

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 TCG Minnesota, Inc. Regarding Negotiated Contracts for Switched Access Services

RECOMMENDATION ON MOTION FOR SUMMARY DISPOSITION AND FOR DETERMINATION OF STATUS OF DATA

This matter came before Administrative Law Judge Steve M. Mihalchick on the Department of Commerce's (Department) Motions for Summary Disposition and for Data to be Determined Public Data. TCG Minnesota, Inc. (TCG) responded to the Department's motion and both Qwest Corporation (Qwest) and the Department replied. The record closed on August 24, 2007 when the Department filed a response to TCG's Supplement to Response to Motion for Summary Disposition. No oral argument was heard.

Linda S. Jensen, Assistant Attorney General, 445 Minnesota Street, Suite 1400, Saint Paul, MN 55101, appeared on behalf of the Department. Letty S.D. Friesen, AT&T Law Department, Room B1223, 2535 E. 40th Ave, Denver, CO 80205 and Rebecca B. DeCook, Moye White LLP, 1400 16th Street, 6th Floor, Denver, CO 80202-1473, appeared on behalf of TCG. 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.

Based on the memoranda and files herein, the Administrative Law Judge makes the following:

ORDER

IT IS ORDERED THAT:

1. The Department's request that all of the exhibits and testimony that are part of the official record in *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*, MPUC Dkt. No. P-442, 5798, 5340, 5826, 5025, 5643, 443, 5323, 5668, 4661/C-04-235 (the 04-235 docket or 04-235), be incorporated into the record in this docket is **GRANTED**.
2. The Department's request that the Affidavit of Gregory J. Doyle dated June 29, 2007, and its attached Exhibit GJD-1, be incorporated into the record in this docket is **DENIED**.

3. The Verified Complaint in this docket, including its exhibits, is part of the record in this docket.

Further, based on the memoranda and files herein, 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. The Department's Motion for Summary Disposition be **GRANTED** as to all of TCG's alleged violations, namely:

2. That TCG 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 TCG is subject to enforcement under Minn. Stat. § 237.74, subd. 11.

3. That TCG violated Minn. R. 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 tariffed or otherwise approved by the Commission.

4. That TCG has refused to provide a service to an IXC in accordance with its applicable tariffs, price lists, contracts, and Commission rules and orders, in violation of Minn. Stat. § 237.121, subd. (a)4, and Minn. R. 7812.2210, subp. 9.

5. That TCG violated Minn. R. 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;

6. That the rates and terms that TCG provided to Verizon under the Second Unfiled Agreement were unreasonably discriminatory under Minn. Stat. § 237.74, subd. 2.

7. That TCG's rates, tolls, tariffs or price lists, charges, or schedules with respect to Verizon 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).

8. That TCG violated Minn. Stat. § 237.07, subd. 1, by providing to Verizon under the Second Unfiled Agreement specific rates, charges and other terms regarding TCG's provision of intrastate switched access service, and by failing to file with the Department these specific rates, charges or terms offered by TCG.

9. That TCG 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 Verizon, 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.

10. That TCG 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.

11. That TCG 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 TCG is subject to enforcement as set forth in Minn. Stat. §§ 237.16, 237.461 and 237.462.

12. TCG 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 tariffs as required by Minn. Stat. §§ 237.121, subd. (a)(4), 237.07, subd. 1, and Minn. R. 7812.2210, subp. 9, and 7810.0500, subp. 1; and for discriminating in its provision of intrastate services in violations of Minn. Stat. §§ 237.74, subd. 2 and 237.09, subds. 1 and 2; and Minn. R. 7812.2210, subps. 2, 3, and 5.

13. The Department's motion for the Second Unfiled Agreement (attached as Exhibit I to the Verified Complaint in this docket) to be determined to be public data be **GRANTED**.

14. The Department's motion for the First Unfiled Agreement (attached as Exhibit VI to the Verified Complaint in this docket) to be determined to be public data be **GRANTED**.

15. The Department's motion for paragraphs 33, 34 and 36 of the Verified Complaint in this docket to be determined to be public data be **GRANTED**.

