

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

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

Jeanne M. Cochran, Asst. Attorney General
 OFFICE OF THE ATTORNEY GENERAL
 1100 Bremer Tower
 445 Minnesota Street
 St. Paul, MN 55101-2131
 (651) 296-2106

Lori Swanson, Attorney General
 OFFICE OF THE ATTORNEY GENERAL
 Suite 102, State Capitol
 75 Rev. Martin Luther King, Jr. Blvd.
 St. Paul, MN 55155

*Attorneys for Respondent-Appellee
 Minnesota Public Utilities Commission*

Theodore A. Livingston (Chi)
 John E. Muench (Chi)
 Jeffrey A. Berger (DC) (admitted *pro hac vice*)
 MAYER BROWN LLP
 1909 K Street, N.W. / 71 S. Wacker Dr.
 Washington, DC 20006 / Chicago, IL 60606
 (202) 263-3855 / (312) 701-7180

Letty S. Friesen
 AT&T LAW DEPARTMENT
 2535 East 40th Avenue, Room B1201
 Denver, CO 80205
 (303) 299-5708

William E. Flynn (#0030600)
 Meghan M. Elliott (#0318759)
 LINDQUIST & VENNUM P.L.L.P.
 4200 IDS Center
 Minneapolis, MN 55402
 (612) 371-3211

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

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INTRODUCTION

The MPUC's response fails to rehabilitate the erroneous ruling below. There is no dispute that the MPUC's authorization to assess a penalty expired nearly a year before the MPUC reached a penalty ruling in October 2007. The MPUC looks to Minnesota's general savings statute (§ 645.35) for rescue, but it does not provide deliverance: the statute only governs "repeals," and the legislature never "repealed" § 237.462. Instead, it enacted a single statute with a sunset provision. Even if a sunset provision could be deemed a "repeal," § 645.35 does not apply because the agency has no vested right to levy a penalty and it did not commence its proceeding "under or by virtue" of § 237.462. Moreover, applying the law as it existed when the Department commenced its proceeding confirms the MPUC's lack of authority because § 237.462 expressly stated it would expire in August 2006. The MPUC's improper weighing of the § 237.462 factors only compounds the illegality of its ruling.

Apart from its unauthorized penalty ruling, the MPUC incorrectly held AT&T liable for several provisions of Chapter 237 from which it is exempt given that "switched access services" are not "local services." The statute does not define "local services," no matter the MPUC's attempt to cobble together inapplicable provisions of Chapter 237 to form a definition of the term that encompasses "switched access services." By contrast, the MPUC's rules plainly define "local services" as retail services separate and apart from wholesale "switched access services" offered by one provider to another. The MPUC offers an array of reasons why the language of the rules should not be read plainly, but none are availing. Because AT&T did not sell "local services" to MCI, the

MPUC erred in finding AT&T liable for a knowing and intentional violation of inapplicable statutory provisions.

AT&T adhered to the only two sections of Chapter 237—§ 237.74 and § 237.121—that governed its provision of “switched access services” to MCI. As AT&T explained in its opening brief, the MPUC erred in finding AT&T liable under these statutes because (1) no statute requires AT&T to file unique, or “off-tariff,” rates with the MPUC; (2) AT&T offered rates in accordance with its filed tariffs *and* its contract with MCI; and (3) the Department did not prove that any *unreasonable* rate discrimination existed. The MPUC now asks this Court to alter the language in § 237.74 and § 237.121 and to overlook the Department’s failure to meet its burden of proof, but the Court should decline the invitation and instead reverse the MPUC’s legally incorrect decision.

ARGUMENT

I. The MPUC Lacked The Authority To Levy The \$552,000 Penalty.

The MPUC should not have assessed a penalty against AT&T because it did not have the power to do so, and § 645.35 fails to revive the MPUC’s authority.¹ In general, a tribunal must apply the law as it exists at the time of ruling. AT&T Br. 15. The MPUC invokes § 645.35 to counter this baseline rule, but § 645.35 addresses “repeals”—the

¹ This Court should disregard the MPUC’s sleight of hand with the standard of review. The suggested “presumption of correctness” (at 11) is a mirage; this Court reviews the MPUC’s legal conclusions *de novo*. *St. Otto’s Home v. Minn. Dep’t of Human Services*, 437 N.W.2d 35, 39-40 (Minn. 1989) (for “questions of law, reviewing courts are not bound by the decision of the agency and need not defer to agency expertise”).

rescission of a first statute by a second statute. *Id.* at 15-18.² There was no such repeal here. Rather, a single statute containing a sunset provision expired before the MPUC ordered AT&T to pay \$552,000. And, as AT&T explained, even if the expiration of § 237.462 somehow constituted a “repeal,” § 645.35 does not apply because the MPUC has no right to levy a penalty. *Id.* at 18-23. The MPUC’s response is ineffective, as it relies on inapposite case law and faulty logic (MPUC Br. 36-44). Moreover, even if § 237.462 still controlled, the MPUC has failed to point to *substantial evidence* that justified the penalty determination.

