No. A08-382

State of Minnesota
In Court of Appeals

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

AT&T Communications of the Midwest, Inc.,
Relator-Appellant,

v.

Minnesota Public Utilities Commission,
Respondent-Appellee.

OPENING BRIEF OF RELATOR-APPELLANT AT&T COMMUNICATIONS OF THE MIDWEST, INC.

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The MPUC ruled that it had the authority to penalize AT&T.

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The MPUC ruled that AT&T violated Minnesota law because it did not file this agreement.

Minn. Stat. §§ 237.74, 237.121

STATEMENT OF THE CASE

Relator-Appellant AT&T appeals the MPUC's ruling that AT&T violated Minnesota telecommunications law and its imposition of a $552,000 penalty. In October 2005, the Minnesota Department of Commerce (the "Department") alleged that AT&T failed to file a single agreement pursuant to which it provided MCI with "switched access services." A5; A118 (¶ 26). After the matter was referred to an Administrative Law Judge ("ALJ"), the Department moved for summary disposition. A49, A52. Without a hearing, the ALJ granted this motion over AT&T's objection, ruling that AT&T's failure to file the agreement violated various telecommunications statutes. A27-28. The ALJ proceeded to a "penalty phase" where, unlike its liability determination, the ALJ held a hearing and received evidence. A28. In June 2007, the ALJ recommended that the MPUC penalize AT&T a total of $552,000—or $1,000 per day for the alleged 552 days that AT&T purportedly failed to comply with Minnesota law. A42.

The MPUC adopted the ALJ's recommendations on October 26, 2007 and ordered AT&T to pay a penalty of $552,000 pursuant to Minn. Stat. § 237.462. A2. On November 5, 2007, AT&T filed a Petition for Reconsideration (Admin. Rec. No. 234) addressing the trade secret status of the "switched access services" agreement at the core of the controversy. On January 30, 2008, the MPUC issued an order resolving that reconsideration motion. A880-84

Due to the lack of statutory clarity regarding whether its limited motion for reconsideration halted the passage of the 30-day window to appeal the MPUC's October 26 ruling, AT&T filed a petition for a writ of certiorari on November 20, 2007. A865-76.

On December 20, 2007, this Court granted the MPUC's motion to dismiss the petition as premature and expressly permitted AT&T to "file a new appeal after the MPUC rules on the motion for reconsideration, in accordance with Minn. Stat. § 14.64." A877-84. Consequently, on February 29, 2008, AT&T filed another petition for a writ of certiorari. A895-96. AT&T respectfully requests oral argument.

STATEMENT OF THE FACTS

A single contract between AT&T and MCI gave rise to the disputed administrative proceedings. The contract concerned "switched access" fees that AT&T charged MCI for initiating and completing intrastate long-distance calls made by and to AT&T's local customers using MCI's long distance services. The regulation of telecommunications carriers in Minnesota, the nature of the contract, and the bases for the decision to penalize AT&T $552,000 are all pertinent to the factual background.

A. The Regulation Of AT&T In Minnesota And Its Contract With MCI

AT&T is a "telecommunications carrier," as that term is defined by Minn. Stat. § 237.01, subd. 6. A53; A113 (¶ 7).[1] AT&T has the authority to operate in Minnesota both as an interexchange carrier ("IXC"), providing intrastate long distance services, and a Competitive Local Exchange Carrier ("CLEC"), providing local telephone service. A28-29; A53; A113 (¶ 7). Chapter 237 of the Minnesota Code, along with the supporting rules promulgated by the MPUC, serve as the primary repository of laws governing telecommunications carriers such as AT&T. *See* Minn. Stat. § 237.01 *et seq.*; Minn R.

[1] For the Court's convenience, AT&T has prepared a statutory and regulatory addendum to accompany this brief.

7812.0050 *et seq*. This statutory and regulatory regime underwent a significant overhaul in 1995, as the legislature replaced regulation with increased competition. One of the provisions enacted in this amendatory wave exempted "telecommunications carriers" from a significant portion of Chapter 237; except where "local services" are involved, only three sections of Chapter 237 apply to "telecommunications carriers." Minn. Stat. § 237.035(e).

This appeal centers on the agreement between AT&T and MCI—referred to herein as "the AT&T Agreement"—for the provision of "switched access service." "Switched access service" describes the interaction between a local exchange carrier and an IXC that is necessary for the completion of a long-distance call. *In the Matter of a Commission Investigation of Intrastate Switched Access Charge Reform*, 2004 Minn. PUC Lexis 140, at *2 (Minn. PUC Oct. 8, 2004) ("Switched access consists of switching (the use of the carrier's computer to route the [long distance] call) and transport (the use of the carrier's lines to transmit signals between the switch and another provider's facilities)"). A call from Brainerd to St. Paul, for instance, usually involves three carriers: (1) a local carrier in Brainerd that originates the call; (2) a local carrier in St. Paul that completes, or terminates, the call; and (3) an IXC that serves as a bridge between the two local exchanges. The IXC generally pays the originating and terminating local carriers for the use of their network; these fees are referred to as "access charges," and "switched access charges" constitute a specific type of access charge. *Southwestern Bell Tel. Co. v. FCC*, 138 F.3d 746, 747 (8th Cir. 1998) ("switched access services" are those "in which the IXCs used the LECs' regular local service facilities for originating and terminating long-distance telephone calls").

The AT&T Agreement set out the terms by which AT&T sold switched access services to MCI. A644-50. The Department alleged that in its capacity as a CLEC, AT&T offered MCI, in its capacity as an IXC, switched access services at rates less than what AT&T offered to other IXCs in its published tariffs. A4. AT&T and MCI entered into the AT&T Agreement as part of a settlement that resolved a series of litigation disputes between the two carriers arising out of or relating to MCI's bankruptcy proceedings. A631-43; A547-49 (Handal Test.); A212-14 (Handal Test.). While it is undisputed that AT&T maintained *tariffs* on file governing switched access services offered to IXCs, AT&T did not file the AT&T Agreement with the MPUC.

A separate agreement—referred to herein as the "MCI Agreement"—set out the terms pursuant to which AT&T, as an IXC, purchased switched access services from MCI, as a CLEC. The Department initially brought a claim against MCI, several other CLECs, and AT&T in its capacity as an IXC, for their failure to file contracts concerning switched access services. A67-82. In April 2005, MCI, along with some of the other CLECs named in the complaint, entered into settlements resolving the dispute. A5; A83-105. Pursuant to these agreements, MCI paid a $5,000 penalty and several of the other CLECs paid penalties between $400 and $5,000. A96 (¶ 7); *see also* Compliance Payments (Admin. Rec. Nos. 81, 82-85, 87, 92-94). In light of these settlements, the MPUC determined that the complaint against AT&T as an IXC was moot. A90.

B. The Department's Amended Complaint Against AT&T As A CLEC

The Department amended its complaint and initiated the instant proceedings against AT&T in October 2005. A107-32. At the center of the Department's complaint was the allegation that by entering into its CLEC contract with MCI, AT&T improperly deviated from the rates listed in its published tariffs. *See, e.g.*, A121 (¶ 35). The Department further claimed that by not making this agreement public, AT&T "knowingly and intentionally" violated an array of statutes and rules, which fall into two general categories. A121-23 (¶¶ 35-43).

First, several of the statutes require a carrier to file tariffs with the MPUC listing the rates for services offered, and to adhere to that tariff. For example, one provision cited by the Department A115 (¶ 13) requires that carriers "keep on file with the department either a tariff or price list" for the services offered. Minn. Stat. § 237.74, subd. 1; *see also* Minn. Stat. § 237.07; Minn. R. 7810.0500, subp. 1; Minn. R. 7812.2210, subp. 2. Another set of statutes cited by the Department (A122-23, ¶¶ 38-39, 42) mandates that a carrier adhere to the tariffs and contracts it files. *See* Minn. Stat. § 237.121, subd.(a)(4), Minn. R. 7812.2210, subp. 5. At the same time, however, Minnesota law specifically permits providers to enter into agreements—also known as "off-tariff" contracts—featuring different rates than those offered in tariffs. *See* Minn. Stat. §§ 237.74, subd. 2 & 3 (addressing "special" and "unique" pricing); 237.121(a)(4) (a "telecommunications carrier" must provide services "in accordance with its applicable tariffs, price lists, *or contracts*") (emphasis added); 237.071 ("prices unique to a particular customer or group of customers may be allowed for noncompetitive services and for services subject to emerging competition")

Second, the Department claimed (A123, ¶ 43) that AT&T's failure to file the contract violated statutes that bar a carrier from offering services on terms that are "unreasonably discriminatory." Minn. Stat. § 237.74, subd. 2. As one example, § 237.60 states that "telephone companies" may not "offer telecommunications service within the state upon terms or rates that are unreasonably discriminatory." Minn. Stat. § 237.60, subd. 3 (emphasis added); *see also* Minn. Stat. 237.09, subd. 1; Minn. R. 7812.2210, subd. 5.

