

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,

vs.

Minnesota Public Utilities Commission,
Respondent-Appellee.

**BRIEF AND ADDENDUM OF RESPONDENT MINNESOTA PUBLIC
UTILITIES COMMISSION**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

1. Whether the determination of the Minnesota Public Utilities Commission (“Commission”) that AT&T Communications of the Midwest, Inc. (“AT&T”) violated several state filing and anti-discrimination laws by providing MCI with switched access service at a special rate that was not filed with the State in a tariff or otherwise is consistent with the law and supported by substantial evidence?

The Commission ruled in the affirmative.

Apposite Authority:

- Minn. Stat. §§ 237.74, 237.035, 237.07, 237.09, 237.773, 237.761, 237.121; Minn. R. 7812.2210
- 1995 Minn. Laws Ch. 156
- *PrairieWave Telecommunications Inc. v. AT&T*, 2006 WL 1096791 (Minn. P.U.C.)
- *Geo. A. Hormel & Co. v. Asper*, 428 N.W.2d 47 (Minn. 1988)

2. Whether the Commission properly determined that AT&T’s violations were knowing and intentional?

The Commission ruled in the affirmative.

Apposite Authority:

- *Claude v. Collins*, 507 N.W.2d 452 (Minn. Ct. App. 1993), *rev’d on other grounds*, 518 N.W.2d 836 (Minn. 1994)
- *In Re Kantel Communications*, 1995 WL 131319 (Minn. P.U.C.)
- *In re Henry Youth Hockey Ass’n., License No. 02795*, 511 N.W.2d 452 (Minn. Ct. App. 1994), *modified in part*, 559 N.W.2d 410 (Minn. 1994)

3. Whether the Commission properly determined that it retained authority to impose a penalty on AT&T for its knowing and intentional violations and whether the penalty was reasonable and supported by substantial evidence?

The Commission ruled in the affirmative.

Apposite Authority:

- Minn. Stat. §237.462 (2004); Minn. Stat. §645.35 (2007)
- *State v. Chicago Great Western Ry. Co.*, 222 Minn. 504, 25 N.W.2d 294 (Minn. 1946)
- *Granville v. Minneapolis Public Schools, Special School District No. 1*, 732 N.W.2d 201 (Minn. 2007)
- *In re Haugen*, 278 N.W.2d 75 (Minn. 1979)

STATEMENT OF THE CASE

Minnesota law requires rates for services provided by telecommunications carriers to be filed with the State in tariffs or price lists.¹ Minnesota law also prohibits unreasonable discrimination by carriers. AT&T seeks review of an October 26, 2007 Commission order finding that AT&T violated these laws. A1-20. AT&T also challenges the Commission's decision to impose a \$552,000 penalty on AT&T for its illegal conduct. A19.

This case originated when the Minnesota Department of Commerce ("DOC") filed a complaint alleging that AT&T violated laws by offering and providing switched access service to MCI at a unique rate that was not filed with the State. A1. The complaint was centered on an agreement between AT&T and MCI, the terms of which AT&T sought to keep hidden from the public. A4-A5.

The Commission referred the matter to the Office of Administrative Hearings for a contested case proceeding. A1. Subsequently, the DOC moved for summary disposition, which AT&T opposed. *Id.*

The Administrative Law Judge ("ALJ") found that the undisputed facts show AT&T gave MCI a special deal on switched access service at a rate that was not in AT&T's tariff or otherwise filed. A53. The undisputed facts further show that the rate

¹ A tariff refers to "[d]ocuments filed by a regulated telephone company with a state public utility commission or the Federal Communications Commission. The tariff, a public document, details services, equipment and pricing offered by the telephone company... to all potential customers." NEWTON'S TELECOMM DICTIONARY (23rd ed. 2007).

AT&T provided to MCI was far lower than the tariffed rate for switched access service that AT&T charged other companies. *Compare A649 with A132.*

Based on these undisputed facts, the ALJ determined that AT&T had violated numerous telecommunications laws and rules because AT&T had failed to file the unique rate for switched access service that it charged MCI. A56-A62. The ALJ also determined that AT&T's actions were knowing and intentional. The ALJ then conducted an evidentiary hearing on the penalty factors set forth in Minn. Stat. §237.462 and recommended a penalty of \$552,000. A28, A33-A45.

After exceptions were filed, the Commission met on two separate days to hear oral argument and consider the matter. A2. The Commission carefully considered the record and the law. On October 26, 2007, the Commission issued its order: 1) finding AT&T violated key Minnesota laws; 2) finding AT&T's violations were knowing and intentional; 3) imposing a penalty of \$552,000; and 4) finding AT&T's agreement with MCI is a public document under the Minnesota Government Data Practices Act. A1-20.

The Commission's order is fully consistent with the law, is supported by substantial evidence in the record, and reflects the Commission's reasoned decision-making. The Commission's decision should be affirmed.

STATEMENT OF FACTS

I. AT&T HAS PROVIDED REGULATED TELEPHONE SERVICE IN MINNESOTA FOR MANY YEARS.

AT&T has been authorized to provide telephone service in Minnesota for almost 25 years. In 1983, AT&T received authority from the Commission to provide long

distance service (or “interexchange service”) in Minnesota. A4. Since 1996, AT&T has also been authorized by the Commission to provide local telephone service. *Id.*; *See also, In the Matter of AT&T Communications of the Midwest, Inc.*, 1996 WL 467758 (Minn. P.U.C.). The Commission order granting AT&T authority to provide local telephone service provides that AT&T is required by law to file tariffs for its local exchange services. 1996 WL 467758 at *5. Further, AT&T itself committed to filing tariffs containing the rates, charges, and terms under which AT&T would provide local exchange services to its customers. *Id.* at * 2.