A. A Statutory Repeal Differs From An Expiration-By-Sunset.

Section 645.35 is inapplicable pursuant to its plain language because the legislature mandated § 237.462’s expiration when it enacted the provision in the first instance. The word “repeal” refers to the “abrogation of an existing law” by a second law. BLACK’S LAW DICTIONARY 1076 (8th ed., abridg. 2005). No repeal occurred here: the Minnesota legislature never enacted a second statute that rescinded the first. Instead, there was one expression of the legislature’s will—a single statute with an expiration date. When August 1, 2006 came to pass, § 237.462 ceased to have legal effect *without* further legislative action.

Courts regularly recognize such a distinction between a “repeal” and a sunset

² The MPUC’s suggestions of waiver (MPUC Br. 10 n.3, 20 n.7, 39 n.19) are misplaced: AT&T challenged the invocation of § 645.35 and the applicability of § 237.035’s exemption in the proceedings below. AT&T Response 13-17 (May 12, 2006) (Admin. Rec. No. 123); AT&T Final Reply Br. 2-5 (Apr. 10, 2007) (Admin. Rec. No. 215); AT&T Exceptions Br. 16-19, 21-24 (June 21, 2007) (Admin. Rec. No. 221).

provision. AT&T Br. 17-18. The MPUC suggests that the cases cited by AT&T are inapplicable because they did not involve a savings statute (at 43), but the MPUC misses the point. Regardless of whether those courts addressed savings statutes, they treated an expiration-by-sunset differently from a repeal. It is hardly “illogical[]” (*id.* at 39) to distinguish between a statute that terminates because of a second legislative action and a statute that self-destructs by virtue of language inserted when the legislature first acted.

Indeed, this distinction makes perfect sense as applied to § 645.35. Minnesota law “saves” certain “repealed” provisions because of concerns that the second enactment would retroactively impinge upon a right granted by the first. Minn. Stat. § 645.35. Such concerns do not exist where the legislature has acted once, *prospectively*. *Cf. Wichelman v. Messner*, 250 Minn. 88, 107 (1957). The MPUC may wish to expunge the word “repeal” from § 645.35, but this Court cannot engage in such editing. *In re Civil Commitment of Stone*, 711 N.W.2d 831, 837 (Minn. Ct. App. 2006) (“we may not, in construing a statute, ignore its plain language”).

The MPUC equates a sunset and a repeal by distorting *Granville v. Minneapolis Public Schools, Special School District No. 1*, 732 N.W.2d 201 (Minn. 2007). *Granville* concerned Minn. Stat. § 645.36—a separate provision that governs the revival of defunct statutes and states that “when a law is repealed which repealed a former law, the former law shall not thereby be revived, unless it is so specifically provided.” *Granville* analyzed a “bookkeeping” statute that rescinded over 300 laws, including the expiration provision of a tort immunity law. *Id.* at 205. Because the “bookkeeping” statute did not

expressly revive the immunity statute, the expiration date in the immunity statute controlled. *Id.* at 206-07.

The Court *did not* however, hold that “the term ‘repeal’ necessarily includes the ‘sunset’ or expiration of law.” MPUC Br. 39. Instead, the Court ruled that “*for revival purposes*, there is no meaningful difference between a law that has been repealed and one that has expired.” 732 N.W.2d at 205 (emphasis added). The MPUC’s selective omission of the Court’s proviso twists *Granville*’s holding: the Court did not generally discuss the differences between a “repeal” and a sunset. While there may be no “meaningful difference” between a repeal and a sunset provision with regard to § 645.36—because requiring the legislature to specify its intent to revive a defunct statute should not turn on how that statute became defunct—there is a clear distinction between a “repeal” and a “sunset” for purposes of § 645.35. If anything, the revival statute highlights the legislature’s desire not to permit deceased statutes to play the Lazarus role the MPUC envisions for § 237.462: *Granville* confirms that when the legislature permits a statute to expire, the provision remains inoperative unless there is a clear desire to revive it, and there was none here.

At the core of the MPUC’s response lies a bold request that this Court ignore the legislature’s will. When it enacted § 237.462, the legislature mandated that the penalty provision expire unless the legislature later changed its mind. The legislature in fact changed its mind twice, extending the life of § 237.462 in 2004 and 2005. AT&T Br. 16 n.2 (tracing history of § 237.462). But, then it let time take its course, and § 237.462 expired in August 2006. To extend the life of § 237.462 would transgress the provision

as originally enacted in 1999 and subsequently amended. *Pususta v. State Farm Ins. Cos.*, 632 N.W.2d 549, 552 (Minn. 2001) (“Our primary objective in interpreting statutory language is to give effect to the legislature’s intent as expressed in the language of the statute.”).

The MPUC suggests that the absence of any disclaimer of § 645.35 in § 237.462 demonstrates that the legislature meant for the savings provision to apply beyond its expiration date. MPUC Br. 42-43 (“the Legislature has not manifested an intent that Minn. Stat. § 645.35 not apply”). This is a bizarre argument: it would have been nonsensical for the legislature to have cited a statute relating to repeals by a later legislative act after it just enacted a statute set to self-destruct on a particular date *with no further legislative activity*. The failure to mention § 645.35 proves AT&T’s point: there was no need for the legislature to cite § 645.35 because the legislature could “save” § 237.462 by simply reenacting the statute. Indeed, that is the whole point of a sunset provision: to mandate “the automatic cessation” of a statute unless it is “reauthorized by the legislature.” Rebecca M. Kysar, *The Sun Also Rises*, 40 GA. L. REV. 335, 337 (2006). The legislature declined to take such action here, and accordingly the MPUC lost the power to penalize AT&T in August 2006, well before it assessed a \$552,000 penalty.