AT&T denied all the allegations in the Department's complaint. Principally, it denied that Minnesota law required it to file the MCI agreement or that the agreement was unreasonably discriminatory. A135-37, A139-40 (¶¶ 9-22, 35-43). Moreover, AT&T answered that it did not knowingly, intentionally, or willfully violate any Minnesota law. A140-41 (¶¶ 44-47).

C. The ALJ Ruled In The MPUC's Favor

The ALJ treated the questions of liability and penalty separately, ruling first in June 2006 that AT&T violated Minnesota law and then subsequently assessing a penalty against it. Over AT&T's objection that questions of fact precluded summary disposition, the ALJ ruled against AT&T without taking any evidence and based solely on the allegations in the MPUC's complaint. As a threshold matter, the ALJ rejected AT&T's contention that the bulk of Chapter 237's provisions did not apply to AT&T—in its capacity as a CLEC "telecommunications carrier"—because it did not offer a "local service." A56. AT&T had contended that Minn. Stat. § 237.035 exempted AT&T from all but three provisions of Chapter 237 because "switched access service" is not a "local service." AT&T Exceptions Br. 16-19 (June 21, 2007) (Admin Rec. No. 221). Accordingly, AT&T argued, it could not be subject to claims for violation of all the statutes cited in the Department's complaint. The ALJ disagreed, holding that "switched access services are local services," and thus AT&T was subject to most of Chapter 237. A58.

The ALJ proceeded to rule that AT&T "knowingly and intentionally" violated the Minnesota laws and regulations cited by the Department. The ALJ believed that AT&T was required to file even "unique" pricing agreements, regardless of whether AT&T maintained tariffs on file with the MPUC. A57-59, A61. The ALJ further held "that by offering unique pricing to MCI that it did not file as a tariff, AT&T engaged in unreasonable discrimination." A60. Finally, the ALJ concluded that because the Department had *alleged* that AT&T "purposefully" failed to file its contract and to offer similar terms to all its switched access customers, "its actions were knowing and intentional." A62.

A few months later, the ALJ held "penalty phase" hearings, and in June 2007 the ALJ recommended that AT&T be penalized $552,000, or $1,000 per day for the 552 days the AT&T Agreement was in effect. Despite acknowledging that § 237.462 was "no longer in effect" because it was "repealed effective August 1, 2006, through sunset provision," the ALJ cited § 237.462 as the source of its power to levy a penalty against AT&T. A34. The ALJ reached this conclusion on the basis of the "savings clause" in Minn. Stat. § 645.35. A34-35.

Believing it still possessed penalty authority under § 237.462, the ALJ weighed the nine factors listed in that section, which include willfulness, harm to customers or competitors, history of past violations, economic benefit gained, and corrective action taken. During the hearings, AT&T presented testimony challenging nearly every factor. For example, AT&T witnesses testified that they did not willfully "hide" the contract because they did not know they had any filing obligation in Minnesota. A215-16, A472, A526, A536, A542, A545-49 (Handal Test); A181, A410-12, A427-28 (Baker Test). Indeed, AT&T publicly disclosed the contract in its annual report with the MPUC (A473, Handal Test.), and in filings with the MCI Bankruptcy court (A214, Handal Test. AT&T also presented evidence that the contract with MCI did not harm consumers or competitors. A232-33, A242-43, A553-55, A590-91 (Lehr Test.). Moreover, AT&T's witnesses testified that the contract did not financially benefit AT&T; the AT&T agreement *lowered* AT&T's revenue, and when the AT&T Agreement was taken together with the MCI Agreement—*i.e.*, AT&T as the IXC and MCI as the CLEC—the impact was revenue neutral. A223, A553-54, A570-73, A581 (Lehr Test.); A216, A473 (Handal Test.). The Department did not present any evidence reflecting an independent analysis of the contract's effect (if any) on competition generally, let alone on consumers.

AT&T further addressed several factors concerning its track record before the MPUC, as well as the MPUC's handling of similar cases involving other providers. For example, it was undisputed that AT&T committed no prior violations in Minnesota and that AT&T took corrective action by recovering the tariffed rates for access services from MCI (collecting the difference between the contract rate and the tariff rate). AT&T

Responses 54, 61 (Admin Rec. Nos. 155, 165). Finally, AT&T urged the ALJ to consider the amount of the settlements between the MPUC and other CLECs in setting a penalty for AT&T; these settlements concerned identical violations pursuant to which the MPUC levied penalties of $400 and $5,000 per unfiled contract. A193-95 (Baker Test).

Despite AT&T's evidence, the ALJ resolved every factor against AT&T. The ALJ determined that AT&T acted willfully because, as "a huge corporation," it was "presumed to know its obligations under the law." A36-37. AT&T harmed competitors, the ALJ ruled, because its failure to file "deprived competitors of the opportunity to take advantage of similar rates," which "ultimately hurts consumers." A37. The ALJ recognized that AT&T had no "past violations" in Minnesota, but nonetheless pointed to supposed actions in other jurisdictions as one reason for its penalty decision. A38. While AT&T's undisputed testimony suggested otherwise, the ALJ believed that AT&T benefited from the AT&T and MCI Agreements when considered together. A39. Finally, the ALJ discounted AT&T's corrective actions, and in setting AT&T's penalty, the ALJ declined to consider the amount of the settlements between the MPUC and the other CLECs. A40-41. Ultimately, the ALJ recommended a penalty of $552,000 because of its "findings of willfulness as well as concerns that AT&T apparently fails to recognize the gravity of its actions." A42.

D. The MPUC Adopted The Recommendations Of The ALJ With Only Slight Modification.

Rejecting AT&T's exceptions to the ALJ's Recommendation, the MPUC concurred with both its liability and penalty determinations. The MPUC disagreed that anything more than a summary disposition was necessary because, in its view, AT&T knowingly and intentionally provided switched access services to MCI on terms that differed from its tariffs. A8. By not filing the AT&T Agreement, the MPUC reasoned, AT&T violated Minnesota law regarding "*tariffs*." A9. The MPUC did not discuss Minnesota's requirements for filing off-tariff contracts, nor did it respond to AT&T's contention that the vast majority of Chapter 237 did not apply to the AT&T Agreement because "switched access services" are *not* "local services." The MPUC believed that AT&T could be held liable solely because "AT&T provided service to MCI at terms that were different from the terms in AT&T's tariff." A10.

The MPUC concurred with the ALJ as to the recommended penalty. A11-17. Again relying on the savings clause in Minn. Stat. § 645.35, the MPUC held that despite the sunsetting of § 237.462 in August 2006, the penalty provision remained applicable because the proceeding against AT&T "commenced in 2004." A11. The MPUC then proceeded to address the various factors in § 237.462, finding that AT&T willfully violated Minnesota law, that its violation harmed competitors and customers, and that AT&T benefited from the agreement. A12-14. While the MPUC acknowledged AT&T's corrective actions, stating it would "consider these factors" along with others in assessing AT&T's penalty, it did not assign a particular weight to the "steps" taken by AT&T to "bring swifter resolution to this issue." A16. The MPUC ultimately agreed that $552,000 was a "meaningful sanction," but failed to touch upon AT&T's argument that it should not be penalized a hundred times more than CLECs alleged to have committed the same alleged infractions. A16-17.

SUMMARY OF THE ARGUMENT

The MPUC's Order finding AT&T liable and imposing a $552,000 penalty crumbles under the weight of three significant legal errors relating to the MPUC's penal authority and the few statutes that govern CLECs' offering of "switched access services."

First, the MPUC lacked the ability to levy *any* penalty under Minn. Stat. § 237.462 because that provision expired in August 2006, more than a year before the MPUC issued its order. Defying the bedrock principle that one must apply the law as it exists at the time of decision, the MPUC held that a statute concerning "repeals" (Minn. Stat. § 645.35) "saved" the MPUC's authority because the Department filed its complaint before § 237.462 expired. However, the savings statute is inapplicable, and the MPUC erred in relying upon it, because the legislature did not "repeal" § 237.462. Rather than enact a second statute that abrogated the first, the legislature enacted a single provision that expired on a set date by virtue of a sunset provision. Without a "repeal," there is no place for the application of § 645.35.

Nor should the MPUC have used § 645.35 to prop up its authority because the savings statute preserves only "vested rights," and no such "rights" were affected by the expiration of § 237.462. Generally, a private plaintiff has no "vested right" in recovering a particular remedy. A governmental agency in particular has no "vested right" in any statutory outcome because a governmental entity has only the power the legislature gives to it. The legislature is free to eliminate what it created without affecting any vested rights or implicating the savings statute.