II. AT&T PROVIDES SWITCHED ACCESS SERVICE.

As part of its certificate of authority filing with the Commission, AT&T requested authority to provide a number of local exchange services including switched access service. *Id.* at * 1. Switched access service is a service sold by local service providers to long distance companies and involves the use of the local providers’ facilities. As the Commission explained:

Three parties must cooperate to complete the typical long-distance (interexchange) call: the local service provider where the call originates, the local service provider where the call terminates, and the long-distance carrier that connects them. “Access charges” refers to the collection of the prices that the long-distance carrier pays to the local service provider for the use of their plant to connect to the calling and called parties. “Switched access charges” refers to this same collection of prices plus a price for the use of the local service provider’s routing computer (“switch”).

A4.

III. AT&T AND MCI ENTERED INTO BI-LATERAL SWITCHED ACCESS AGREEMENTS AT LOW, UNTARIFFED RATES, WHICH AT&T SOUGHT TO HIDE.

In 2004, AT&T and MCI entered into two agreements governing the sale and purchase of switched access services. A4. At the time, both entities were already selling switched access service to each other. *See* A4; A482-A483.

The terms of two mutually-beneficial agreements were nearly identical, except that purchaser and seller were reversed. *See* A4; PUC Confidential App. (“PCApp.”) 76 - 88 (copies of the agreements). Both agreements became effective on January 27, 2004. A4. *Id.*

Under the terms of one of the contracts, MCI agreed to sell switched access services to AT&T as a long distance provider at unique prices that were lower than MCI’s tariffed rates. A4. This contract is referred to as the “MCI Agreement” by AT&T in its brief and is called the “First Unfiled Agreement” in the Commission’s order.

Under the terms of the second contract, AT&T, as a local provider, agreed to sell intrastate switched access service to MCI’s long distance subsidiaries at a special reduced rate, which was less than AT&T’s tariffed rates for the same switched access services. A4. This contract is referred to as the “AT&T Agreement” by AT&T in its brief and is called the “Second Unfiled Agreement” in the Commission’s order. It is this second contract that is the focus of this appeal.

At the time it entered into the Second Unfiled Agreement, AT&T had a tariff for switched access services. A120 (¶32), A130, A132. However, the rate AT&T gave MCI under its confidential agreement was much, much lower than the rates contained in

AT&T's tariff for the same service. *Compare* A649 (Second Unfiled Agreement, Schedule A -- showing a switched access service rate of \$0.005 for both originating and terminating access) *with* A132 (AT&T Switched Access Tariff, Section 17.15.2, in effect as of December 2002 -- showing an originating switched access rate of \$0.011396, and a terminating switched access rate of \$0.032462); *see also* PCApp. 14 - 15 (¶¶29-33 of the DOC's non-public Amended Complaint containing information which is now public as a result of the Commission's October 26, 2007 order designating the Second Unfiled Agreement as a public document); A20 (¶3). AT&T provided MCI access service at the reduced, untariffed rate so that AT&T could secure a similar reduced, untariffed rate from MCI for AT&T's long distance service. *See* PCApp. 130 - 136 (Ex. 25). The Second Unfiled Agreement contained the same rate as prior agreements between the parties. *See* A4, A482, A483, A477, A493.

The record shows that AT&T knew that the rate it was providing to MCI in the Second Unfiled Agreement was significantly less than its tariffed rate, and intended to provide that reduced rate to MCI. *See* A493, A540; *Compare* A132 *with* A649. Yet, AT&T did not modify its tariffs or price lists to reflect this reduced rate, or otherwise file the rates and terms of the Second Unfiled Agreement at any time while the agreement was in effect. A53. AT&T failed to do so even though it was aware that the rates, terms, and conditions under which it offered services to its customers were required to be filed with the Commission. *See In Re AT&T*, 1996 WL 467758 at *2, *5; *see also* A515, A516, A521.

AT&T took steps to ensure the unique, unfiled rate and terms of the agreement were kept secret from other switched access customers, and the public generally. AT&T required the negotiations be kept confidential and included specific language in the agreement requiring that the agreement be kept confidential. A533-A534; A647 (¶11A). Further, over the entire course of the administrative proceeding below, AT&T alleged that the agreement should be treated as a non-public “trade secret” document and kept hidden from other switched access customers and the public. *See* A17, A28 (¶10).

In its Statement of the Facts, AT&T misleads the reader when it claims it disclosed the contract to the Bankruptcy court and to the State. *See* Opening Br. of Relator - AT&T (“AT&T Br.”) at 9. All the Bankruptcy Court knew was that MCI and AT&T planned to enter into a switched access agreement. *See* A637. There was no disclosure of the rates and terms, nor was there any disclosure that AT&T did not plan to file a tariff or price list with the reduced rate it gave MCI. A44. Similarly, AT&T’s claim that it disclosed the contract in an annual report filed with the State lacks evidentiary support and conflicts with other evidence in the record. First, AT&T’s claim is based on the bald, unsupported claim of its witness, not an actual annual report. Second, annual reports of telecommunications carriers are filed with the DOC, but the DOC did not discover the contract by reviewing AT&T’s annual report. *See* A118 (¶26), A130. Rather, the DOC learned of the agreement from MCI, not AT&T. *Id.*

IV. THE DOC LEARNED OF THE AGREEMENTS THROUGH DISCOVERY FROM MCI.

In June 2004, the DOC filed a complaint against a number of carriers arising out of several other unfiled agreements, pursuant to which various competitive local

exchange carriers or “CLECs” agreed to provide AT&T as a long distance carrier with switched access services at untariffed rates. A118, A130. In October 2004, in response to a DOC discovery request, MCI revealed the First and Second Unfiled Agreements to the DOC. *Id.* These agreements had never been disclosed before to the DOC. A118 (¶¶25-26). Subsequently, MCI and all other carriers except AT&T settled their claims with the DOC. *See* A92. Only the claims against AT&T in its provision of switched access service to MCI remained. *Id.* After the DOC filed its Amended Complaint, the Commission referred the matter to the Office of Administrative Hearings for a contested case proceeding. A1.