B. Section 645.35’s “Proceedings Commenced” Language Fails To Save § 237.462 From Expiration.

Regardless of whether a sunset provision can somehow be equated with a “repeal,” § 645.35 does not apply here. Section 645.35 protects vested rights, and the desire to obtain a particular remedy does not constitute a “vested right.” AT&T Br. 18-

20. The MPUC in particular, as a creature of legislative will, has no vested right to levy a penalty because the legislature is always free to impair its own administrative agency's rights. *Id.* at 20-21, citing, *e.g.*, 16B AM JUR. 2D CONST. LAW § 697 (2007).

The MPUC does not dispute that it lacks a vested right to assert a penalty or that it has only "the authority that the Legislature has provided to it." MPUC Br. 43. This should end the inquiry, but the MPUC rejects that "vested rights" are a concern, even though this the appeal centers on the agency's ability to levy a penalty. The MPUC contends instead that "the savings provisions of Section 645.35 apply to a 'proceeding commenced' regardless of whether vested rights are involved." *Id.* at 45. Accordingly, the MPUC argues, § 645.35 preserves the penalty authority because the Department filed its amended complaint before August 1, 2006. The MPUC's gambit fails because (1) the Department did not commence proceedings "under or by virtue" of § 237.462; and (2) even if it did, § 237.462 as it existed when the Department initiated its proceeding expressly stated that it would cease to have legal effect in August 2006.

First, the MPUC's argument rests on a truncated reading of § 645.35. While it emphasizes the "proceeding commenced" language, it ignores the modifying clause that follows: the proceeding must be commenced "under or by virtue of the law repealed" in order for § 645.35 to apply. Section 237.462 does not fit into this pigeonhole: while it once gave the MPUC the "[a]uthority to issue penalty orders" (Minn. Stat. § 237.462 (2005)), it nowhere authorized the commencement of a proceeding. Indeed, § 237.462 expressly cross-referenced Minn. Stat. § 237.081, which *does* provide for the commencement of a proceeding. *See* Minn. Stat. § 237.462, subd. 1 (2005) ("After a

proceeding under section 237.081, the commission may issue an order administratively assessing monetary penalties”); *cf.* Minn. Stat. §§ 237.02, 237.05, 216A.07 (permitting the MPUC or the Department to commence various proceedings). Whereas a proceeding may be commenced “under or by virtue” of § 237.081, the MPUC did not commence a proceeding “under or by virtue” of § 237.462, but rather relied upon this provision solely to authorize the assessment of a monetary penalty.

The MPUC recognizes this distinction in its brief. It repeatedly describes § 237.462 as authorizing the MPUC to assess a penalty. *See, e.g.*, MPUC Br. 14 (“The Commission retained authority to impose a penalty pursuant to Minn. Stat. § 237.462”). It does not, however, describe § 237.462 as giving regulators the power to commence a proceeding; it fails to state anywhere in its brief that it commenced its action against AT&T “under or by virtue of” § 237.462. Savings clauses “must be strictly construed”—they “will not be held to embrace anything not fairly within its terms”—and a penalty assessed under § 237.462 does not fit within the confines of § 645.35’s “proceeding commenced under or by virtue of” language. 82 C.J.S. *Statutes* § 431 (2008).

Second, even if the Department commenced its proceeding “under” § 237.462, the savings statute does not preserve the MPUC’s penalty authority because the law in existence at the time of suit contained an expiration date. The MPUC relies heavily on *State v. Chicago Great Western Ry. Co.*, 222 Minn. 504 (Minn. 1946), but that case exposes the fatal weakness in the MPUC’s argument. MPUC Br. 36-37. In *Chicago Great Western*, the legislature repealed a penalty provision several months after the State initiated suit. *Id.* at 507. Had the legislature not specifically disabled the application of

§ 645.35 when it passed the second statute repealing the first, the suit “would have proceeded and been concluded under the laws *in existence* when the suit was initiated.” *Id.* at 510 (emphasis added).

Chicago Great Western is inapposite because the original law “in existence” in that case did not contain an expiration date. By contrast, the law “in existence” when the Department initiated suit (in October 2005) provided that any penalty powers would expire on August 1, 2006. To apply § 237.462 *as it existed in October 2005* is to conclude the MPUC lacked the penalty power in October 2007; any other result would ignore the expiration date. *See State ex rel. Pearson v. Probate Court of Ramsey County*, 205 Minn. 545, 555 (1939) (“statutes must be so construed as to give effect to every section and part”).

The MPUC’s focus on the absence of citation to the savings statute has it backwards. *See, e.g.*, MPUC Br. 36 (“Section 645.35 keeps alive penalty authority * * * unless the Legislature specifically intends that [§ 645.35] not apply”). Section 645.35 does not apply for the same reason that the legislature had no reason to mention it: the legislature enacted one statute that temporally limited the penalty authority of the MPUC. When the date of reckoning arrived, the authority vanished. To revive that authority because the legislature did not disclaim § 645.35 would run counter to the legislature’s purpose in enacting § 237.462 in the first place.³ Had the legislature wanted § 237.462 to

³ The MPUC suggests that the legislature’s general “intent through Minn. Stat. § 645.35” should trump its specific intent to enact § 237.462 with a sunset provision (MPUC Br. 43), but “widely-accepted rules of construction dictate that specific

survive without forcing future legislatures to reenact it, it would not have included the sunset provision.