Even if the MPUC actually retained the authority to levy a penalty, the MPUC's decision would have to be reversed because it weighed the nine statutory factors improperly. While the MPUC properly held that several of the factors tilted in AT&T's favor—*i.e.*, AT&T's corrective action, the absence of past violations, and the fact that there was only one alleged infraction—it ruled against AT&T on the remaining factors. In doing so, the MPUC relied on inconclusive and speculative evidence presented by the Department, while ignoring and minimizing the evidence presented by AT&T that its actions were not "willful," did not cause harm to consumers or competitors, and did not financially benefit AT&T. Moreover, the MPUC failed to take into account the significant disparity between the $5,000 (or less) penalties assessed against other CLECs for the same alleged infraction and the $552,000 penalty assessed against AT&T. Because the MPUC committed legal error and reached an arbitrary decision unsupported by the evidence in the record, it must be reversed.

Second, the MPUC held AT&T liable for a variety of statutes from which it is exempt. Section 237.035 provides that "telecommunications carriers," such as AT&T, are not bound by the bulk of the provisions in Chapter 237, except to the extent such carriers provide "local services." This "local services" exception, however, does not apply here: the "switched access services" that AT&T sold to MCI are not "local services." As the telecommunications rules and statutes demonstrate, "local services" are those provided to a retail consumer by a provider, and the term does not encompass services provided by one carrier to another on a wholesale basis.

Moreover, even if the applicable regulations could be construed to equate "switched access services" with "local services"—an interpretation that defies both the regulations' plain meaning and common sense—the MPUC erred in ruling that AT&T "knowingly and intentionally" violated those Minnesota laws applicable only to providers of "local services." Because the meaning of "local services" is a novel question of law, AT&T could not have knowingly and intentionally violated laws that it had a good faith to believe were inapplicable. The MPUC overlooked the Department's failure of proof on this point; it ignored factual disputes that existed under the proper legal test for "knowing and intentional" and essentially substituted a strict liability standard in its stead.

Finally, the MPUC erred by finding AT&T liable for violating the few statutes that do apply. AT&T did not violate the filing requirement in Minn. Stat. § 237.74 because nothing in that provision mandated that AT&T file an off-tariff contract such as the AT&T Agreement. Moreover, AT&T complied with Minn. Stat. § 237.121 because it acted in conformity with its agreement with MCI; the MPUC has never claimed otherwise. Nor did AT&T unreasonably discriminate in its provision of services; Minnesota law *permits* rate discrimination, but only forbids unreasonable discrimination, and the MPUC failed to present *any* evidence showing that AT&T's rates constituted unreasonable discrimination.

ARGUMENT

The decision of the MPUC must be reversed because it made critical errors of law regarding the MPUC's penal authority, the application of Chapter 237 to "switched access services," and AT&T's supposed "knowing and intentional" violation of Minnesota's filing and antidiscrimination requirements. The standard of review for an agency decision is set forth in Minn. Stat. § 14.69. *Minnesota Dep't of Pub. Serv. v. Minnesota Pub. Utils. Comm'n*, 574 N.W.2d 408, 412 (Minn. 1998). This Court must reverse the MPUC where its "finding, inferences, conclusion, or decisions" are "in excess of the statutory authority or jurisdiction of the agency," are "affected by other error of law," or are "unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 14.69(b), (d), (e). Because the MPUC misinterpreted the law and its own authority in making its liability and penalty rulings, its decision cannot stand.

I. The Expiration Of Minn. Stat. § 237.462 Eliminated The MPUC's Power To Levy The $552,000 Penalty, Which Was Not Justified In Any Event.

A. The Legislature Deprived The MPUC Of The Authority To Assess A Penalty After August 2006.

Even though § 237.462 ceased to have any legal effect on August 1, 2006, the MPUC ruled that the statute remained "applicable to the current proceeding." A11. However, as a general matter, it is the existing law that controls. *Holen v. Minneapolis-St. Paul Metropolitan Airports Comm'n*, 250 Minn. 130, 136 (1957); *cf. Interstate Power Co., Inc. v. Nobles County Bd. of Comm'rs*, 617 N.W.2d 566, 575 (Minn. 2000) ("The general rule is that appellate courts apply the law as it exists at the time they rule on a case, even if the law has changed"). As the United Supreme Court has explained, "a court should 'apply the law in effect at the time it renders its decision.'" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994) (internal citation omitted).

Contrary to this basic rule of law, the MPUC believed it retained the power to penalize AT&T. In so concluding, the MPUC errantly relied on an inapt Minnesota savings statute, which provides that "'[t]he *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.'" A11, quoting Minn. Stat. § 645.35 (emphasis added). The MPUC's recourse to § 645.35 was misplaced for two reasons: (1) there was no "repeal" that could have invoked § 645.35; and (2) the savings statute does not cover remedy provisions or the government's limited interest in wielding them.

1. Section 237.462 expired by virtue of a sunset provision, not a "repeal."

As a threshold matter, § 645.35 by its very terms does not control here because the legislature did not "repeal" § 237.462. Rather, the remedy provision expired pursuant to a sunset provision enacted before the MPUC filed its complaint against AT&T.[2] A repeal occurs when a later statute rescinds, revokes, or otherwise is incompatible with an earlier statute. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007); *St. Martin Evangelical Lutheran Church v. S.D.*, 451 U.S. 772, 788 (1981) (a repeal, either express or implied, occurs "when the earlier and later statutes are

[2] The legislature enacted § 237.462 in 1999, embedding within the statute a sunset provision that set an expiration date of December 31, 2004. 1999 Minn. Laws, c 224, s 6. In 2004, the legislature extended the expiration date to August 1, 2005. 2004 Minn. Laws c 261, art 6, s 7. In June 2005, the legislature further extended the expiration date to August 1, 2006. 2005 Minn. Laws, 1stSp, c 1, art 4, s 117.

irreconcilable") (internal quotation marks omitted). A repeal thus requires two statutes at two points in time; what the first creates, the second destroys. *See* BLACK'S LAW DICTIONARY 1076 (8th ed., abridg. 2005) (a "repeal" is an "abrogation of an existing law by legislative act"). By contrast, a "sunset" provision requires no second statute; instead, a single statute contains an expiration date that results in "the automatic cessation of a public law * * * unless reauthorized by the legislature." Rebecca M. Kysar, *The Sun Also Rises*, 40 GA. L. REV. 335, 337 (2006).

Minnesota's savings statute has no application here in part because the legislature never enacted a second statute. Instead, the legislature enacted one statute and equipped it with a self-destruction date. Thus, all along, there was only a single statute with a limited life-span. When the calendar turned to August 1, 2006, the limitation that had been an express, but dormant, part of the statute since its creation took effect. Time—not a second statute—annulled § 237.462, and § 645.35 accordingly has no application here.

Courts adhere to this distinction between a repeal and a sunset provision. For example, in one Pennsylvania case, a statute with a sunset provision required a landfill owner to pay fees in order to obtain a permit. *Berks County v. Dep't of Envtl. Prot.*, 894 A.2d 183 (Pa. Commw. Ct. 2006). The court held that even though the owner had agreed previously to pay the fees, the agency lacked the authority to collect them after the statute's expiration date because doing so "would defeat the purpose of the sunset clause and the legislature's clear intention that the recycling fees be temporary." *Id.* at 202. Other courts have ruled that where a statute terminates unless action is taken to renew it—and none is taken—the law expires by virtue of the sunset provision itself, and not any independent action undertaken by the legislature or the agency. *AT&T Corp. v. FCC*, 369 F.3d 554, 560 (D.C. Cir. 2004) (a sunset provision's "words clearly indicate[d] that Congress intended for the statute's protections to expire by operation of law on a date certain," and "nothing" required the FCC "to consider whether to allow the sunset provision to go into effect"); *Little Bev. Co. v. DePrez*, 777 N.E.2d 74, 82 (Ind. Ct. App. 2002) (the law "expired by operation of the Sunset Law as prescribed by the General Assembly and not by any agency action"). In short, the MPUC's invocation of § 645.35 stumbles on the first hurdle because the statute only applies in the event of a "repeal," which never occurred here.

