812.2210, subps. 2, 5, 9 and Minn. R. 7810.0500.

[50] Minn. Stat. §13.37, subd. 1(b).

[51] In addition, as the Department points out in its Post-Hearing Reply Brief, AT&T explicitly supported disclosure of other CLEC's switched access service agreements in the 05-1282 docket. AT&T fails to explain why it is fine for other switched access service agreements to be public but why its must be protected. See Department's Post-Hearing Reply Brief, pp.12-14 (March 30, 2007).

[52] MCI also complains that it is not fair to MCI, which settled its piece of this docket, to have to now suffer the consequences of the Second Unfiled Agreement becoming public. While MCI may be a bystander in this docket, it is hardly an innocent bystander. It agreed to secrecy, benefited from secrecy and continues to argue for secrecy in the face of a battery of laws prohibiting the secrecy it seeks. If MCI suffers collateral damage from the release of the Second Unfiled Agreement, it is only because it put itself in a position to be hurt.

[53] Hearing Exhibit 12 is the agreement filed by MCI and AT&T in the course of MCI's bankruptcy proceeding. This exhibit, which does contain confidentiality provisions, was approved by the bankruptcy court. Handal Test.,RPH-1.

[54] Department's Reply Brief, pp.15-20 (March 30, 2007); Qwest's Response to AT&T's Post-Hearing Brief, Comments Concerning Post-Hearing Brief of Department, and Response to AT&T's Motion to Make Certain References Non-Public, pp.27-29 (March 30, 2007).

[55] Doyle Direct, p.9, Ex. GJD-4.

[56] Doyle Direct, p. 9; Doyle Rebut, p. 13.

[57] Id.

[58] Docket 04-235, "Notice and Order for Hearing," January 24, 2006, at p. 2.

[59] *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwgie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. 1400.5500 K; Minn.R.Civ.P. 56.03.

[60] See Minn. R. 1400.6600.

[61] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).

[62] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986).

[63] *ITMO of the Application of AT&T Communications of the Midwest, Inc. for a Certificate of Authority to Provide Local Services*, Docket No. 96-211, Order Granting Certificate of Authority With Conditions, July 15, 1996, p. 7. (The Commission rejected AT&T's argument that that approval of its tariffs is not necessary, since AT&T is regulated as a telecommunications carrier under Minnesota statute. The Commission stated that "Minn. Stat. § 237.035(e) provides that a telecommunications carrier's local service will be subject to Minn. Stat. Ch. 237, with the exception of rate of return investigations and depreciation requirements.")

[64] *ITMO of the Application of AT&T Communications of the Midwest, Inc. for a Certificate of Authority to Provide Local Services*, Docket No. 96-211, Order Granting Certificate of Authority With Conditions, July 15, 1996, p. 7. (The Commission rejected AT&T's argument that that approval of its tariffs is not necessary, since AT&T is regulated as a telecommunications carrier under Minnesota statute. The Commission stated that "Minn. Stat. § 237.035(e) provides that a telecommunications carrier's local service will be subject to Minn. Stat. Ch. 237, with the exception of rate of return investigations and depreciation requirements.")

<sup>[65]</sup> *In re the Complaint of PrairieWave Telecommunications, Inc. Against AT&T Communications of the Midwest*, MPUC Docket No. P-442/C-05-1842, "Order Finding Failure to Pay Tariffed Rate, Requiring Filing, and Notice and Order for Hearing," Issued February 8, 2006, nn. 2, 3, 4.

<sup>[66]</sup> The section states: "Notwithstanding any provisions of section 237.035 and 237.74 to the contrary, before adopting the rules under subdivision 8, the local services provided by a telecommunications carrier are subject to this chapter in the same manner as those local services of a telephone company regulated under this chapter ..."

<sup>[67]</sup> *ITMO of the Application of AT&T Communications of the Midwest, Inc. for a Certificate of Authority to Provide Local Services*, Docket No. 96-211, Order Granting Certificate of Authority With Conditions, July 15, 1996, p. 7.

<sup>[68]</sup> Minn. Rule 7812.0600 lists the basic services that local service providers are required to provide to all customers in its service area such as touch tone capability, 911, access to directory assistance, etc.

<sup>[69]</sup> Minn. Rule 7812.2210, subp. 2 and 3, require a telecommunications carrier to maintain a comprehensive tariff and to file copies of its tariff with the Commission, the Department, and the OAG-RUD.

<sup>[70]</sup> Minn. Rule 7810.0100, subp. 37.

<sup>[71]</sup> SONAR at p. 9.

<sup>[72]</sup> Minn. Rule 7812.2210, subp. 5A.