While the MPUC attempts to minimize its role as a creature of the legislature (at 43-44), it cannot disclaim that it “has only those powers given to it by the legislature.” *Peoples Nat. Gas Co., Div. of Inter-North, Inc. v. Minn. Pub. Util. Comm’n*, 369 N.W.2d 530, 534 (Minn. 1985). This impacts the applicability of § 645.35, which turns on whether private or public rights are implicated. 82 C.J.S. *Statutes* § 431 (2008) (savings provisions “are inapplicable to the repeal of a statute merely declaring a public nature”); *cf. Holen v. Minneapolis-St. Paul Metropolitan Airports Comm’n*, 250 Minn. 130, 136 (1957) (“a public right may always be modified or annulled by subsequent legislation without contravening the due process clause”). The legislature can give and take away the MPUC’s penalty authority at will, and here, it permitted the MPUC to assess fines only for a limited period of time. Once the pertinent date arrived, the legislature’s intent to terminate that penalty authority took hold, regardless of when the Department commenced the proceeding.

C. The MPUC’s Penalty Was Not Supported By Substantial Evidence.

Even if the MPUC had the authority to impose a penalty, the lack of substantial evidence to support the \$552,000 penalty assessed requires reversal. Of the 9 factors in § 237.42, the MPUC correctly ruled that 3 factors counseled against the imposition of a penalty—only a single violation was at issue, AT&T had no history of past violations,

provisions control over general provisions.” *Mumm v. Mornson*, 708 N.W.2d 475, 492 (Minn. 2005).

and AT&T took corrective action. AT&T Br. 24. The MPUC erred with regard to the remaining six factors because it accepted the Department's conjecture over AT&T's actual evidence. *Id.* at 24-29.

The MPUC's response relies on the same type of unproven speculation that undercuts the ruling below. *First*, the MPUC contends that "AT&T acted with careless disregard for the law" (MPUC Br. 45), but cites testimony showing only that AT&T knew it provided an off-tariff rate to MCI. Minnesota permits AT&T to enter into contracts containing off-tariff rates without requiring that those contracts or rates be filed (AT&T Br. 42-44; *infra* 21-23), and thus AT&T neither had a "knowing awareness" of a duty to file such rates nor did it make a "deliberate, conscious, and intentional choice to disregard this duty." *Garrity v. Kemper Motor Sales*, 280 Minn. 202, 207 (1968). As Mr. Handal testified, he was "simply unaware that there might be some obligation to make such a filing," a position inconsistent with a deliberate or conscious attempt to skirt the law. A215.⁴ The Department ultimately failed to adduce any evidence showing that AT&T knew it had to file the rate in the AT&T Agreement—as opposed to filing a tariff, which AT&T indisputably did—but AT&T then deliberately disregarded its responsibilities.

Second, AT&T countered the Department's speculation regarding the alleged violation's harm with evidence that no harm resulted. AT&T Br. 26-27. The MPUC

⁴ Handal did not "conced[e]" that he neglected "to determine whether the MCI rate should be filed" (MPUC Br. 46). Rather, he testified that he was not advised that a failure to file the rate in the AT&T Agreement would violate Minnesota law. A526.

claims that “evidence in the record shows that AT&T’s violations were grave” (MPUC Br. 46), but cites only testimony that violations of filing requirements *in the abstract* may “harm the integrity of the regulation process.” This testimony came from a witness who conceded that he lacked any “direct evidence” of harm. A339. AT&T, by contrast, presented the testimony of Dr. Lehr, who explained that *in this precise situation*, there was no competitive harm. No evidence, for example, indicated that prices or services changed as a result of the rate in the AT&T Agreement or that competitors suffered any harm. A554-55. Dr. Lehr based his conclusions not on conjecture, but on such metrics as the “number of minutes that were transacted under the contract,” AT&T’s “share of traffic,” and AT&T’s relative lack of “market power.” A590-91, A232-43.

Third, the Department did not show that “AT&T realized a significant economic benefit” from its arrangement with MCI. MPUC Br. 47-48. Even when considering the combination of the AT&T Agreement (with AT&T as the CLEC selling switched access to MCI) and the MCI Agreement (with the roles reversed), the resulting financial impact “was revenue neutral to AT&T.” A216. The MPUC’s disregard of this evidence is driven by a misconception that because the two agreements “were in AT&T’s interest,” they produced a “economic benefit” to AT&T. MPUC Br. 48. As the undisputed evidence demonstrates, AT&T entered into the two agreements in order to resolve legal disputes with MCI that arose out of a separate bankruptcy proceeding. A547-49. There is no support for the MPUC’s conjecture that “AT&T’s motivation for these bi-lateral deals was to realize savings for its long distance operations.” MPUC Br. 47. While a desire to avoid the risks of further litigation in the bankruptcy court and to resolve its

disputes with MCI motivated AT&T, the unrebutted evidence indicates that AT&T did not enjoy a direct economic benefit from its agreements with MCI.

In sum, the MPUC's penalty ruling—to the extent there existed any authority for its issuance—is not buttressed by substantial evidence. Capriciousness as to the penalty amount further mars the ruling: the MPUC never justified the staggering gap between the \$552,000 penalty assessed against AT&T and the \$400-\$5000 penalties assessed against other CLECs that allegedly committed the exact same infractions. While a distinction between a settlement payment and a penalty imposed may account for some of the difference (MPUC Br. 47-48), it does not explain a hundred-fold disparity.