2. The MPUC has no vested right to levy a penalty.

Even if the expiration of § 237.462 by sunset somehow constituted a "repeal" such that it fell within the possible reach of § 645.35, the savings statute still does not apply here. Section 645.35 does not bar the application of all new legislation, but rather only that which disrupts a plaintiff's "vested rights." *United Realty Trust v. Property Dev. & Research Co.*, 269 N.W.2d 737, 743 (Minn. 1978) ("The legislature has the power retroactively to validate a contract previously invalid so long as it does not interfere with a vested right").[3] The "right accrued," as that term is used in § 645.35, "must, in fact, be vested," and a "'right' is not 'vested' unless it is something more than a mere

[3] As the Minnesota Supreme Court has made clear, § 645.35 is concerned with the due process implications of *retroactive legislation*—that which reaches back in time to snatch away what was the plaintiff's. *Wichelman v. Messner*, 250 Minn. 88, 107 (1957). To reiterate, because only one statute exists here—the Minnesota legislature *prospectively* built an expiration date into § 237.462—there is no retroactivity problem.

expectation." *Olsen v. Special School Dist.*, 427 N.W.2d 707, 711 (Minn. Ct. App. 1988). In essence, the interest must "be some right or interest in property that has become fixed or established." *Id.*, citing *Snortum v. Snortum*, 155 Minn. 230, 233 (1923).

The MPUC erred in levying the fine because it had no vested interest in asserting a penalty against AT&T. To begin with, and regardless of the MPUC's status as a governmental agency, Minnesota law has long held that "'[n]o man"—even a private plaintiff—"has a vested right to a mere remedy.'" *Donaldson v. Chase Secs. Corp.*, 216 Minn. 269, 275 (1943), *aff'd* 325 U.S. 304 (1945), quoting *Kipp v. Johnson*, 31 Minn. 360, 363 (1884). As a consequence, it "is generally held that legislation dealing only with remedies and procedures are *not* beyond the reach of retroactive legislation." *Peterson v. City of Minn.*, 285 Minn. 282, 288 (1969). For example, in *State ex rel. Butters v. R.R. & Warehouse Comm'n*, 209 Minn. 530 (1941), the Supreme Court permitted the repeal of a statute to deprive a private plaintiff, suing for relief before an administrative agency, of his ability to obtain the desired remedy. The Court followed a simple line of logic: the "remedy was statutory" and "was taken away" by a repeal before the remedy was granted; "hence, when the decision under review was made, [the remedy] was not available." *Id.* at 533. It was "immaterial that action was commenced and trial had before repeal," the Court ruled, because the "remedy under the former statute was not yet perfected by final judgment" and accordingly was "subject to destruction by repeal of the statute without which it was lifeless." *Id.*

Butters commands reversal: just as in *Butters*, the remedy power here was "lifeless" without § 237.462, which the legislature let lapse before the MPUC "perfected" the penalty. After the MPUC initiated the action, but before it levied a penalty, § 237.462 ceased to have any legal force. Thus, the remedy authority "was taken away" before the MPUC reached a penalty conclusion. *Id.* at 533. Put another way, the MPUC's "right to recover depended" on § 237.462, but that provision expired "before" the MPUC could have "acquired any vested right to damages under it." *Id.* at 534.

The incorrectness of the MPUC's ruling is compounded by its agency status. It is elemental that a governmental agency has no "vested right" in levying a statutory penalty such that § 645.35 would apply. To the extent the expiration of § 237.462 could even be considered retroactive legislation, the State stands apart, because unlike a private plaintiff, the concept of a "vested right" is foreign to it. A state's ability to affect certain rights of *private plaintiffs* may be limited by concerns of due process, but the state is free "to pass a retroactive law which impairs its own rights." 16B AM JUR. 2D CONST. LAW § 697 (2007); 2 NORMAN J. SINGER, STATUTES AND CONSTRUCTION, § 41:3 (6th ed. 2001) ("The state itself has no protection against retroactive application of an act of its legislature").

While research uncovered no published Minnesota opinion addressing this distinction between private plaintiffs and governmental bodies, the majority—if not unanimous—view is that "[a] state *has no vested rights* which are immune from its legislative control." *Skelton v. B.C. Land Co.*, 539 S.W.2d 411, 413 (Ark. 1976) (emphasis added).[4] A repeal eliminates a governmental body's ability to pursue relief, even if the repeal becomes effective after the disputed actions occurred or the government initiated suit. *See, e.g., City of Tucson v. Whiteco Metrocom*, 194 Ariz. 390, 394 (Ariz. Ct. App. 1999) (city had no vested right to enforce a zoning ordinance because "[t]he City's power to enact zoning ordinances derives exclusively from the state," and thus "the legislature has virtually unlimited authority" to "reduce or condition" the City's powers); *State ex rel. Pittman v. Ladner*, 512 So.2d 1271, 1275-76 (Miss. 1987) (government had no vested right to recover "monies misspent by public officials in derogation of statutory procedures" where the legislature repealed the statute before a final judgment had been rendered against the officials); *Sturm, Ruger & Co. v. City of Atlanta*, 560 S.E.2d 525, 530-31 (Ga. App. Ct. 2002) (upholding the legislature's express prohibition of a city's lawsuit because a municipality does not have "a vested right to pursue" a particular lawsuit given that "[m]unicipal corporations are creations of the law" and "[t]he legislature may modify or limit" their power at will) (internal quotation marks omitted).

The basis for this principle is clear, particularly where applied to penalty

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4 *See also, e.g., State Highway Dep't v. Bass*, 29 S.E.2d 161, 165 (Ga. 1944) ("the right of the State, as distinguished from the right of a citizen, may be impaired by retrospective laws"); *Rouselle v. Plaquemines Parish Sch. Bd.*, 633 So.2d 1235, 1247 (La. 1994) (Louisiana may "pass[] retrospective laws waiving or impairing its own rights") (internal quotation marks omitted); *Am. Mut. Liability Ins. Co. v. Commonwealth*, 398 N.E.2d 491, 496 (Mass. 1979) (where "'a State enacts retroactive legislation impairing its own rights, it cannot be heard to complain'"); *State ex rel. Meyer v. Cobb*, 467 S.W.2d 854, 856 (Mo. 1971) ("As long as private rights are not infringed, the state may constitutionally pass retrospective laws waiving or impairing its own rights") (internal quotation marks omitted).

provisions: what the legislature gives, it may also take away. The MPUC's authority to penalize under § 237.462 is solely a creature of the legislature's prerogative. *Peoples Nat. Gas Co., Div. of Inter-North, Inc. v. Minn. Pub. Util. Comm'n*, 369 N.W.2d 530, 534 (Minn. 1985) (the "Commission, being a creature of statute, *has only those powers given to it by the legislature*") (emphasis added) (internal quotation marks omitted). Accordingly, the agency has no authority to issue penalties apart from whatever power the legislature gives it, and the legislature is free to curtail that power at any time. *Cf. Rowe v. Dep't of Empl. & Econ. Dev.*, 704 N.W.2d 191, 194 (Minn. Ct. App. 2005) ("An administrative agency's jurisdiction depends entirely on the statute under which it operates," and "[n]either agencies nor courts may enlarge an agency's powers beyond that contemplated by the legislature").

Decisions in other jurisdictions accord with this understanding of the relationship between the legislature's will and administrative authority. A New Jersey court ruled that a county could not collect fines imposed on citizens after the legislature mandated that all such fines be paid to the state rather than the county. *State v. Rosenman*, 443 A.2d 719, 722 (N.J. Super. 1982). The court explained that the county had "no vested right in any fine" because it was "subject to the control of the State" and to the legislature's "decision as to how the fine is to be collected and to whom it should be distributed." *Id.*; *see also Meriwether Inv. Co. v. Lampton*, 53 P.2d 147, 153 (Calif. 1935) (city had no vested right to a penalty because "[t]he penalty was purely a creature of the statute and when the statute was repealed, or amended so as to do away with the penalty, the city's right thereto ceased"). Similarly, courts have ruled consistently that the government does not have a vested right to assess tax penalties, and the legislature may eliminate that power at whim. *See Neal v. United States*, 1998 U.S. Dist. Lexis 12048, at *26-*27 (W.D. Pa., July 9, 1998) ("the government does not have a 'vested right in the Internal Revenue Code'" because "[j]ust as Congress may *impose* tax liability retroactively *at its pleasure*, Congress may *withdraw* tax liability *at its pleasure*"); *City of McAlester v. Jones*, 72 P.2d 371, 374 (Okla. 1937) (a city had no vested right to delinquent tax funds collected by the county after state legislature ordered the repayment of the penalties to taxpayer).

The concept of a "vested right" simply does not apply to a penalty imposed under Chapter 237, and thus the MPUC's application of § 645.35 was improper. The instant § 237.462 ceased to have legal effect by virtue of the sunset provision, the MPUC lost whatever power the legislature had previously given to it, regardless of when the MPUC initiated its action against AT&T. On August 1, 2006, long before the MPUC decided to penalize AT&T—indeed, before the ALJ even recommended the $552,000 penalty—the legislature deprived the MPUC of its ability to use § 237.462 as a penal tool. As such, the penalty against AT&T cannot stand, and the MPUC's decision must be reversed.