16. The Department's motion for the 1998 Switched Access Services Agreement between MCI and AT&T (1998 SASA) (attached as Exhibit GJD-1 to Affidavit of Gregory Doyle in support of Department's Motion for Summary Disposition and For Data to be Determined Public Data in this docket) to be determined to be public data be **DENIED**.

Dated: September 18, 2007

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

MEMORANDUM

Background

All of the questions of liability and penalty in this docket are intertwined with the 04-235 docket, which involved the same parties and the same agreement at issue here. In the 04-235 docket, the Department filed a Verified Complaint and Request for Commission Action on June 16, 2004, alleging that numerous competitive local exchange carriers (CLECs) had provided switched access services to inter exchange carriers (IXCs) at non-tariffed rates. The Department resolved all of the claims in that docket, except its claims against AT&T Communications of the Midwest, Inc. (AT&T Midwest), which is a subsidiary of AT&T

Corporation (AT&T Corp.). In October, 2005, the Department filed an Amended Verified Complaint against AT&T Midwest alleging the same violations.

During the proceedings in the 04-235 docket, the Department became aware that TCG, a second subsidiary of AT&T Corp., was also selling switched access services to MCI subsidiaries, including MCI Network Services, under the same Second Unfiled Agreement as AT&T Midwest.¹ On June 6, 2006, the Department filed a Verified Complaint and Request for Commission action in this docket. In the Verified Complaint, the Department alleged that TCG violated Minnesota statutes and rules in its provision of intrastate switched access services. The allegations against TCG in this docket are identical to those brought against AT&T Midwest in the 04-235 docket.

On June 26, 2006, the Administrative Law Judge (ALJ) issued his Recommendation on Motion for Summary Disposition in the 04-235 docket, finding that AT&T Midwest had violated numerous statutes and rules by intentionally and willfully failing to file the Second Unfiled Agreement. The 04-235 docket then moved into a penalty phase, during which the parties presented pre-filed and live direct and rebuttal testimony and cross-examined witnesses.

Following the hearings in the penalty phase of the 04-235 docket, on June 1, 2007, the ALJ issued his Recommendation on Motion for Summary Disposition, Findings of Fact, Conclusions of Law and Recommendation (June 2007 Recommendations). In that report, the ALJ recommended that the Commission impose a penalty of \$1,000 per day for each of 552 days during which AT&T Midwest had operated under the Second Unfiled Agreement. In addition, the ALJ recommended that certain data which up until then had been protected as trade secret be made public based on the finding that that data should have been publicly filed in the first place. The Commission is currently scheduled to hear argument on that matter on September 18, 2007.

In this, the 06-498 docket, the Commission issued its Order Finding Jurisdiction, Grounds to Investigate and Requiring Answer on July 28, 2006. TCG filed its Answer on August 17, 2006 denying that it had violated any statutes or rules in its provision of switched access services to Verizon. On February 28, 2007, Qwest Corporation filed a Petition to Intervene in this matter, and by Order dated March 16, 2007, the Administrative Law Judge admitted Qwest as a party. On March 23, 2007, Verizon was added to the service list as a non-party participant.

The Department brought its Motions for Summary Disposition and for Data to be Determined Public Data on July 3, 2007. Qwest filed a statement in Support for and Joinder in the Department's motions on July 12, 2007. On July 23, 2007, TCG filed its Response to the Department's Motions. On August 6, 2007, the Department and Qwest each filed a Reply to TCG's Response to the Department's motions. TCG filed a Supplement to its July 23 Response on August 15, 2007; and on August 22, 2007, Qwest filed a Reply to TCG's Supplement. The record closed on August 22, 2007.

¹ Verizon now owns the MCI entities referred to in this docket, including MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services and MCI Communications Services, Inc. d/b/a Verizon Business Services. The entities formerly owned by MCI will hereinafter be referred to in this Recommendation as "Verizon."

TCG is a wholly owned subsidiary of AT&T Corporation, licensed and certified to operate as a telecommunications carrier in Minnesota.² Both TCG and AT&T were included, as subsidiaries of AT&T Corporation, under the terms of the Second Unfiled Agreement.