V. THE ALJ DETERMINED THE EVIDENCE DEMONSTRATED KNOWING AND INTENTIONAL VIOLATIONS AND SUPPORTED A PENALTY.

Based on the undisputed evidence before him, the ALJ issued a recommendation finding that AT&T had violated several state telecommunications laws and rules. A49-A62. The ALJ’s decision was not based on mere allegations, as AT&T erroneously contends, but rather was based on the Second Unfiled Agreement itself, AT&T’s tariff for switched access service, and verified facts contained in the DOC’s amended verified complaint and other documents attached to the DOC’s Motion For Summary Disposition. *See* A49-A62; A132, A644-A650; PCApp. 1 - 129.

The ALJ found that the undisputed facts showed that AT&T knew it was providing switched access service to MCI at reduced rates that were not filed as part of AT&T’s tariff or otherwise and AT&T did so purposefully. A53, A62. The ALJ found this conduct resulted in knowing and intentional violations of statutes and rules requiring

that rates offered or charged by telecommunications carriers be filed with the State. *See* A56-A62.² The ALJ's liability determinations were based on the fact that *the rates* in the agreement were not filed in a tariff or otherwise, not the failure to file the Second Unfiled Agreement itself. *See, i.e.,* A57-A58 (finding AT&T violated Minn. Stat. §237.74, subdivision 1 "by not filing its unique MCI rates" and violated Minn. R. 7812.2210 "by not filing its MCI rates"). Similarly, the ALJ concluded that AT&T, as a matter of law, violated statutes and rules prohibiting unreasonable discrimination by "fail[ing] to file its unique price arrangement as a tariff." A60-A62. Underlying these findings was the ALJ's conclusion that switched access service is a "local service" for purposes of the statutes and rules at issue in the proceeding. A56-A57.

The ALJ then held an evidentiary hearing on the penalty factors set forth in Minn. Stat. §237.462. At the hearing, AT&T had a full opportunity to present evidence on all the factors, including its intent and willfulness. *See, generally,* A177-A245.

The evidence confirmed that AT&T knew that switched access service was required to be tariffed with the State, that AT&T had a tariff for the service, and knowingly and intentionally gave MCI a rate substantially lower than the rate in its tariff. A132, A477, A493, A515, A521, A540 *see also* A644-A650. There was also evidence that showed, among other things, that AT&T's actions undermined the integrity of the regulatory process, deprived other long distance carriers of the opportunity to take

² On page 6 of its Statement of the Facts, AT&T claims "Minnesota law specifically permits providers to enter into agreements - also known as "off-tariff" contracts - featuring different rates than those offered in tariffs." This is not a fact, but rather is AT&T's erroneous interpretation of the law.

advantage of similar, reduced switched access rates, and provided AT&T with important benefits. *See* A37 (quoting Doyle testimony), A39, A53, A158-A160, A547; Admin. R. Nos. 154, 155, and 165 (Exs. 7A, 7B and 15 showing the savings realized from the agreements).

After the evidentiary hearing and briefing, the ALJ concluded that the Commission retained authority under Minn. Stat. §237.462 to impose penalties. A34-A35. Based on the evidence presented, the ALJ recommended a penalty of a \$1000 a day for AT&T's illegal conduct. A42.

VI. THE COMMISSION FOUND THAT AT&T KNOWINGLY AND INTENTIONALLY VIOLATED SEVERAL LAWS AND SHOULD BE PENALIZED.

Based on its own independent and careful review of the record and the law, the Commission determined that AT&T had knowingly and intentionally violated laws governing the filing of rates and prohibiting unreasonable discrimination. A1-11. The Commission specifically recognized the long history and importance of tariff filing requirements, including the requirement that unique prices included in contracts be filed in a tariff or price list. A2-A3.³

The Commission concluded that it retained authority to impose penalties under Minn. Stat. §237.462, when read in conjunction with Minn. Stat. §645.35 -- the Legislature's general savings provision. A11. The Commission considered the evidence

³ AT&T faults the Commission for not specifically addressing the question of whether "switched access services" are "local services" in its order. AT&T Br. at 11. However, AT&T failed to raise this issue in its Exceptions. *See* Admin. R. No. 221 (AT&T Exceptions). The Commission properly adopted the ALJ's recommendations on the issue without a detailed discussion. A19.

on each of the penalty factors. The Commission found AT&T acted in a knowing and intentional manner, with disregard for the law, from which it benefited, and in doing so AT&T caused harm. A11-A17. The Commission determined the evidence supported a meaningful sanction, and adopted a penalty of \$1000 per day or \$552,000 for AT&T's knowing and intentional violations. *Id.*

SCOPE OF REVIEW

Minn. Stat. §14.69 outlines the scope of judicial review of an agency decision. This statute provides that an agency's decision will be affirmed unless the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious.

On appeal, agency decisions enjoy a presumption of correctness and "deference should therefore be shown by courts to the agency's expertise and its special knowledge in the field." *In Re Application Grand Rapids Public Utilities Commission To Extend Its Assigned Service Area*, 731 N.W.2d 866, 870 (Minn. Ct. App. 2007) (citations omitted). The party seeking review bears the burden of proving that the agency's conclusions violate one or more provisions of Minn. Stat. §14.69. *Markwardt v. State, Water Resources Bd.*, 254 N.W.2d 371, 374 (Minn. 1977).

Courts give substantial deference to the agency's fact-finding process and it is the challenger's burden to establish that the findings are not supported by the evidence. *See*

In re Excess Surplus Status of Blue Cross and Blue Shield of Minnesota, 624 N.W.2d 264, 279 (Minn. 2001) (“*Blue Cross*”) (citation omitted). A reviewing court may not substitute its own judgment for that of an administrative agency when the agency’s finding is properly supported by the evidence. *Vicker v. Starkey*, 265 Minn. 464, 470, 122 N.W.2d 169, 173 (1963).

While this Court retains the authority to review de novo questions of law, “an agency’s interpretation of the statute it administers is entitled to deference and should be upheld, absent a finding that it is in conflict with the express purpose of the Act and the intention of the legislature.” *Geo. A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988) (citations omitted); *see also Blue Cross*, 624 N.W.2d at 278 (judicial deference is extended to an agency decision maker in the interpretation of statutes that the agency is charged with administering and enforcing).