B. Even If § 237.462 Controlled, The MPUC Applied It Improperly.

If the court concludes, as it should, that § 237.462 eliminated the MPUC's authority, it need not reach the question of whether the MPUC properly applied the penalty provision. However, even if the Court rules that the MPUC actually had the authority to levy the penalty, its decision would still have to be reversed because the MPUC's evaluation of the nine factors in § 237.462 produced a decision that was arbitrary and capricious, undermined by legal errors, and not supported by substantial evidence in the record. Minn. Stat. § 14.69(e).[5]

The MPUC properly applied some of the nine factors listed in § 237.462. For example, it concluded that only a single violation existed, and, in a partial reversal of the ALJ, the MPUC disregarded evidence of supposed violations by AT&T in other jurisdictions (*compare* A14 *with* A38), focusing instead "on AT&T's conduct surrounding" the AT&T Agreement. A14. The MPUC further recognized that AT&T had *no* history of past violations in Minnesota. Moreover, unlike the ALJ, the MPUC acknowledged that AT&T took corrective action, even though it questioned (without basis) its motivation for doing so. A15.

Where the MPUC went astray was putting the whole package together: in weighing the remaining factors, which also tilt in AT&T's favor, the MPUC ignored the Department's lack of evidence supporting a penalty and unfairly disregarded evidence presented by AT&T.

First, the ALJ and the MPUC ruled against AT&T despite a lack of substantial

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5 Before it expired, § 237.462 permitted the MPUC to "issue an order assessing a penalty of between $100 and $10,000 per day" for "knowing and intentional violations of" *specific* sections of Chapter 237, namely "sections 237.09, 237.121, 237.16, 237.411 and any rules adopted under those sections." Minn. Stat. § 237.462, subd. 1(1), subd. 2(a) (2005). To begin with, because it assessed a penalty in part for alleged violations of Minn. Stat. §§ 237.07, 237.74, and 237.60, which are not listed in § 237.462, the MPUC erred as a matter of law.

When § 237.462 had legal effect, the MPUC could consider several factors in determining a penalty amount, including: (1) the "willfulness" of the violation; (2) "harm to customers or competitors"; (3) "history of past violations"; (4) "number of violations"; (5) "the economic benefit gained" by the alleged violator; (6) "any corrective action" undertaken; (7) financial ability to pay the penalty; and (8) "other factors that justice may require." Minn. Stat. § 237.462, subd. 2(b) (2005).

evidence as to "willfulness." This element requires a "knowing awareness" of a duty combined with "a deliberate, conscious, and intentional choice to disregard this duty." *Garrity v. Kemper Motor Sales*, 280 Minn. 202, 207 (1968). However, the MPUC did not review any evidence showing a "deliberate" or "conscious" disregard of a duty to file an off-tariff *contract*.

In derogation of its burden of proof, the Department failed to adduce any testimony showing that AT&T understood the existence of a filing obligation for off-tariff contracts, but chose to ignore such duties. All the Department's lone witness could surmise was "that AT&T should have known" (A300, Doyle Test.), a far cry from the "deliberate" disregard standard. AT&T rebutted this weak evidence, but the MPUC nonetheless concluded that AT&T acted willfully because (1) it is "a large and sophisticated corporation"; (2) it knew about tariffing requirements in general; and (3) it carefully "crafted" the AT&T Agreement. A12-13; A36-37.

The problem with this ruling is many-fold. As a threshold matter, the size of AT&T is irrelevant and the MPUC's mention of it unfair; simply because a carrier is "large" does not mean that any deviation from legal standards that may occur is *per se* a deliberate violation of Minnesota law. Under the MPUC's ruling, every "sophisticated" corporation's mistake of law, no matter how innocent, will always be willful.

More significantly, in a theme that appears throughout its decision, the MPUC incorrectly equated a *tariff* with a *contract*. However, mere knowledge of a filing requirement *for tariffs* does not equal a conscious and deliberate disregard of a supposed filing requirement for *contracts*. While AT&T's witnesses testified to their awareness of tariffing requirements, they also explained that they lacked knowledge of any obligation to file off-tariff contracts. A215-16 ("We were simply unaware that there might be some obligation to make such a filing and we had no understanding that we needed to investigate whether such a filing was required."), A472, A514-16, A542, A545-49 (Handal Test.). Furthermore, the effort expended by AT&T in drafting the AT&T Agreement has no bearing on whether AT&T deliberately violated Minnesota law. In the face of consistent testimony by AT&T witnesses that they did not know of any filing requirement for contracts—let alone deliberately disregard such a requirement—the Department failed to satisfy *its* burden of demonstrating that AT&T willfully violated Minnesota law.

Second, the MPUC's ruling on harm, or "gravity of the violation," is undermined by a complete lack of evidence. While the MPUC recognized that demonstrating harm "is notoriously difficult," it declined to make any attempt to hold the Department to its burden of proof. A13. Instead, the MPUC based its ruling on a vague notion of "harm to the integrity of the regulatory process," and further implied that dozens of carriers went out of business because AT&T did not file the Agreement, a dubious causal connection that even the MPUC recognized could not be proven. *Id.* ("it is impossible to determine whether any of these carriers might have been able to stay in business if they enjoyed the lower switched access rates offered" in the AT&T Agreement). Furthermore, the Department's lone witness conceded that he lacked any "direct evidence" of harm or of an instance in which AT&T increased its rates as a result of the AT&T Agreement. A319-20, A339 (Doyle Test.).

Balanced against this lack of proof was a plethora of economic evidence that AT&T's actions did not result in any harm. AT&T's witnesses demonstrated there was nothing to suggest that "as a result of this contract * * * the prices charged to consumers and the services offered were changed." A554-55 (Lehr Test.) With "no actual impact on consumers * * * there's no actual impact on competitors either," and thus, no harm. *Id.* Whereas the Department's witness based his conclusions on conjecture, AT&T's witnesses relied on "the number of minutes that were transacted under the contract," the relevant "share of traffic," and measures of "market power." A590-91 (Lehr. Test). Indeed, because of AT&T's lack of market power and the relatively small amount of "actual traffic exchanged" under the AT&T Agreement, the "potential for harm" was "limited" and never came to fruition. A232-33, A242-43 (Lehr Test.).

Third, the MPUC arbitrarily ignored AT&T's demonstration that it derived no benefit from the AT&T Agreement because it received *less* than its tariffed rates for switched access charges. As AT&T's witnesses explained, the purpose of the AT&T Agreement was not revenue generation. Rather, the CLEC agreement was part of a settlement arising out of MCI's bankruptcy, which resolved multiple other legal disputes between the two companies. A547-49 (Handal Test.) (explaining that AT&T and MCI used "switched access issues" for their "dollar value in association with a whole host of other disputes in the bankruptcy"). Thus, while the MPUC could not fathom why AT&T would accept a loss of switched access revenue from MCI—the MPUC refused to believe that AT&T would "surrender * * * valuable claims against MCI" with no resulting "benefit to AT&T," A38—it overlooked the testimony before it: AT&T accepted a revenue reduction as part of a broader settlement package.

Nor did the implementation of the contract produce an economic benefit for AT&T. As AT&T's witnesses testified, the AT&T Agreement "had a negative revenue effect on AT&T." A216 (Handal Test.); A231 (Lehr Test.) ("[S]ince the AT&T CLEC agreement would have lowered MCI's access costs for traffic (and hence AT&T's access revenues), AT&T could not expect to gain directly from the contract"). Even the Department's witness concurred with the inevitable conclusion that "[t]here was no direct financial benefit to AT&T in charging lower rates to MCI, but not other carriers." A162 (Doyle Test.).

In ruling against AT&T, the MPUC focused on the "combination of" the AT&T Agreement (AT&T selling switched access to MCI) and the MCI Agreement (MCI selling to AT&T). However, it disregarded the evidence presented about the cumulative effect of those agreements. All the testimony indicated that "both contracts taken together, resulted in a financial impact that was revenue neutral to AT&T." A216 (Handal Test.); A573 (Lehr Test.) (describing the "revenue neutral" status of the two agreements together). AT&T the CLEC earned less money from the AT&T Agreement, and the reduced rates AT&T the IXC paid to MCI the CLEC did not make up for the high cost of providing intrastate long distance service. Accordingly, the agreements produced no economic benefit. A190 (Baker Test). Balanced against this array of proof, the Department offered only the syllogism that any harm to AT&T's competitors would be a benefit to AT&T (A318-19, Doyle Test.), a chain of logic that fails not only because of its theoretical nature but also because the Department never proved any harm to competitors.