II. AT&T Is Immune From The Bulk Of Chapter 237's Provisions Because Wholesale Switched Access Services Are Not Local Services.

The MPUC fundamentally erred by subjecting AT&T to liability under a host of statutory provisions from which it is exempt because switched access services are not “local services” under Minnesota law. The MPUC cannot (and does not) dispute that as a “telecommunications carrier,” AT&T is exempt from nearly all of Chapter 237 except to the extent it provides “local services.” AT&T Br. 30-31, citing Minn. Stat. § 237.035(a), (e). Although Chapter 237 does not define “local service,” the MPUC's rules expressly define “local service” as a service offered to a retail “customer” or “end-user.” *Id.* at 31-39. To demonstrate this, AT&T cited not only the definition of “local service” in Minn. R. 7812.0100, subp. 33—which differentiates between “local services” offered to retail customers and “switched access services” offered on a wholesale basis to other carriers—but four other related rules that confirm “switched access services” are not “local

services.” AT&T Br. 34-37. For example, the “local service offering[s]” described in Minn. R. 7812.0600, subp. 1 refer only to those services offered on a retail basis to a “customer” or “end user.” Because “switched access services” are not “local services,” § 237.035(a) exempts AT&T from all of Chapter 237, save for two provisions (Minn. Stat. §§ 237.74, 237.121) discussed below (*see infra* 21-25).

In response, the MPUC distorts various provisions in Chapter 237 and ignores its own rules, but ultimately fails to show that the “switched access services” at issue here constitute “local services.” The MPUC’s misconstruction of Chapter 237 begins with its incorrect statement that “the Legislature has explicitly provided in Chapter 237 that switched access is a local service.” MPUC Br. 20. The Legislature did no such thing: it did not define the term “local service” in either § 237.01 (the definition section of Chapter 237) or § 237.035 itself.

Unable to locate a definition of “local service” that simply does not exist, the MPUC rummages through Chapter 237, locates what it claims to be a definition of “local services” in § 237.773, and attempts to import it to § 237.035. As a threshold matter, § 237.773, which governs “alternative regulation for small telephone compan[ies],” is not applicable to AT&T, which is not a “telephone company,” let alone a “small telephone company.” It is unclear why the MPUC believes the segment of Chapter 237 dealing with “Alternative Regulation Plans” for “telephone companies” should govern a “telecommunications carrier” that is not operating pursuant to such a plan. Nor is it certain why any construction of “local service” that may appear in § 237.773 would control the scope of the exemption in § 237.035. Indeed, the legislature expressly

cabined the reach of the alternative regulation provisions, mandating that nothing in § 237.773 “is intended *in any way* to change or modify the definitions contained in section 237.01 or what constitutes the provision of telephone service under this chapter or other laws.” Minn. Stat. § 237.774 (emphasis added).

In any event, § 237.773 does not define “local service.” Rather, it mentions “local services” and “switched network access service” in connection with another statute, Minn. Stat. § 237.761. Section 237.773 allows “a small telephone company” to “change rates for local services except switched network access services, listed in section 237.761, subdivision 3, to reflect” various cost factors. Minn. Stat. § 237.773, subd. 3(b). Section 237.761, in turn, requires a telephone company’s alternative regulation plan to cover all “price-regulated services.” Minn. Stat. § 237.761, subd. 3(1), (3). Disregarding the cross-reference to § 237.761, the MPUC suggests that the “exception for ‘switched access service’ from ‘local services’ in Section 237.773 shows that switched access service is a ‘local service’ for purposes of Chapter 237.” MPUC Br. 20.

The MPUC stretches the language of § 237.773 too far because the cross-reference to § 237.761 undermines the definition the MPUC wishes to extract. The MPUC does not explain why the legislature would have equated local services with “switched access services” in § 237.773, yet treated those services differently in 237.761, where it clearly distinguishes “residential and business service for local calling” from “switched network access service.” If “switched access service” were truly the same as “local service,” there would be no need to list them in separate paragraphs in § 237.761.

Moreover, if § 237.773 defined “switched access services” as a type of “local service,” it would contradict other parts of Chapter 237 that distinguish between “local service” and wholesale “access” services offered to other carriers. For example, in § 237.60 the legislature differentiated between “local service,” “long-distance service,” and “access” services. Minn. Stat. § 237.60, subd. 4, cited at AT&T Br. 34. Similarly, § 237.12 refers to carrier-to-carrier services without any reference to such services as “local services.”

The MPUC’s search for a definition in § 237.773 proves fruitless. It seems particularly odd to invoke § 237.773—which applies only to “telephone companies”—where the distinction between “local services” and other services in § 237.035 applies only to “telecommunications carriers.” The legislature had little need to differentiate between “local services” and other services with regard to “telephone companies,” because such providers are subject to nearly *all* of Chapter 237 regardless of what services they offer. The MPUC mixes apples and oranges by extracting a meaning of “local services” from a provision that governs “telephone companies” and applying it to a provision that governs “telecommunications carriers.”