SUMMARY OF THE ARGUMENT

Minnesota’s rate filing requirements are the bedrock of the State’s regulatory system governing telecommunications carriers. Filing requirements seek to prevent unreasonable discrimination by providing notice to all potential customers of the legal rates at which telecommunications services are being offered. *See AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 222, 118 S. Ct. 1956, 1962, *reh. denied*, 524 U.S. 972 (1998) (analogous federal filing requirements have the “goal of preventing unreasonable and discriminatory charges”); *see also Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 384, 52 S.Ct. 183, 184 (1932) (filing requirements “render rates definite and certain, and ... prevent discrimination and other abuses”). Strict

compliance with filing requirements is necessary to prevent carriers from offering preferential, unfiled rates to select customers and thereby engaging in unreasonable discrimination. *See MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 230, 114 S. Ct. 2223, 2231 (1994) (stating compliance with filing requirements is “‘utterly central’ to the administration of the [federal Communications] Act”) (citations omitted).

Since as early as 1915, Minnesota has required providers of telephone service to offer their services in accordance with tariffs filed with the State. *See* 1915 Minn. Laws, ch. 152, §5 (Addendum “Add.” 34). Minnesota’s current laws require all telecommunications (or telephone) providers to file their rates in a tariff or price list with the State. *See* Minn. Stat. §237.74, subd. 1; Minn. Stat. §237.07;⁴ Minn. R. 7812.2210, subds. 2, 3, 5. Minnesota law also prohibits rates that are unreasonably discriminatory. *See* Minn. Stat. §237.74, subd. 2, Minn. Stat. § 237.09, subd. 1.; Minn. Stat. §237.60.

The Commission correctly determined that AT&T violated the laws requiring filing of rates when it provided switched access service to MCI at a special, reduced rate that was not filed as a part of a tariff or otherwise with the State. Contrary to AT&T’s assertion, there is *no* exception to the rate filing requirements for rates included in “off-tariff contracts.” AT&T’s interpretation is contrary to the plain language of the law and would render the filing requirements meaningless.

AT&T also violated Minnesota’s laws prohibiting unreasonable discrimination. The rules implementing the statutory prohibition against unreasonable discrimination

⁴ This statute is made applicable to telecommunications carriers providing local service by virtue of Minn. Stat. §237.035(e).

specify that the offering of unique prices without a tariff filing is unreasonable discrimination. *See* Minn. R. 7812.2210, subp. 5 (allowing unique prices only upon a tariff filing). The undisputed evidence shows that AT&T violated these laws when it sold MCI switched access service at a unique price without making the required filing.

Further, contrary to AT&T's assertion, the "local service" laws, which require filing of rates and prohibit unreasonable discrimination, apply to switched access service. The Legislature has expressly provided that switched access service is a "local service" within the meaning of Chapter 237. Moreover, the Commission has interpreted "local service" to include switched access service.

The Commission also correctly concluded that AT&T's violations were "knowing and intentional" as used in Chapter 237. A violation is "knowing and intentional" if the actor has knowledge of the underlying facts and intends to do the acts that result in the violation. Here, the facts show AT&T knew it had to file a tariff setting forth its rates for switched access service, and AT&T also knew and intended to provide MCI with an unfiled rate that was significantly less than its tariffed rate. Thus, AT&T's violations were "knowing and intentional." Contrary to AT&T's assertion, it is not necessary to show that the actor intended to break the law.

Finally, the Commission imposed a reasonable penalty on AT&T for its illegal conduct. The Commission retained authority to impose a penalty pursuant to Minn. Stat. §237.462. Because the proceeding below commenced well before Minn. Stat. §237.462 was repealed by sunset, Minn. Stat. §645.35 attaches to preserve the Commission's penalty authority. Case law establishes that the term "repeal" as used in Minn. Stat.

§645.35 includes a repeal by sunset. Further, contrary to AT&T's assertion, the savings provisions in Minn. Stat. §645.35 are not limited to "vested rights." The plain language of Minn. Stat. §645.35 extends the savings protections to "proceeding[s] commenced."

The penalty imposed by the Commission against AT&T for its illegal conduct is reasonable, is supported by the record, and is consistent with the law. The evidence in the record supports the Commission's penalty decision, showing that AT&T's illegal conduct was done intentionally and willfully, without regard for the law. Further, the evidence shows that AT&T's violations resulted in harm to the regulatory process and other switched access customers, while at the same time AT&T benefited. Based on its weighing of the evidence, the Commission imposed a modest penalty of a \$1000 per day or \$552,000. This penalty is at the low-end of the penalty scale and is far less than the per day penalty imposed by the Commission in another case involving unfiled rates. The Commission's penalty determination was well within its discretion and its order should be affirmed.

ARGUMENT

I. THE COMMISSION CORRECTLY DETERMINED THAT AT&T VIOLATED SEVERAL LAWS.

By providing MCI with switched access service at unfiled rates, AT&T violated several telecommunications laws. AT&T's arguments to the contrary fail upon examination.

A. AT&T Violated Minn. Stat. §237.74, Subd. 1.

The Commission correctly determined that AT&T violated the filing requirement in Minn. Stat. §237.74, subdivision 1 by “not filing its unique MCI rates” with the State in a tariff or price list. *See* A19 (¶1), A57. Minn. Stat. §237.74, subdivision 1 provides that “[e]very telecommunications carrier shall elect and keep on file with the department either a tariff or price list for each service on or before the effective date of the tariff or price, containing the rules, rates, and classifications used by it in the conduct of the telephone business.”⁵ This law requires rates offered by a telecommunications carrier to be filed on or before the effective date.

There is no dispute that AT&T is a “telecommunications carrier” or that switched access service is a “service” within the meaning of this statute. *See* A4, A57. Furthermore, AT&T does not dispute that it did not file a tariff or price list containing the unique switched access rate that it provided to MCI on or before the effective date. A53. Therefore, the Commission correctly determined that AT&T violated Minn. Stat. §237.74, subdivision 1.