Finally, the MPUC paid no heed to AT&T's evidence that other CLECs alleged to have committed the same violations paid relatively small penalties. For example, when the Department settled its claims against MCI and other CLECs, it assessed penalties of only $400 to $5,000. A96 (¶ 7). The Department had alleged that these CLECs committed the same violations as AT&T: failure to file an off-tariff contract, which purportedly resulted in unreasonable discrimination. A83-86. The disparity between these penalties and the $552,000 penalty against AT&T for the same alleged infractions is staggering and undeserved. When combined with the other factors above, it demonstrates that the MPUC's penalty ruling was marred by capriciousness, legal error, and a lack of substantial evidence. Consequently, it must be rejected, even assuming that the MPUC had the authority to levy such a penalty in the first place.

II. AT&T Did Not Knowingly And Intentionally Violate Minnesota Laws That Do Not Apply To AT&T's Provision Of "Switched Access Services."

The MPUC's penalty ruling is only part of the problem, as the faults in the MPUC's order extend to liability as well. Principally, the MPUC concluded that the "switched access services" in the AT&T Agreement were "local services." As a consequence, and with little discussion, the MPUC improperly subjected AT&T to a host of statutes that do not apply to "telecommunications carriers" where they offer services other than "local services." At a very minimum, there is sufficient doubt about the categorization of "switched access services" under Minnesota law that the MPUC erred in ruling that AT&T "knowingly and intentionally" violated Minnesota law.

A. As A CLEC Offering A Wholesale Service To An IXC, AT&T Is Exempt From The Majority of Chapter 237.

The exemption misconstrued by the MPUC was a significant part of the 1995 overhaul of the Chapter 237 scheme for telecommunications providers. *In the Matter of a Formal Complaint by McLeod Telemanagement, Inc. Against US WEST Communications, Inc.*, 1996 Minn. PUC Lexis 172, at *2 (Oct. 24, 1996) ("In August of 1995, after decades of essentially limiting the local telecommunications market to regulated monopolies, the Minnesota Legislature opened the local market to competition."). Among its amendments, the legislature distinguished between "telephone companies" and "telecommunications carriers." *Compare* Minn. Stat. § 237.01, subd. 6 (defining "Telecommunications carrier") *with id.* § 237.01, subd. 7 (defining "Telephone company"). Unlike "telephone companies," which are subject to all of Chapter 237, "telecommunications carriers" operating as CLECs, such as AT&T, are exempt from nearly all of Chapter 237. *See In the Matter of McLeodUSA's Tariff Filing*, 2004 Minn. PUC Lexis 104, at *6-*7 (Minn. PUC July 22, 2004) ("Under Minn. Stat. § 237.035, competitive local exchange carriers (CLECs) * * * are exempt from rate regulation and most of the other regulatory requirements that apply to incumbent local exchange carriers").

Section 237.035 contains the pertinent exemption. It provides that "[t]elecommunications carriers are subject to regulation under this chapter *only* to the extent required under paragraphs (b) to (e)" of the statute. Minn. Stat. § 237.035(a) (emphasis added). Paragraphs (b) and (c) subject telecommunications carriers to three statutory provisions *only*, regardless of the service provided—Minn. Stat. §§ 237.121, 237.74, and 237.16, subd. 8 and 9. Paragraph (e), however, contains an exception to the exemption: it mandates that "a telecommunications carrier's *local service* is subject to this chapter." Minn. Stat. § 237.035(e) (emphasis added).

Chapter 237 does not define "local service," and the meaning of the term presents a novel question for this Court. Nonetheless, the regulations promulgated to implement the 1995 amendments (Rule 7812.0500 *et seq.*) define the term in such a way as to show conclusively that AT&T did not provide a "local service" to MCI.[6] Consequently, AT&T is bound only by the provisions in paragraphs (b) and (c), which AT&T did not violate, as explained in Section III, *infra*.

As the regulations demonstrate, "local service" refers to a service offered by a provider, such as a CLEC, to a retail "customer" or "end-user." It does *not*, however, include "switched access service" offered by a CLEC to an IXC. Whereas "local service" refers to a collection of retail services provided to retail end-users, "switched access service" is a specific type of service provided on a wholesale basis to other carriers to enable them to provide long distance services to their retail customers.

In creating this distinction, the regulations define "Local service" to mean "dial tone, access to the public switched network, and any related services provided in

[6] These rules were developed pursuant to a legislative mandate. Minn. Stat. § 237.16, subd. 8(a).

conjunction with dial tone and access, including services that may be required under part 7812.0600." Minn. R. 7812.0100, subp. 33. This definition targets the rudiments of service offered to a retail customer or end-user. The reference to "dial tone"—the elemental portion of a wireline telecommunications service that enables a retail "customer" to place a call—is emblematic: it identifies a segment of the relationship between a provider and a "customer" or an "end-user" that makes little sense in the context of the access services provided to an IXC by a CLEC.

It is tempting, but incorrect, to conclude that the proximity of the word "access" to "switched" in this definition somehow means that "switched access services" are "local services." This fallacy ignores the other words in the definition, which concern a consumer's ability to access the "public switched network," *i.e.* the generic term for "the worldwide voice telephone network accessible to all those with telephones and access privileges." NEWTON'S TELECOM DICTIONARY 749 (23d ed. 2007). Access to the "public switched network" refers to a consumer's ability to make calls to other parts of Minnesota, the U.S. and the world. It is distinct from the services a CLEC offers to an IXC so that a customer may enjoy such access.[7]

[7] The rule of *ejusdem generis* forecloses the notion that the phrase "any related services" can be construed to cover "switched access services." "[G]eneral words," such as "any related services," are "confined to the class of which they are a part." *State v. Moore*, 699 N.W.2d 733, 738 (Minn. 2005) (internal quotation marks omitted); *see also* Minn. Stat. § 645.08(3) ("general words are construed to be restricted in their meaning by preceding particular words"). Because "dial tone" and "access to the public switched network" refer to services provided to end-users by a CLEC, "any related services" cannot be expanded to include "access services" provided to an IXC.

The cross-reference to Rule 7812.0600 in the definition of "local service" differentiates between a "local service" offered to retail customers and a "switched access service" subscribed to by other carriers, but not offered to any retail end-users. Among the "[b]asic [s]ervice [r]equirements" addressed in Rule 7812.0600 is a long distance obligation: "[a] local service provider" must provide "as part of its local service offering * * * 1 + intraLATA and interLATA presubscription and code-specific equal access to interexchange carriers subscribing to its switched access service." Minn. R. 7812.0600, subp. 1(C). This rule describes two services provided to two different types of entities. The first—the "local service" offering—refers to the availability of long distance service to a customer. The second—the "switched access service"—concerns the IXC's technological ability to complete a long distance call. These two services are no more equivalent than the service a supermarket offers to shoppers (access to products) is the same as the service a supermarket offers to food producers (an outlet to sell their products).

Only the service offered to a customer is a "local service." Rule 7812.0600 differentiates between: (1) a "local service," whereby a CLEC provides a consumer with a conduit to an IXC, and (2) an IXC "subscribing" to that CLEC's "switched access." The CLEC-customer relationship is distinct from the interaction between the CLEC and the IXC. Put another way, a consumer subscribes to the local service—the ability to pick up the phone and make a long distance call—but the IXC subscribes to a completely different service that permits the completion of that call. "Switched access service" may enable a "local service"—a customer's ability to make long-distance calls—but it is not a "local service."

The distinction between these types of services echoes provisions in Chapter 237, which are instructive even if they are not applicable here. For example, in a statute governing "costs of service," the legislature differentiated between "local service," "long-distance service," and "access" services. Minn. Stat. § 237.60, subd. 4. Had the legislature considered "local service" and "access service" to be coequal, it would not have used different terms to describe them, and it is axiomatic that all terms in a statute must be given meaning. *Schaeffer v. Newberry*, 50 N.W.2d 477, 482 (Minn. 1951) ("it is a well-established rule of statutory construction that every term of a statute should be given meaning when possible").

At least four other separate, but related, rules confirm that a "local service"—as that term is used in § 237.035—does not refer to "switched access services" sold to IXCs to complete an intrastate long distance call. These rules share a common thread: they impose requirements on the provision of "local service" that pertain—by their plain terms and their context—solely to the interaction between a provider and a "customer" or "end-user." Conversely, where the rules set out requirements for how carriers relate to each other, those services are not referred to as "local services."