Without any language to support it, the MPUC offers the erroneous argument that the “ph[r]ase ‘local service’ distinguishes between a provider’s local and long distance service, not retail and wholesale service.” MPUC Br. 22. This argument rests on an unjustified leap of logic: the legislature’s decision to retain “much more limited scope of regulation for a telecommunication carrier’s long distance services,” does not somehow mean the term “local services” encompasses “switched access services.” *Id.* If the

Legislature sought to exempt a telecommunication carrier's long distance services from most regulation, as the MPUC suggests, it does not follow that the legislature would somehow subject the intercarrier service necessary to complete a long distance call to more regulation than long distance service itself.

In light of Chapter 237's silence, the MPUC's rules are the best indicator of the meaning of "local service." Barely noticeable in the MPUC's response is the recognition that Rule 7812.0100, subp. 33 *actually defines* the term. Rule 7812.0100, along with a bevy of other rules, plainly distinguish between local services, which are retail services offered to "end users," and "switched access services," which are wholesale services offered to other providers. AT&T Br. 31-37. Minnesota is not unique in this regard: it is common in the industry to make this retail-wholesale distinction. *See, e.g.* 47 C.F.R. § 69.2(m) ("End User means any customer of an interstate or foreign telecommunications service that is not a carrier"). The MPUC's response to the definition in the rules relies on two diversions, and neither suggests that "local services" include wholesale services.

First, the MPUC rests on the fallacy that "[b]ecause switched access service is essential to providing local telephone service and access to the local telephone network, switched access service" is a "local service." MPUC Br. 24. The MPUC, however, mistakes (1) a requirement that a local service provider afford a consumer equal access to all long-distance providers (*i.e.* the local service provider cannot permit a consumer to use one IXC, but not another) with (2) the technological process that makes the

completion of a long distance call possible.⁵ The first may be a part of a “local service” offering, but the second is not. AT&T Br. 33. Rule 7812.0600, subp. 1(C) codifies this distinction by separately describing (1) a consumer’s “equal access to interexchange carriers” and (2) an interexchange carrier’s subscription to a “local service provider’s” switched access service. Simply because “switched access services” may be essential to providing a “local service” does not mean that “switched access services” are themselves “local services” any more than an artery essential to the coronary mission is the same thing as the heart.⁶

Second, the MPUC requests that this Court defer to its purported interpretation of the term “local service.” MPUC Br. 23-25. The MPUC, however, exaggerates the two rulings it cites (*PrairieWave* and *McLeod*). In each, the agency did not expressly “hold” or “find” that switched access services were “local services.” Rather, the MPUC cited to § 237.035(e) in footnotes in the process of explaining the filed rate doctrine generally. *See, e.g., In re PrairieWave*, 2006 WL 1096791, at *2 & nn. 2-3 (Minn. P.U.C. Feb. 8, 2006). At most, the MPUC assumed that § 237.035(e)’s “local service” provision applied to “switched access services,” but there is no hint that the MPUC actually analyzed the issue raised here in either decision.

⁵ The MPUC (at 24) further confuses “access to the public switched network”— a consumer’s ability to make calls to points outside of his or her local exchange—with the services AT&T offered to MCI to permit the customer to enjoy that ability.

⁶ The MPUC similarly goes astray by suggesting that § 237.761’s listing of wholesale “switched network access service” as “essential for providing local telephone service,” means that “switched network access service” itself is a “local service.” MPUC Br. 22-23.

More significantly, the MPUC overstates the deference given to agency interpretations of unambiguous rules. This Court “will not defer to an agency’s interpretation of its own regulation when the regulation’s language is clear and capable of understanding.” *In re City of Annandale*, 731 N.W.2d 502, 512 (Minn. 2007). There is no ambiguity here: the MPUC defined “local service” in Rule 7812.0100 to include only retail services offered to end-users, not wholesale services offered to other providers. The remaining 7812 Rules similarly do not classify “switched access services” specifically or wholesale services generally as “local services.” Consequently, the Court should not defer to an interpretation of “local services” that conflicts with the plain language of the MPUC’s rules as promulgated.

Because “switched access services” are not local services, § 237.035 exempts AT&T from almost all of Chapter 237, and the MPUC concluded incorrectly that AT&T knowing and intentionally violated inapplicable provisions of Chapter 237. Even if all of Chapter 237 applies, the MPUC still erred by ruling against AT&T on a motion for summary disposition because it ignored the requirement that the Department prove a knowing and intentional violation.⁷ AT&T Br. 39-41. This procedural error was compounded by Department’s failure to show that AT&T had “knowledge of those facts

⁷ The MPUC disputes AT&T’s claim of a procedural violation by suggesting that the ALJ based its determination on “undisputed facts” established by the AT&T Agreement, AT&T’s switched access tariff, and the Department’s complaint. Complaints of course contain allegations—not “facts”—and the other documents cited by the Department contained no information about AT&T’s knowledge or intent.

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).

The MPUC misconstrues not only the case upon which it relies—*Claude v. Collins*, 507 N.W.2d 452, 456 (Minn. App. 1993), *rev'd on other grounds*, 518 N.W.2d 836 (Minn. 1994)—but also the testimony from AT&T's witnesses that the company acted in good-faith. The citation of *Claude* is odd: the statute at issue there did "not explicitly list intent as an element of a violation of its provisions," whereas Chapter 237 expressly placed a burden on the Department to prove a "knowing and intentional" violation. 507 N.W.2d at 256. Moreover, the *Claude* court affirmed a decision *not* to penalize some of the government officials because they acted in "good faith." *Id.* at 457.