AT&T seeks to avoid liability by erroneously claiming that subdivisions 2 and 3 of Minn. Stat. §237.74 create an exception to the filing requirement in Section 237.74, subdivision 1 for “off-tariff contracts.” AT&T also erroneously asserts that it has complied with subdivision 1’s filing requirements. AT&T Br. at 42-44. AT&T’s arguments are without merit.

⁵ For historical reasons, the DOC maintains the Commission’s records.

First, AT&T's arguments are based on a fundamental misunderstanding of the findings of the ALJ and Commission. AT&T erroneously claims that the ALJ and Commission found that AT&T violated Minn. Stat. §237.74, subdivision 1 by failing to "file an off-tariff contract." AT&T Br. at 42. To the contrary, the ALJ and Commission found that AT&T violated Minn. Stat. §237.74, subdivision 1 "by not filing its unique MCI rates" in a tariff or price list. A57, A19 (¶1), *see also* A8 ("stating the Commission understands the ALJ to conclude that AT&T violated the law by knowingly and intentionally providing service at terms that differed from its tariff.") As discussed above, the undisputed facts show AT&T did not file a tariff or price list containing the unique MCI rate and therefore violated the requirement that all carriers "*shall* elect and keep on file... *a tariff or a price list* for each service *on or before the effective date ... containing the ... rates...used by it....*" Minn. Stat. §237.74, subd. 1.

Second, contrary to AT&T's assertion, Minn. Stat. §237.74, subdivisions 2 and 3 do not authorize contracts with unfiled rates (a/k/a "off-tariff" contracts). These subdivisions deal with discrimination and special pricing, *not* whether unique rates must be filed. Minn. Stat. §237.74, subds. 2-3. The unique prices permitted by subdivisions 2 and 3 remain subject to the filing requirement in subdivision 1. Nowhere in Minn. Stat. §237.74, subdivision 2 or subdivision 3 does it provide that rates in contracts are exempt from the requirement in Minn. Stat. §237.74, subdivision 1 that carriers "shall" file tariffs or price lists containing rates on or before their effective date. *Id.* It would be absurd to conclude that the Legislature's silence on the question of filing in subdivisions 2 and 3 creates an affirmative exception to the rate filing requirement in the subdivision 1. *See*

Hagerty v. Hagerty, 281 N.W.2d 386, 389 (Minn. 1979) (stating “extension of statutory provisions are to be made by the legislature rather than the courts”); Minn. Stat. §645.17. Yet, that is what AT&T would have this court do.

Third, AT&T claims that it complied with the filing requirements of Minn. Stat. §237.74, subdivision 1 because it had a tariff on file for switched access service, even though the tariff did not contain the unique MCI rate but only higher, less favorable rates. AT&T’s argument is erroneous. The plain language of the statute requires AT&T to file “a tariff or price list ... containing ... rates ... used by it in the conduct of [its] telephone business.” Here, AT&T charged a unique rate to MCI but its tariff did not “contain” the unique MCI “rate[] ... used by it in the conduct of [its] telephone business.” Minn. Stat. §237.74, subd. 1. Therefore, AT&T violated Section 237.74.

Fourth, if AT&T’s erroneous interpretation of Section 237.74 were adopted, it would render the filing requirements in subdivision 1 meaningless. As the ALJ and Commission correctly found, if AT&T could have a tariffed rate but still offer different, unfiled rates in “off-tariff” contracts as it did here, then the tariffing obligations in subdivision 1 would be hollow. *See* A57, A19 (¶1). Customers would no longer be able to rely on tariffs to know the rates at which services are offered. Such a result would undermine the regulatory framework adopted by the Legislature to prevent unreasonable discrimination. *See AT&T v. Central Office Telephone*, 524 U.S. at 222. AT&T’s position also flies in the face of the well-established filed rate doctrine, which requires carriers to charge only filed rates. *Id.* Therefore, the only logical interpretation of Minn. Stat. §237.74, subdivisions 1, 2, and 3, when read as a whole, is that telecommunications

carriers can have the unique prices permitted by subdivisions 2 and 3, but those rates must be filed as part of a tariff or price list in accordance subdivision 1. *See also* Minn. R. 7812.2210, subps. 2, and 5 (specifically requiring a tariff filing for unique pricing); *PrairieWave v. AT&T*, 2006 WL 1096791 at *2 (Minn. P.U.C.) (stating unique prices must be filed with the State).

Finally, AT&T cites Minn. Stat. §237.121 and Minn. Stat. §237.071 to try to support its erroneous claim that it did not violate Minn. Stat. §237.74. AT&T Br. at 43. However, there is no language in either statute exempting rates in contracts from the filing requirements in Section 237.74, subdivision 1 or any other statute.⁶ Therefore, this Court should uphold the Commission's determination that AT&T violated Minn. Stat. §237.74, subdivision 1 "by not filing its unique MCI rate." A57, A5, A19 (¶1); *see also*, *Geo. A. Hormel*, 428 N.W.2d at 50 (deference should be accorded to an agency's reasonable interpretation of a statute it administers).

B. AT&T Violated "Local Service" Statutes And Rules.

The Commission also found that AT&T violated the filing and anti-discrimination provisions of Minn. R. 7812.2210 and Minn. Stat. §§237.07 and 237.09, which apply to

⁶ AT&T claims that because the Legislature included the word "contract" in §237.121 but not in §237.74, the Legislature somehow implicitly authorized "off-tariff" contracts with rates that are not filed in a tariff or price. This argument is without merit. Because §237.74, subd. 1 requires rates offered to be filed in a tariff or price list, the "contract" referred to in §237.121 *can and must* include rates that have been filed with the State. Furthermore, there could be circumstances where a carrier has included a tariffed rate and is complying with the tariff, but not the specifics of the contract, like the date the service is to be provided. Thus, the absence of the word "contract" from §237.74 does not suggest the exemption sought by AT&T.