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

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.³ 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.⁴

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.⁵ If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.⁶

Collateral Estoppel

The Department and Qwest have both argued that TCG should be precluded from litigating the issues concerning liability and penalty because those issues were fully litigated in the 04-235 docket and collateral estoppel precludes TCG from re-litigating the issues here. Collateral estoppel, or issue preclusion, “precludes parties to an action from relitigating in subsequent actions issues that were determined in the prior action.”⁷ Collateral estoppel applies in administrative proceedings when the following five requirements are met:

- 1) the issue to be precluded must be identical to the issue raised in the prior agency adjudication;
- 2) the issue must have been necessary to the agency adjudication and properly before the agency;
- 3) the agency determination must be a final adjudication subject to judicial review;
- 4) the estopped party was a party or in privity with a party to the prior agency determination; and

² TCG’s Answer and Affirmative Defenses, paras. 3 and 4.

³ *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.

⁴ See Minn. R. 1400.6600.

⁵ *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).

⁶ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986).

⁷ *In re Village of Byron*, 255 N.W. 2d 226, 228 (Minn. 1977).

5) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.⁸

In order to determine whether collateral estoppel applies in this matter, each of the requirements above must be addressed.

Under collateral estoppel or “issue preclusion,” once an issue is determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.⁹

If collateral estoppel applies in this case, then the liability and penalty determinations included in the ALJ’s June 2007 Recommendations are conclusive in this docket against TCG and all of evidence considered in 04-235 is before the ALJ in this matter as well.

Whether the Issues Raised in the Two Dockets are Identical, Necessary to the Commission’s Adjudication and Properly Before the Commission

The first two requirements in the collateral estoppel analysis are whether the issues to be precluded are identical in the two proceedings; and whether the issues are necessary to the Commission’s adjudication and properly before the Commission.

The violations addressed in the June 2007 Recommendations are identical to those set forth in the verified complaint in this docket. As set forth in the June 2007 Recommendations, the following issues in the AT&T Midwest docket are captioned with the relevant counts of alleged violations in the TCG and AT&T Midwest dockets listed in brackets next to each caption:

1. Whether AT&T Violated the Filing Requirements of Minn. Stat. § 237.74, subd. 1. [Count 7 of TCG/AT&T Midwest Complaints]¹⁰
2. Whether AT&T Violated the Filing Requirements of Minnesota Rule 7812.2210, subps. 2 and 3. [Count 1 of TCG/AT&T Midwest Complaints]
3. Whether AT&T violated Minnesota Rule 7812.2210, subp. 9, and Minn. Stat. § 237.121 (a)(4). [Count 6 of TCG/AT&T Midwest Complaints]
4. Whether AT&T violated Minnesota Rule 7810.0500, subp. 1. [Count 2 of TCG/AT&T Midwest Complaints]
5. Allegation that AT&T violated Minn. Stat. § 237.74, subd. 2, and Minn. Rule 7812.2210, subp. 5. [Counts 4 and 7 of TCG/AT&T Midwest Complaints]
6. Allegation that AT&T violated Minn. Stat. § 237.07, subd. 1. [Count 3 of TCG/AT&T Midwest Complaints]

⁸ *Graham v. Special School District No. 1*, 472 N.W. 2d 114, 115-116 (Minn. 1991), citing *Ellis v. Minneapolis Comm’n. of Civil Rts.*, 319 N.W. 2d 702, 704 (Minn. 1982) and *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422, 86 S. Ct. 1545, 1560 (1966).

⁹ *Kaiser v. Northern States Power Co.*, 353 N.W. 2d 899, 902 (Minn. 1984)

¹⁰ The only count in the TCG and AT&T Midwest complaints not analyzed for liability purposes in the ALJ’s June 2007 Recommendations is Count 8 which simply cites the enforcement and investigation authority of the Commission.