AT&T similarly presented evidence that it acted in good faith. While Mr. Handal was aware of AT&T's "tariffing obligation," he did not know "switched access services" were somehow "local services" such that all of Chapter 237 would apply. While the MPUC emphasizes Handal's testimony that AT&T knew about the *tariff* filing requirement, it ignores Handal's testimony that he was not aware off-tariff rates needed to be filed for switched access services. As explained below (*see infra* 21-23), while tariffs need to be filed, a requirement with which AT&T complied, Minnesota law does not require the filing of off-tariff rates.

The MPUC claims that AT&T's argument "would reward companies that remain ignorant of the law" (at 32), but that is simply incorrect. The MPUC never produced evidence that AT&T *chose* to remain unknowledgeable about a set of laws, as opposed to following laws that on their face support AT&T's position. And AT&T does not seek

undue granularity in the knowledge requirement, as the MPUC suggests (at 32-33), but rather requests application of the guiding standard: the Department had to prove AT&T actually had knowledge that its actions were illegal. *See Welfare of A.A.E.*, 590 N.W.2d at 775. The MPUC's recommended standard, on the other hand, cannot be anything but strict liability because, under its formulation, a violation is knowing and intentional if it merely occurred no matter the basis for a corporation's actions. MPUC Br. 31. That is the essence of strict liability. Because the Department failed to meet its burden of proof on the knowing and intentional element, the MPUC's decision must be reversed even if the Court were to determine that "local services" include "switched access services." *Welfare of A.A.E.*, 590 N.W. 2d at 775.

III. AT&T Did Not Violate The Two Provisions of Chapter 237 That Apply.

The MPUC's response fails to bolster the ruling below that AT&T violated § 237.74 and § 237.121. These two statutes embody three separate requirements—(1) that AT&T file tariffs; (2) that AT&T comply with its tariffs and contracts; and (3) that AT&T not offer service at rates that are unreasonably discriminatory. The MPUC's ruling must be reversed because AT&T complied with all three. AT&T Br. 41-46.

A. AT&T Satisfied The Filing Requirement For Tariffs.

The MPUC recognizes that AT&T filed a tariff for its switched access services and concedes that Minnesota law permits providers to offer unique or special rates, but wishes to engraft onto § 237.74 a requirement that such unique rates be filed with the MPUC. MPUC Br. 16-19. Chapter 237 does not support such an interpretation because while it specifically permits providers to offer rates that do not appear in a tariff, it does

not impose a filing requirement for them. AT&T Br. 42-44. Subdivisions 2 and 3 of § 237.74, along with § 237.071, all contemplate that a telecommunications carrier will offer unique prices to a particular customer. *Id.*, citing, *e.g.*, Minn. Stat. § 237.74, subd. 3 (“prices unique to a particular customer or group of customers may be allowed”). Yet, none of those provisions requires that such prices be filed with the MPUC.

In suggesting that a filing requirement exists, the MPUC relies on semantics and requests a judicial rewrite of § 237.74. The MPUC first attempts some linguistic arbitrage; it accuses AT&T of misunderstanding the MPUC’s ruling because, in its view, the MPUC found that AT&T failed to file an off-tariff *rate*, not that it failed to file an off-tariff *contract*. AT&T Br. 17. No matter whether the Court considers the issue to involve the rate in the AT&T Agreement, or the Agreement itself, the result is the same: Minnesota law permits AT&T to offer MCI switched access services at a rate different than its tariffed rate without a separate filing regarding that rate.

The MPUC then asks this Court to take the forbidden step of inserting new language into § 237.74. Lacking citation, the MPUC asserts that the unique pricing provisions “remain subject to the filing requirement in subdivision 1.” MPUC Br. 17. However, those provisions neither mention a filing requirement for unique rates nor cross-reference the filing requirement in subdivision 1. To request this Court to insert a filing requirement in § 237.74 for unique pricing is to ask this Court to overstep its bounds: this Court may “not supply that which the legislature purposefully omits or inadvertently overlooks.” *Green Giant Co. v. Commissioner*, 534 N.W.2d 710, 712

(Minn. 1995). It is certainly not “absurd,” as the MPUC contends (at 17), to interpret the legislature’s “silence” for what it is: an absence of a filing requirement.

Similarly, the MPUC suggests that § 237.74 should include a filing requirement not only for “tariffs” and “price lists,” but also for rates in “contracts,” as that term is used in § 237.121. MPUC Br. 19 (“the ‘contract’ referred to in § 237.121 *can and must* include rates that have been filed with the State”). However, § 237.74 nowhere mentions the word “contract.” While § 237.121 describes three categories—tariffs, price lists, and contracts—§ 237.74 imposes a filing requirement for only two of the three. If the legislature wished to require carriers to file rates contained in off-tariff contracts, it could have included the word “contract” in § 237.74. But, it did not, and it “is not for the court to encroach upon the legislative field by an interpretation which would in effect rewrite a statute.” *McNeice v. Minneapolis*, 250 Minn. 142, 147 (1957) (the court is “required to take the statutes as we find them”).