“local services.” A56, A58; A60-A61; A19 (¶1). *See* Minn. Stat. §237.035(e). AT&T erroneously argues that switched access service is not a “local service” and, *on that basis alone*, claims the Commission erred in finding that AT&T violated these provisions.^{7, 8} *See* AT&T Br. at 29-38. This argument is without merit.

Switched access service is a “local service” as used in Chapter 237 and its implementing rules. First, contrary to AT&T’s assertion, the Legislature has explicitly provided in Chapter 237 that switched access service is a local service. The relevant language is found in Minn. Stat. §237.773, Subdivisions 3(b) and (c):

(b) At any time following one year after electing under subdivision 2, a small telephone company *may change rates for local services except switched network access services*, listed in section 237.761, subdivision 3 to reflect:

(c) On or after the later of January 1998, or two years after making the election under subdivision 2, a small telephone company *may increase rates for local services, except switched network access services*, listed in section 237.761, subdivision 3.

Minn. Stat. §237.773 (emphasis added). 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. If the Legislature did not intend the term “local service” to include switched access service, then there would have been no need for the

⁷ AT&T did not raise this “local service” argument in its exceptions to the ALJ’s report even though the ALJ ruled against AT&T on this point. *See* Admin. R. No. 221 (AT&T’s Exceptions).

⁸ AT&T does argue that the violations were not “knowing and intentional.” AT&T Br. at 39-41. However, that argument is not a challenge to the determination that the violations occurred, but rather questions whether the violations were knowing and intentional.

Legislature to provide the exception. *See* Minn. Stat. §645.16 (“Every law shall be construed, if possible, to give effect to all its provisions.”)

Further, the “local service” language in Minn. Stat. §237.773, Subdivisions 3(b) and (c) was adopted in 1995 in the same session law where the Legislature adopted the “local service” language in §237.035(e) at issue in this case. 1995 Minn. Laws ch. 156, §2, §20 (Add. 42, 58-59). Thus, switched access service is a “local service” for purposes of Minn. Stat. §237.035(e). *See Angell v. Hennepin County*, 565 N.W.2d 475, 479 (Minn. Ct. App. 1997), *aff’d*, 578 N.W.2d 343 (1998) (courts presume that the Legislature “uses the same term consistently in different statutes”).

Second, while the Court need not look any further to determine whether switched access service is a “local service” for purposes of Chapter 237 and its rules, the amendments to the definition of “telecommunications carrier” and related changes made in 1995 support this conclusion. Prior to 1995, long distance providers were defined as “telecommunications carriers” and local providers were defined as “telephone companies.” *See* Minn. Stat. §237.01, subs. 2, 6 (1994) (Add. 5.) In 1995, the Minnesota Legislature enacted changes to authorize full competition in the provision of local exchange service. *See* 1995 Minn. Laws ch. 156 (Add. 42).⁹ In doing so, the Legislature expanded the definition of “telecommunications carrier” to include not just

⁹ Contrary to AT&T’s assertion on page 4 of its brief, the Legislature did not “replace[] regulation with increased competition.” As 1995 Laws of Minnesota Chapter 156 shows, the Legislature required regulation of new local competitors. *See* Add. 42.

long distance (“interexchange”) providers¹⁰ but also new competitive “local service” providers like AT&T¹¹ as well as certain local providers authorized before August 1, 1995.¹² The amendments expressly distinguish between long distance service (or “interexchange service”) and local service. *See* Minn. Stat. §237.01, subd. 6.

Consistent with this distinction, the Legislature provided that a telecommunications carrier’s “local service” is subject to most of the provisions of Chapter 237. *See* Minn. Stat. §237.035(a)-(e). The Legislature retained a much more limited scope of regulation for a telecommunications carrier’s long distance services. *See* Minn. Stat. §237.035(a)-(c). Therefore, the phrase “local service” distinguishes between a provider’s local and long distance service, not retail and wholesale service, as AT&T erroneously claims.

Third, Minn. Stat. §237.761, when read in combination with Minn. Stat. §237.773, confirms that the term “local service” is a broad term that includes both retail services and wholesale services. Minn. Stat. §237.761, also enacted in 1995, lists “switched network access service” as a service that is “essential for providing local telephone service.” Further, this statute lists both retail and wholesale services as essential for providing local telephone service. *See* Minn. Stat. §237.761. Also, Section 237.773

¹⁰ Minn. Stat. §237.01, Subd. 6(1).

¹¹ Minn. Stat. §237.01, Subd. 6(3).

¹² Minn. Stat. §237.01, Subd. 6(2). Minn. Stat. §237.16, subd. 4 governed the expansion of a telephone company’s service area. *See* Minn. Stat. §237.16, subd. 4 (1994). This clause does not apply to AT&T because it was not granted a certificate of authority to provide local service until 1996. *See* A4. The Legislature also retained the definition of “telephone company” to cover the old incumbent, local providers. *See* Minn. Stat. §237.01, subd 7.

refers to these services as “local services.” *See also*, Minn. R. 7810.0100, subp. 23 (providing that “local exchange service” includes the use of exchange facilities required to make local and long distance calls).

Fourth, Commission precedent establishes that the term “local service” includes access service and other wholesale services. In *PrairieWave*, the Commission held that Minn. Stat. §237.07, subdivision 2, which requires filing of rates, is applicable to *PrairieWave*’s access service rates by virtue Minn. Stat. §237.035(e)’s “local service” provision. 2006 WL 1096791 at n. 2, n. 3 (Minn. P.U.C.). The Commission also found that Minn. R. 7812.2210, subp. 2 and subp. 5.A.-B., which require prices for “local services” to be filed in a tariff, applies to *PrairieWave*’s access services. *Id.* *See also*, *In re McLeodUSA Telecommunications, Inc.*, 2004 WL 2293945 at n. 5 (Minn. P.U.C.) (finding that wholesale services are “local services” for purposes of Minn. R. 7812.2210, subp. 8).¹³ Therefore, “local service” as used in Minn. Stat. §237.035(e) and Minn. R. 7812.2210 includes switched access service.