7. Allegation that AT&T violated Minn. Stat. §§ 237.09, 237.16, 237.461 and 237.462. [Counts 5, 9, 10 and 11 of TCG/AT&T Midwest Complaints]

Both the Commission and TCG itself recognize that the issues involved in the two cases are identical. As identified by the Commission in its Notice and Order for Hearing in the 04-235 docket, the issues to be decided were “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 Commission’s issue statement in the Notice and Order for Hearing in the 06-498 docket is identical to the 04-235 docket, except that “AT&T” is replaced by “TCG.” In its Response to the Department’s Motion for Summary Disposition, TCG acknowledges that dockets 04-235 and 06-498 “involve the very same contract and are both premised on AT&T’s/TCG’s alleged failure to comply with a filing obligation.”¹¹

Because the issues to be precluded are identical and are the same issues identified by the Commission, which is the agency that has jurisdiction to decide these issues, the first two requirements for application of collateral estoppel are met.

Whether the Commission’s Determination Is a Final Determination Subject to Judicial Review

In order for collateral estoppel to apply, the agency’s decision must be a final determination subject to judicial review. While this recommendation by the ALJ is not subject to judicial review, the Commission’s decision in both of the dockets in question will be subject to judicial review pursuant to Minn. Stat. §§ 14.63 – 14.69. Regardless of whether the Commission agrees with the ALJ’s specific findings, conclusions and recommendations, the principles of collateral estoppel will apply to whatever decisions the Commission makes. Whatever the Commission’s ultimate decision on the issues in the 04-235 docket, principles of collateral estoppel will apply, resulting in the same decisions and conclusions in docket 06-498. All of the Commission’s final decisions in both dockets will then be subject to judicial review. Should the Commission disagree with this collateral estoppel analysis, it can return the case to the ALJ for further consideration.

Whether the Estopped Party Is a Party or in Privity with a Party

The fourth and fifth requirements of the collateral estoppel analysis – the privity requirement and the requirement that the estopped party must have had a full and fair opportunity to be heard in the previous action – are closely connected to one another.¹² While the exact relationship between AT&T Corp. and its subsidiaries is not clear enough to determine that TCG is a party in the 04-235 docket, the relationship is close enough to find that TCG is at least in privity with AT&T Midwest.

The estopped party “must have its interests sufficiently represented in the first action so that the use of collateral estoppel is not inequitable.”¹³ The question of equity is addressed by looking to see whether the estopped party’s interests “are sufficiently represented in an action

¹¹ TCG’s Memorandum in Response to Department’s Motion for Summary Disposition, p. 2.

¹² See *Crossman v. Lockwood*, 713 N.W.2d 58, 62 (Minn. App. 2006). *Miller v. Northwestern Nat’l. Ins. Co.*, 354 N.W. 2d 58, 61 (Minn. App. 1984).

¹³ *Miller v. Northwestern Nat’l. Ins. Co.*, 354 N.W. 2d 58, 61 (Minn. App. 1984).

‘where the record demonstrates controlling participation and active self-interest in the litigation.’¹⁴

As a subsidiary of AT&T Corp., TCG’s interests have been fully represented in the both the 04-235 and the 06-498 dockets. The same AT&T Corp. attorneys represent both AT&T Midwest and TCG in each of the cases.¹⁵ The witnesses in both cases are from AT&T Corp. rather than from one or another of the subsidiaries. When given the chance to offer new evidence in the summary judgment proceedings in 06-498, the only new evidence offered by TCG was offered through an affidavit signed by an employee of AT&T Corp. The Second Unfiled Agreement, which is the document at issue in both cases, was signed by officials of AT&T Corp. rather than by representatives of either or both of the subsidiaries. When discussions occurred during a hearing in the 06-498 docket concerning the possibility of combining these two dockets, the same attorneys who spoke for AT&T Corp. and AT&T Midwest also spoke on behalf of TCG. AT&T Corp. has controlled the litigation in both dockets. No statements have been made in either proceeding purporting to distinguish the interests of AT&T Corp. from either of the subsidiaries, or AT&T Midwest from TCG. All of their interests are apparently aligned if not one and the same – and all of their interests have been and are being actively represented. There is no reason to invest further time and resources so that AT&T Corp. can continue to make arguments which it has been given ample opportunity to present. AT&T Corp. and TCG have been given a full and fair opportunity to be heard.