B. AT&T Satisfied The Requirements Of § 237.121.

AT&T adhered to its tariff *and* its contract with MCI, and accordingly the MPUC improperly held AT&T liable for violating § 237.121. The legislature’s use of the disjunctive in § 237.121 cannot be ignored; the statute prohibits a telecommunications carrier from failing “to provide a service * * * in accordance with its applicable tariffs, price lists, *or* contracts.” Minn. Stat. § 237.121(a)(4) (emphasis added). The MPUC, however, reads the “or” right out of the statute, suggesting that if “AT&T provided MCI with access service at a” lower rate than its tariffed rate, it violated § 237.121 (MPUC Br. 26). AT&T offered services in accordance with its tariffs, and it provided a service in

accordance with its contract with MCI. Thus, it satisfied § 237.121 by providing a service in accordance with its tariffs *or* its contracts.

C. The MPUC Concedes There Was No Proof Of Unreasonable Discrimination.

The MPUC does not dispute the Department's failure to prove unreasonable discrimination, but rather rests on a *per se* theory. AT&T demonstrated in its opening brief that the Department made no attempt to prove that AT&T's alleged discrimination was "unreasonable," a key burden of proof given that § 237.74 bars only "rates that are unreasonably discriminatory." Minn. Stat. § 237.74, subd. 2. The MPUC concedes that no such proof was presented, and argues instead that the failure to file a unique rate is automatically discriminatory under Rule 7812.2210, subp. 5 (MPUC Br. 27-28). However, Rule 7812.2210 governs only "local services" and thus is inapplicable where wholesale "switched access services" are involved. *See supra* 13-21.

To the extent the MPUC intimates that the failure to file an off-tariff rate automatically makes that rate unreasonable under § 237.74, it ignores half that statute. The legislature intentionally created two separate requirements in § 237.74, placing them in two different subsections. Equating the failure to file a rate with unreasonable discrimination renders subdivision 2 superfluous, an interpretation this Court must avoid. *Astleford Equip. Co. v. Navistar Int'l Transp. Corp.*, 632 N.W.2d 182, 189 (Minn. 2001) (when "interpreting a statute, 'no word, phrase, or sentence should be deemed superfluous, void, or insignificant'"). The statute should be read naturally to require the Department to prove that the difference between the tariff rate and the rate in the AT&T

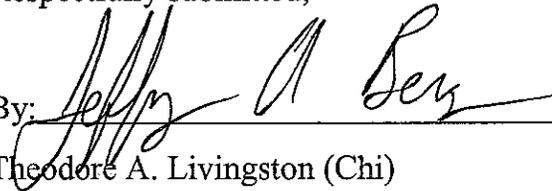
Agreement was unreasonable. Because the Department failed to shoulder this burden, the MPUC's ruling was fatally flawed.

CONCLUSION

For the reasons above, and those discussed in AT&T's opening brief, the decision of the MPUC should be reversed.

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Respectfully submitted,

By: 

Theodore A. Livingston (Chi)

John E. Muench (Chi)

Jeffrey A. Berger (DC) (admitted *pro hac vice*)

MAYER BROWN LLP

1909 K Street, N.W. / 71 S. Wacker Dr.

Washington, DC 20006 / Chicago, IL 60606

(202) 263-3855 / 312 (701)-7180

Letty S. Friesen

AT&T Law Department, Room B1201

2535 East 40th Avenue

Denver, CO 80205

(303) 299-5708

William E. Flynn (#0030600)

Meghan M. Elliott (#0318759)

LINDQUIST & VENNUM P.L.L.P.

4200 IDS Center

Minneapolis, MN 55402

(612) 371-3211

Attorneys for AT&T Communications of the Midwest, Inc.

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 Reply Brief, upon all attorneys listed below, by sending such documents via U.S. Mail, First Class, postage-prepaid on May 19, 2008.

Burl W. Haar
MINNESOTA PUBLIC UTILITIES
COMMISSION
Suite 350
121 East Seventh Place
St. Paul, MN 55101-2147

Lori Swanson
Minnesota Attorney General
MINNESOTA OFFICE OF THE ATTORNEY
GENERAL
Suite 102, State Capitol
75 Rev. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

Jeanne M. Cochran
Assistant Attorney General
MINNESOTA OFFICE OF THE ATTORNEY
GENERAL
1100 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101-2131

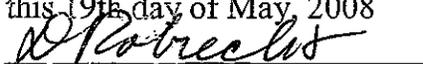
Linda Jensen
MINNESOTA OFFICE OF THE ATTORNEY
GENERAL
1400 Bremer Tower
445 Minnesota Street, Suite 900
St. Paul, MN 55101

Joan C. Peterson
QWEST CORPORATION
200 South Fifth Street, Room 2200
Minneapolis, Mn 55402

Larry Espel
GREENE ESPEL, P.L.L.P.
200 South Sixth Street, Suite 1200
Minneapolis, MN 55402

Lesley Lehr
Gregory Merz
GRAY PLANT MOOTY
500 IDS Center
80 South Eighth Street
Minneapolis, MN 55402


Jeffrey A. Berger

SUBSCRIBED AND SWORN to before me
this 19th day of May, 2008

Notary Public

DAVID ROBRECHT
Notary Public, District of Columbia
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 6,965 words as counted by the word-processing software (Microsoft Word) used to generate this brief.

A handwritten signature in black ink, appearing to read "Jeffrey A. Berger", written over a horizontal line.

Jeffrey A. Berger