¹³ In its brief at 30, AT&T cites language from the *McLeod* order stating “[u]nder Minn. Stat. §237.035, competitive local exchange carriers (CLECs), such as *McLeod*, are exempt from rate regulation and most of the other regulatory requirements.” This language in the *McLeod* order mistakenly overstates the extent to which CLECs are exempt from the requirements of Chapter 237. As the Commission correctly found in this case and in other cases, the plain language of Minn. Stat. §237.035(e) provides that a telecommunications carrier’s local service is subject to most of Chapter 237. *See e.g.*, *In the Matter of AT&T Communications of the Midwest, Inc.*, 1996 WL 467758 at *5 (Minn. P.U.C.) (stating that “Minn. Stat. §237.035(e) provides that a telecommunications carrier’s local service will be subject to Minn. Stat. Ch. 237, with the exception of rate of return investigations and depreciation requirements.”); *PrairieWave*, 2006 WL 1096791 at *2, and ns. 2-3 (finding that *PrairieWave*’s access service is subject to Minn. Stat. §237.07 and §237.09 by virtue of Minn. Stat. §237.035(e)); *In re AT&T Corp.*, 1999 WL (Footnote Continued on Next Page)

Fifth, none of the other arguments made by AT&T command a different interpretation. AT&T's arguments are based on AT&T's erroneous claim that the Commission and Legislature *implicitly* limited "local services" to retail services. AT&T Br. at 30-38. For example, AT&T erroneously argues that the Commission's definition of "local service" in Minn. R. 7812.0500, Subp. 33 refers only to services offered to a retail customer. However, the plain language of the rule is not limited to retail services. To the contrary, the rule defines "*local service*" as "dial tone, *access to the public switched network, and any related services...*" Because switched access service is essential to providing local telephone service and access to the local telephone network, switched access service falls within the definition of "local service." *See* Minn. Stat. §237.761.¹⁴

Further, AT&T's arguments to the contrary ignore that the Commission has in the past interpreted the term "local service" as used in Minn. Stat. §237.035(e) and Minn. R. 7812.2210 to apply to access services. Likewise, AT&T ignores that the Legislature specifically provided that switched access service is a "local service." *See* Minn. Stat. §237.773.

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1455081 at *2, n. 2 (Minn. P.U.C.) (finding that Minn. Stat. §237.23 applied to the proposed merger of AT&T Corp. and MediaOne by virtue of Minn. Stat. §237.035).

¹⁴ Contrary to AT&T's assertion, the term "related to" is not properly limited to retail services. As Minn. Stat. §237.761 demonstrates, both retail and wholesale services are essential to providing local service. Minn. Stat. §237.773 also explicitly provides that switched access service is a "local service."

As Chapter 237 and the framework the Legislature established in 1995 demonstrate, the Commission properly concluded that “switched access service” is a “local service” for purposes of Chapter 237 and the Commission’s rules. To the extent the Court believes there is any ambiguity, this Court should defer to the Commission’s reasonable interpretation of these statutes and rules, which it administers. *See Geo. A. Hormel*, 428 N.W.2d at 50 (courts generally defer to an agency’s reasonable interpretation of a statute it administers); *In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issues for the Discharge of Treated Wastewater*, 731 N.W.2d 502, 516 (Minn. 2007) (courts generally defer to an agency’s interpretation of an ambiguous rule where the agency’s interpretation is reasonable).

Therefore, because AT&T erroneously claims that switched access service is not a “local service” for purposes of Section 237 and Minn. R. 7812.2210 and that is the *only* basis on which AT&T challenges the Commission’s finding that AT&T violated Minn. R. 7812.2210 and Sections 237.07 and 237.09, this Court should affirm the Commission’s determination that AT&T violated those provisions. *See* A58, A60-A61, A19 (¶1).

C. AT&T Violated Minn. Stat. §237.121.

The Commission correctly determined that AT&T violated Minn. Stat. §237.121. This law prohibits a telecommunications carrier from refusing “to provide a service, product, or facility to a telephone company or telecommunications carrier in accordance with its applicable tariffs, prices lists, or contracts.” Minn. Stat. §237.121.

The Commission determined that AT&T violated this law because it did not provide switched access service in accordance with the rate in the applicable tariff. A58-A59, A19. AT&T does not dispute that the rate it provided to MCI did not comply with the rates in its tariff.

Instead, AT&T improperly claims that it did not violate Minn. Stat. §237.121 because it complied with the terms of its contract with MCI. Regardless of whether that is true, the undisputed evidence shows that AT&T provided MCI with access service at a rate much, much lower than its tariffed rates and therefore failed to conform to its tariff in violation of Minn. Stat. §237.121.

AT&T also claims that it did not violate Minn. Stat. §237.121 based on its erroneous assertion that Minnesota law permits “off-tariff” contacts. However, as discussed above, there is no basis for such a claim in the law. *See supra* at 16-19. Therefore, the Commission correctly determined that AT&T violated Minn. Stat. §237.121.

D. AT&T Violated The Discrimination Prohibition in Minn. Stat. §237.74, Subd. 2.

The Commission correctly determined that AT&T violated Minn. Stat. §237.74, subdivision 2 when it provided MCI with unfiled rates for switched access service that were much lower than AT&T’s tariffed rates. A19, A60-A61. Section 237.74, subdivision 2 prohibits a telecommunications carrier from offering services at rates that are “unreasonably discriminatory.”

The Commission's determination that AT&T violated this law is supported by Minn. R. 7812.2210, Subpart 5, which implements this provision for a telecommunications carrier's or CLEC's local service rates. Like the statute, the rule prohibits rates that are "unreasonably discriminatory." The rule generally requires uniform rates, but allows unique customer prices in six designated circumstances *only* upon a tariff filing. *See* Minn. R. 7812.2210, subp. 5. Thus, the rule specifies that the offering of unfiled, unique rates is "unreasonably discriminatory." *See* A60-A61. Because AT&T charged MCI a unique reduced rate without making a tariff filing, the Commission correctly determined that AT&T violated the anti-discrimination provision in Minn. Stat. §237.74, subdivision 2 (as well as Minn. R. 7812.2210, subp. 5). *See* A9-11; A60-61.