First, the "basic local service requirements" discussed in Rule 7812.0600, which must be provided "to all customers within" a CLEC's "service area," concern only the relationship between a local service provider and its customers. As a threshold matter, "customer" is a defined term; it refers exclusively to "a person who has contracted with a local service provider for *retail* telecommunications service." Minn. R. 7812.0100, subp. 13 (emphasis added). In light of this reference to "retail" services, Rule 7812.0600 frames "local services" in terms that do not apply to "switched access" services purchased by an IXC from a CLEC on a wholesale basis.[8]

The list of "[r]equired services" and obligations in Rule 7812.0600 further highlights that "local services" are those offered by CLECs to residences and businesses, not those offered to IXCs to complete an intrastate long-distance call. For example, "local service offering[s]" include "single party voice-grade service," "911 or enhanced 911 access," and "a white pages and directory assistance listing." Minn. R. 7812.0600, subp. 1(A), (B), (G). All of these services exist for the benefit of the retail "customer" or "end-user": an IXC purchasing switched access has no need for "access to directory assistance, directory listings, and operator services" or "blocking capability." *Id.*, subp. 1(D)-(E).[9] Indeed, it would be strange if the "switched access" provided to an IXC truly were a "local service" such that AT&T would be obliged by the "required services" language in Rule 7812.0600 to provide 911 access and phone books to MCI. Rather,

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8 "Basic local service" is also defined to mean "the services required under part 7812.0600 and any other services or terms determined by the commission to be integral to the basic communications, health, privacy, or safety needs of *customers*." Minn. R. 7812.0100, subp. 8 (emphasis added). Again, this linkage between "local services" and persons using telecommunications services on a "retail" basis shows that the term does not include "switched access" service.

9 "End-user" is also a defined term that refers exclusively to persons "requesting, receiving, or using telecommunications service on a retail basis." Minn. R. 7812.0100, subp. 18.

"local services" can only be understood in the context of the relationship between CLECs and their customers, not other carriers.

Second, the burdens Rule 7812.0600 imposes on a provider offering "local service" highlight that the term does not include "switched access" sold by one provider to another. A "local service provider" must "provide its local services on a nondiscriminatory basis * * * to *all customers* who request service and *whose premises fall* within the carrier's service area." Minn. R. 7812.0600, subp. 3 (emphasis added). Even apart from its use of the term "customers," which identifies only "retail" purchasers, the reference to "premises" falling "within" a "service area" is indicative of what "local service" means: the term refers to what a CLEC must offer a residence or a business because it is the location of their premises that trigger the service requirement. The term does not refer to what a CLEC provides to an IXC because the "premises" of an IXC are irrelevant for purposes of "switched access."

Third, the selective use of the term "local services" in the Rules helps to differentiate between services provided to "end-users" and services offered by CLECs to IXCs. The rules do not use the term "local services" to describe the latter. For example, the rule imposing "[g]eneral [s]ervice [q]uality [r]equirements" discusses the standards for "[s]ervice to end-users" in one subpart and discusses the quality standards for "[i]ntercarrier agreements" in a separate subpart. *Compare* Minn. R. 7812.0700, subp.1 *with id.* subp. 2. The "end-user" subpart mentions "local services provided by a local service provider," whereas the term "local service" appears nowhere in the subpart addressing quality standards for intercarrier agreements. If the term "local service" actually covered services offered by one carrier to another, the term would appear in the rules governing agreements between carriers, but it does not, emphasizing that "switched access" services are *not* "local services."

Fourth, Rule 7812.2210 echoes the same distinction, declining to use "local services" to describe intercarrier services. A large swath of the rule, including those portions cited by the MPUC as a basis for liability, impose a host of restrictions upon CLECs providing "local services." Minn. R. 7812.2210, subp. 2-7. However, the portion of the rule addressing interactions between providers contains no mention of "local service." *Id.* at subp. 10-11. For example, a segment of the rule requires a CLEC to "allow physical connections to its network and pay appropriate compensation for interconnection with and access to the networks of other local service providers." *Id.* at subp. 10. Similarly, the rules require a CLEC to "obtain prior commission approval before discontinuing a service or physical connection to a telephone company or a telecommunications carrier if end users would be deprived of service because of the discontinuance or disconnection." *Id.* at subp. 11. The "service or physical connection" provided to another telecommunications carrier is notably not described as a "local service." Indeed, this subpart exemplifies the distinction between services provided between carriers ("discontinuing a service or physical connection to a * * * telecommunications carrier") and services provided to retail customers ("if end users would be deprived of service").

The exclusion of intercarrier services from the meaning of "local services" finds its root in Chapter 237, which (when applicable) similarly distinguishes between services offered by carriers to other carriers and services offered by carriers to customers. For example, § 237.12 establishes a variety of requirements for "[s]ervice [c]onnections [b]etween [t]elephone [c]ompanies," such as standards for interconnection, discontinuance, and compensation. Yet, the statute does not anywhere describe such services as "local services." In particular, the statute addresses compensation for "the costs of local exchange facilities used in connection with long-distance phone telephone services," including "switching facilities," but does not describe such services as "local services." Minn. Stat. § 237.12, subd. 3(1).

In sum, under Minnesota law, "local services" do not include "switched access services" provided by AT&T to MCI. To the extent any ambiguity exists, Minnesota's application of *noscitur a sociis* controls: "a term that is capable of several meanings is defined by the words with which the term is associated." *Minch v. Buffalo-Red River Watershed Dist.*, 723 N.W.2d 483, 490 (Minn. Ct. App. 2006). Because the term "local service" is associated *only* with services offered to customers and end-users, it does not cover "switched access services" offered to IXCs.

Consequently, because the services at issue here are *not* "local services," § 237.035 exempts AT&T from the majority of Chapter 237. The MPUC thus erred by holding AT&T liable under Minn. Stat. §§ 237.07, 237.09, and 237.60. Related, AT&T cannot be held liable under the portions of Rule 7812 that address "local services." Minn. R. 7812.2210 subp. 5; *see* A9-11 (finding AT&T liable under Rule 7812.2210). Furthermore, as explained below (at 41-46), AT&T did not violate the two remaining statutes—Minn. Stat. §§ 237.74 and 237.121—that continue to govern AT&T's "switched access" charges.

B. The MPUC Erred In Concluding That AT&T Knowingly And Intentionally Violated Minnesota Law.

At a very minimum, the Department failed to prove that AT&T knowingly and intentionally violated statutes and rules that on their face do not apply to a CLEC such as AT&T. Even if AT&T's good-faith understanding of "local services" described above were not accurate—and the plain language confirms that it is correct—the Department did not demonstrate that AT&T knew its legal position was wrong but acted anyway. The MPUC erred by excusing the Department's failure of proof, and by replacing the "knowing and intentional" requirement with a strict liability regime that diverges from the legislature's will.

As a threshold procedural matter, the MPUC should not have upheld the ALJ's erroneous summary disposition ruling. The ALJ simply accepted the allegations in the Department's complaint as true, holding that AT&T's "actions were knowing and intentional because AT&T purposefully" entered into the AT&T Agreement. A62. The MPUC found "no flaw in this analysis" (A8), but the procedural breakdown is glaring: "[i]t is axiomatic that on a summary judgment motion a court may not weigh the evidence or make factual determination, but *must take the evidence in a light most favorable to the nonmoving party*." *Fairview Hosp. & Health Care Serv. v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337, 341 (Minn. 1995). The ALJ (and the MPUC) reversed this maxim, depriving AT&T of the opportunity to rebut the Department's assertions. The MPUC believed that the ALJ "had sufficient basis" to make a ruling on "the record then available" and that nothing "could un-prove the facts supporting a finding of knowing and intentional violations," but there were neither facts nor a record "then available," only allegations. A9.

Substantively, the Department failed to demonstrate that AT&T knew its actions were illegal. Under Minnesota law, an action is not "knowing and intentional" unless "the actor either has a purpose to do the thing or cause the result specified" *and* the actor has "knowledge of those facts which are necessary to make the actor's conduct" illegal. *In re Welfare of A.A.E.*, 590 N.W.2d 773, 775 (Minn. 1999). As AT&T explained to the ALJ and to the MPUC, it did not have as its purpose the violation of Minnesota law. Rather, it entered into the AT&T Agreement to settle other litigation disputes. Nor did AT&T know that an off-tariff contract, which concerned "switched access services," needed to be filed in Minnesota. A215-16; A472, 514-16, 542, 545-49 (Handal Test).

The MPUC rejected this argument, pointing to the testimony of the individual (Handal) who negotiated the AT&T Agreement. A8-9. But, the cited testimony relates only to AT&T's knowledge about "its tariffing obligation" and "whether the terms of the [AT&T Agreement] conformed to its tariffs." A9. These responses do not shed any light on the paramount questions regarding AT&T's knowledge of its ability to offer different rates in the AT&T Agreement and whether such an agreement had to be filed. For example, Handal did not testify that AT&T knew "switched access services" are "local services" pursuant to § 237.035 such that AT&T knew the majority of Chapter 237 applied. Nor did Handal testify that AT&T somehow knew a contract such as the AT&T

Agreement had to be filed with the MPUC. And Handal naturally did not testify that AT&T knew it was prohibited from offering "switched access service at a different rate" than its tariff because, as explained in more depth below (at 42-43), Minnesota law expressly permits CLECs to enter into agreements featuring rates other than those offered in tariffs. Minn. Stat. §§ 237.74, subd. 2-3, 237.121.