Liability Determination

Because all of the requirements for application of collateral estoppel in an administrative proceeding are present, TCG is estopped from presenting further evidence or argument about its liability in this matter. The liability determination was made on a motion for summary disposition. Therefore, viewing all of the facts in the light most favorable to TCG, for all of the reasons that AT&T Midwest was found to be liable for offering services to Verizon pursuant to the Second Unfiled Agreement, TCG is similarly liable.

Penalty to be Imposed

Because of the application of collateral estoppel, all of the factual determinations made during the penalty phase of the 04-235 docket apply to this docket as well. The facts found by the ALJ after the hearing during the penalty phase of the 04-235 docket apply to this docket as well. The only question to be determined is whether there are any relevant issues raised in this docket which are different from the issues decided in the 04-235 docket.

The first potentially different issue is the applicability of the penalty statutes applied in the 04-235 docket. In that docket, AT&T challenged the applicability of Minn. Stat. §§ 237.461, subd. 3, and 237.462 because they were repealed effective August 1, 2006, through sunset provisions.¹⁶ While it is true that those provisions are no longer in effect, they were in effect on June 6, 2006, when the Department filed its Verified Complaint and Request for Commission

¹⁴ *Crossman*, 713 N.W. 2d at 62 citing *Brunson v. Seltz*, 414 N.W. 2d 547, 550 (Minn. App.1987) (citation omitted), *review denied* (Minn. Jan. 15, 1988).

¹⁵ The Supplement to TCG’s Response to Motion for Summary Disposition filed with the ALJ on August 15, 2007 from counsel for AT&T Corp. and TCG in the 06-498 docket included a cover letter from Janet Keller, whose title on the personalized AT&T letterhead identifies her as “External Affairs Manager” for AT&T.

¹⁶ See Laws 2005, 1st Sp, c.1, art.4, § 117.

action in this docket. Therefore, based on the same reasoning set forth in the ALJ's June 2007 Recommendations, all of the same penalty statutes applied in the 04-235 docket still apply in this docket.

The second question is whether AT&T Midwest and TCG are differently situated in any way that is relevant to the application of the criteria set forth in Minn. Stat. § 237.462. Those factors are:

- (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.

TCG argues that, because AT&T Midwest withdrew evidence concerning TCG from consideration during the penalty phase of the 04-235 docket, the ALJ cannot determine an appropriate penalty based on the factors listed above. TCG states that "at a minimum, information regarding the level of traffic and the dollar value of the differential between TCG's tariff rate and the MCI Agreement rate was not before the ALJ."¹⁷

The June 2007 Recommendations do not rely either on the level of traffic or on the dollar value of the differential between AT&T Midwest's tariff rate and the MCI Agreement rate. Therefore, a lack of evidence regarding these facts does not affect the application of collateral estoppel in this matter.

Furthermore, TCG asserts that, "in his penalty assessment against AT&T, the ALJ relied heavily . . . on AT&T's IXC conduct in sizing the amount of his penalty recommendation." TCG

¹⁷ TCG's Memorandum in Response to Department's Motion for Summary Disposition, p.21.

then argues that, if the ALJ relies on the same analysis in this docket, “would not only exacerbate the legal error, but would be an improper double counting.”¹⁸

Nothing TCG has argued or alleged goes to show that TCG’s relationship with AT&T Corp. and AT&T’s IXC is any different than AT&T Midwest’s relationship is with those entities. It is the interconnected nature of these corporate entities that makes it virtually impossible to separate the motives behind, or even an analysis of the gains derived, from the failure to file the Second Unfiled Agreement. TCG itself admits, through its witness affidavit in this docket, that “TCG . . . had no intent separate from that of AT&T Corp.” when it entered into the Second Unfiled Agreement.¹⁹ TCG, like AT&T Midwest and AT&T’s IXC, was simply a player in a larger corporate strategy.