By invoking the principle that "every person conducting business in a state is presumed to know the state's laws" (A8), no matter the apparent lack of clarity in those laws, the MPUC's ruling transforms a "knowing and intentional" requirement into a strict liability provision. If the legislature had wished conduct itself to be sufficient for liability, it would not have inserted "knowing and intentional" language into the statute. But it did, and the extra burden of proof incumbent on the Department assumes added significance where statutes and rules appear to define "local services" so as to exclude "switched access service," leaving AT&T with the well-grounded impression that the bulk of Chapter 237 did not govern the AT&T Agreement.

III. AT&T Complied With All Applicable Provisions In Chapter 237.

The MPUC's liability decision is flawed because AT&T complied with § 237.74 and § 237.121—the only two provisions in Chapter 237 that applied to AT&T—and the Department failed to prove otherwise. In essence, these two provisions create tariff filing and anti-discrimination requirements for telecommunications carriers. Because AT&T provided services in accordance with the AT&T Agreement, which it did not have to file, and the Department failed to prove that reduced rates in the agreement constituted "unreasonable discrimination," AT&T did not knowingly or intentionally violate either statute.

A. AT&T Fulfilled Its Obligations To MCI Contained In The AT&T Agreement, Which Minnesota Law Did Not Require AT&T To File.

The MPUC's erroneous decision that AT&T violated the filing and compliance requirements in § 237.74 and § 237.121 is undermined by the distinction between a tariff and an off-tariff contract and the requirements for each.

First, the MPUC overlooked a crucial distinction in § 237.74 between "tariffs" and off-tariff pricing arrangements. Section 237.74 requires "[e]very telecommunications carrier" to keep on file "a tariff or a price list for each service * * * containing the rules, rates, and classifications used by it." Minn. Stat. § 237.74, subd. 2. There is no dispute that AT&T maintained a tariff on file with the MPUC for the services it offered, including the switched access services offered to IXCs. A8. However, the MPUC erred in ruling that § 237.74 required AT&T to file an off-tariff *contract.*

The MPUC reached this conclusion because it disregarded the distinct filing requirements (or lack thereof) for a "tariff" versus a "contract." Minnesota law *expressly* permits CLECs to enter into off-tariff contracts, but does not require such unique pricing contracts to be filed with the MPUC. Minn. Stat. § 237.74, subd. 2; *id.* at subd. 3 ("prices unique to a particular customer or group of customers may be allowed for services when differences in the cost of providing a service or a service element justify a different price for a particular customer or group of customers"). Other provisions of Chapter 237 reflect the legislature's desire to permit the off-tariff pricing contained in the AT&T

Agreement. *See* Minn. Stat. §§ 237.121(a)(4) (a "telecommunications carrier" must provide services "in accordance with its applicable tariffs, price lists, *or contracts*") (emphasis added); 237.071 ("prices unique to a particular customer or group of customers may be allowed for noncompetitive services and for services subject to emerging competition").

However, in terms of filing, § 237.74 mandates only the filing of "tariffs" and "price lists." Whereas the legislature plainly imposed a filing requirement for tariffs in subdivision 1, it allowed off-tariff pricing without imposing a concomitant filing requirement in subdivisions 2 and 3. Had the legislature wished to include "contracts" in subdivision 1, or inserted a filing requirement for off-tariff contracts into subdivisions 2 or 3, it could have done so.

The legislature plainly understood how to distinguish between a tariff and a contract when it wanted to. In § 237.121, the legislature separately listed "tariffs," "price lists," and "contracts." Minn. Stat. § 237.121(a)(4). Had the legislature sought to require carriers to file off-tariff "contracts," it could have nestled the word "contract" next to "tariffs" and "price lists" in § 237.74. However, it did not include such language, and it is not the province of this Court to make legislative adjustments. *Green Giant Co. v. Comm'r of Rev.*, 534 N.W.2d 710, 712 (Minn. 1995) ("We will not supply that which the legislature purposefully omits or inadvertently overlooks"); *Hagerty v. Hagerty*, 281 N.W.2d 386, 389 (Minn. 1979) ("extensions of statutory provisions are to be made by the legislature rather than the courts").

By ruling that AT&T knowing and intentionally violated Minnesota law, the

MPUC (and the ALJ's order it incorporated) confused the filing of a tariff, which is required by statute, with the filing of a contract, which is not. For example, the MPUC's discussion of AT&T's knowledge revolved around its awareness of Minnesota's laws for *tariff* filings. A7-9. However, knowledge that it must file "tariffs"—an obligation with which AT&T indisputably complied—has no bearing on whether AT&T "knew" it had an obligation to file an "off-tariff" contract, a requirement that appears nowhere in the pertinent statutes.

Second, and related, the MPUC erred in ruling that AT&T violated § 237.121 because the Department never alleged that AT&T failed to adhere to its contract with MCI. Minnesota law prohibits a telecommunications carrier from engaging in certain practices, including failing "to provide a service, product, or facility to a telephone company or telecommunications carrier in accordance with its applicable tariffs, price lists, *or contracts*." Minn. Stat. § 237.121(a)(4) (emphasis added). There was no violation of § 237.121, however, because AT&T adhered to its contract with MCI, and the Department has never claimed otherwise. AT&T complied with § 237.121 because it provided services in accordance with the AT&T Agreement. The ALJ and the MPUC ruled against AT&T because the AT&T Agreement varied from its filed tariff (A58-59), but implementation of such an agreement does not violate Minnesota law, which expressly permits off-tariff contracts.

B. The AT&T Agreement Was Not "Unreasonably Discriminatory."

The order below must be reversed for an additional reason: the Department did not prove that the rates for "switched access charges" in the AT&T Agreement violated

Minnesota's prohibitions on "unreasonable discrimination." Minnesota law states that "[n]o telecommunications carrier shall offer telecommunications service within the state upon terms or rates that are *unreasonably discriminatory*." Minn. Stat. § 237.74, subd. 2 (emphasis added). The emphasized language is critical: § 237.74 does not bar all discrimination in rates, but rather only "unreasonab[e]" discrimination, a crucial distinction that the MPUC has recognized in the past. *See, e.g., In the Matter of the Introduction of Several Pricing Options by GTE Communications Corporation*, 1999 Minn. PUC Lexis 3, at *7 (Minn. PUC Jan. 29, 1999) ("to the extent that [the charging of different rates] is discrimination, it is not *unreasonable* discrimination as prohibited by Minn. Stat. § 237.74, subd. 2"). It is insufficient to show simply that a carrier charged different parties different rates—Minnesota law expressly permits such discrimination—and § 237.74 targets only "unreasonable" discrimination. The Department made no effort to satisfy its burden of proving that the rates in the CLEC agreement constituted *unreasonable* discrimination. Instead, it simply asserted that because an off-tariff contract existed and was not filed, the discrimination was unreasonable.

The ruling of the MPUC (along with the ruling of the ALJ) overlooked this failure of proof, and suffers from two key flaws. *First*, the MPUC held that AT&T violated § 237.74 based on its interpretation of Rule 7812.2210. A10; A36-37. However, 7812 governs "local services" only, and the rule is inapplicable to a agreement concerning "switched access services." *See supra* 31-37.

Second, the MPUC assumed erroneously that the failure to file an off-tariff contract means that the difference between the rates in the contract and those in the tariff are *per se* unreasonable. Section 237.74 does not support the MPUC's logical leap; the legislature treated the filing and discrimination requirements separately, placing them in different subsections. Simply because a rate is not filed does not mean it is discriminatory, let alone unreasonably discriminatory. Because the Department did not present any evidence to support its claims that AT&T violated § 237.74, subd. 2—let alone that AT&T knowingly and intentionally violated the provision—the liability ruling against AT&T fails as a matter of law.

CONCLUSION

For the reasons explained above, the MPUC's Order should be reversed.

Dated: March 31, 2008

Respectfully submitted,

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AFFIDAVIT OF SERVICE

Jeffrey A. Berger, an attorney admitted *pro hac vice*, being first duly sworn, states that in the city of Washington, District of Columbia, he served the proper number of copies of the foregoing, Relator-Appellant's Opening Brief (with Addendum) and Separate Appendix, upon all attorneys listed below, by sending such documents via UPS on March 31, 2008.

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this 31st day of March, 2008

Notary Public

DAVID ROBRECHT
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My Commission Expires March 14, 2011

CERTIFICATE OF COMPLIANCE

Jeffrey A. Berger, counsel for the Relator-Appellant, hereby certifies that this brief complies with the type-volume limitations contained in Minn. R. Civ. App. 132.01, subd. 3(a)(1) because it contains 12,737 words as counted by the word-processing software (Microsoft Word) used to generate this brief.