Nor is re-application of the penalty analysis an “improper double counting.” TCG is, presumably, on some level, a separate entity from AT&T Corp. and could have chosen to file the Second Unfiled Agreement. Had it done so, this action would not have been brought against TCG and no penalties against TCG would be contemplated. But there is no fact issue about whether TCG filed the Second Unfiled Agreement – it did not. Therefore, the penalty analysis in the 04-235 docket applies here. The penalty of \$1,000 per day for 552 days is an appropriate penalty against TCG for all of the reasons set forth in the June 2007 Recommendations.

Trade Secret Documents

In its Motion for Summary Disposition and For Data to be Determined Public Data, the Department moved for elimination of Trade Secret protection from the following documents:

- 1) the Second Unfiled Agreement (attached as Exhibit I to the Verified Complaint in this docket);
- 2) the First Unfiled Agreement (attached as Exhibit VI to the Verified Complaint in this docket);
- 3) the 1998 Switched Access Services Agreement between MCI and AT&T (1998 SASA) (attached as Exhibit GJD-1 to Affidavit of Gregory Doyle in support of Department’s Motion for Summary Disposition and For Data to be Determined Public Data in this docket);
- 4) paragraphs 33, 34 and 36 of the Verified Complaint in this docket.

The ALJ recommended in the 04-235 docket that trade secret protections be removed from the Second Unfiled Agreement – and, in particular, “that the rates contained in the February, 2004 Second Unfiled Agreement between AT&T and MCI be made public.”²⁰ TCG urges that the Second Unfiled Agreement not be made public at least while the issue of its status remains under consideration by the Commission. Although it does not specifically address the question of the First Unfiled Agreement, the ALJ assumes that TCG’s position regarding protection of that agreement is the same as it is with respect to the Second Unfiled

¹⁸ Id. at 22.

¹⁹ TCG’s Memorandum in Response to Department’s Motion for Summary Disposition, Attachment A, Affidavit of Corbin Coombs, para. 5.

²⁰ June 1, 2007 Recommendations, at 19.

Agreement. TCG objects to removing the Trade Secret protections from paragraphs 33, 34 and 36 of the Verified Complaint in this matter and from the 1998 SASA.

For all of the reasons set forth in the June 1, 2007 Recommendations, the ALJ Recommends that the Trade Secret protections previously granted the Second Unfiled Agreement be removed. Although the question of Trade Secret protections for the First Unfiled Agreement was not addressed in the 04-235 docket, there is no reason to treat it any differently than the Second Unfiled Agreement. The protected data in the two agreements is identical. The difference between the two agreements is simply that Verizon was the party responsible for filing the First Unfiled Agreement. Verizon has withdrawn its objection in the 04-235 docket to withdrawing trade secret protection from the Second Unfiled Agreement and has not objected to withdrawing the protection from the First Unfiled Agreement. Therefore, the ALJ recommends that both agreements be made public.

The data which has been shielded with trade secret protections in paragraphs 33, 34 and 36 of the Verified Complaint in this matter all specify the tariffs TCG was charging Verizon under the terms of the Second Unfiled Agreement. Those tariffs should have been filed, they are spelled out in the Second Unfiled Agreement and they should be made public. Therefore, the ALJ recommends that the trade secret protections accorded those paragraphs up to this point be removed and the entire Verified Complaint be made public.

Finally, the Department argues that the 1998 SASA should also be made public. Although the 1998 SASA was attached as an exhibit to the Department's Motion for Summary Disposition in this docket, it was withdrawn from evidence in the 04-235 docket and is not relevant to a decision in this docket. The 1998 SASA is not the subject of the Verified Complaint in this docket which makes only a passing reference to the 1998 SASA. The statement by Mr. Doyle in his affidavit that the 2004 SASA replaced the 1998 SASA merely restates testimony from an AT&T Midwest witness in the 04-235 docket that the same terms had existed under the 1998 SASA. The Commission has not been asked in this docket to determine whether the 1998 SASA, or any specific data included in it, should have been filed. It seems likely that it should have been, but because the 1998 is not properly part of the record here, the ALJ recommends that the trade secret status of the 1998 SASA remain unchanged at this time.

S.M.M.