AT&T claims that this Court should disregard Minn. R. 7812.2210 in its determination of whether AT&T violated the prohibition against unreasonable discrimination. AT&T Br. at 45. AT&T's argument, however, is based on its erroneous claim that Minn. R. 7812.2210 does not apply to switched access service. As demonstrated above, switched access service is a local service for purposes of Minn. R. 7812.2210. *See supra* at 20-26.

AT&T also erroneously argues that the Commission cannot find a rate is *per se* "unreasonably discriminatory." However, Minn. R. 7812.2210, subpart 5A explicitly provides a unique rate, for which there is no tariff filing is "unreasonably discriminatory." There is no basis for interpreting the identical "unreasonably discriminatory" language in Minn. Stat. §237.74, subdivision 2 any differently. To the

contrary, strong public policy reasons support the Commission's finding. The filing of rates is intended to provide notice of the legal rates at which a carrier offers its service to potential customers and thereby prevent unreasonable discrimination. The offering of unfiled rates deprives potential customers of the opportunity to obtain similar reduced rates for the same service. *See* A37. Also, if a carrier does not file its unique rates, there is no means by which regulators or others can determine whether such rates are otherwise reasonable.¹⁵ *Id.* Thus, where a unique rate is offered without the required tariff filing, the rate is "unreasonably discriminatory."

Here, it is undisputed that AT&T provided MCI with access service at a unique reduced rate that was not filed as part of tariff or price list. Because AT&T failed to make the required tariff filing, there was no need for the Commission to consider any additional evidence regarding the rate. The violation of Minn. Stat. §237.74, subdivision 2 was already established. Therefore, the Commission properly determined that AT&T provided MCI with service at a rate which was "unreasonably discriminatory" in violation of Minn. Stat. §237.74, subdivision 2.

II. AT&T'S VIOLATIONS WERE KNOWING AND INTENTIONAL.

Not only did AT&T violate Minnesota's filing requirements and laws prohibiting discrimination, but AT&T's violations were knowing and intentional. The Commission found that AT&T's violations of these important laws were knowing and intentional within the meaning of Chapter 237 because the facts showed that AT&T knew it had to

¹⁵ Even if a rate is filed, it can still be found to be "unreasonably discriminatory" if it does not meet the other requirements of Minn. R. 7812.2210, subp. 5.

file a tariff setting forth its rates for switched access service and purposefully provided MCI with switched access service at a unique rate that was much lower than its tariffed rate. A7-A9. *See also*, A62.

In the proceeding below, AT&T sought to avoid responsibility for its illegal conduct by claiming ignorance of the law and good faith. A8. The Commission properly rejected AT&T's argument because knowledge of the law and a specific intent to break the law are not required to find a "knowing and intentional violation" within the meaning of Chapter 237. *Id.* The Commission's decision is based on its established precedent, which in turn is based on this Court's decision in *Claude v. Collins*, 507 N.W.2d 452, 456 (Minn. App. 1993), *rev'd on other grounds*, 518 N.W.2d 836 (Minn. 1994).

A. The Commission Applied The Correct Legal Standard In Its Determination.

On appeal, AT&T again erroneously argues that a violation is knowing and intentional under Chapter 237's penalty provisions only if there is evidence that AT&T "knew its actions were illegal" and acted anyway. AT&T Br. at 40. AT&T's claim is contrary to this Court's holding in *Claude* and well-established legal principles.

The *Claude* case involved the imposition of penalties for violations of the Minnesota Open Meeting Law, which requires meetings of public bodies to be open to the public except in limited circumstances. The Minnesota Court of Appeals examined whether city officials who violated the Open Meeting Law did so knowingly and intentionally where they claimed they did not know of the law's provisions and did not intend to break the law. The court stated that a violation is *intentional* where the actor

“has a purpose to do the thing or cause the result specified” and the actor has “knowledge of those facts” that give rise to the violation. *Claude*, 507 N.W.2d at 456. The court held that knowledge of the law and “a specific intent to violate the law need not be shown to prove a violation.” *Id.*

With regard to facts in the *Claude* case, the Court of Appeals determined that a violation of the Open Meeting Law is *intentional* where a public official “*knows or reasonably should know*” that the meeting of a public body was closed for labor negotiation purposes only, and the member “*purposefully*” discussed, received, or decided information pertaining to issues other than labor negotiations. *Id.* at 456-57. The court further found that the public officials *committed intentional violations* of the Open Meeting Law, notwithstanding their claims that “they did not intend to violate the law.” *Id.*

In its brief, AT&T sets forth the same “knowing and intentional” standard as this Court used in *Claude* and as the Commission used in this and prior cases. AT&T Br. at 40. However, AT&T then goes on to erroneously claim this standard requires a showing that “AT&T knew its actions were illegal” and that AT&T had “as its purpose the violation of Minnesota law.” *Id.* As set forth above, this Court’s decision in *Claude* demonstrates no such showing is necessary to find a violation is knowing and intentional. 507 N.W.2d at 456-57; *see also In re Kantel Communications*, Docket No. P1621, 1466/PA-93-1184, 1995 WL 131319 at *4-*5 (Minn. P.U.C.) (finding a knowing and intentional violation notwithstanding claims of lack of familiarity with Minnesota law,

poor advice from counsel and good faith).¹⁶ Therefore, the Commission properly held that evidence of knowledge of the law or a specific desire by AT&T to break the law is not necessary to find a knowing and intentional violation.

AT&T also errs when it claims that the Commission's standard for "knowing and intentional" creates a strict liability offense. AT&T Br. at 41. A strict liability offense is one where an actor is found liable for the offense regardless of whether the actor has knowledge of the underlying facts that give rise to the violation. *See State v. Skapyak*, 702 N.W.2d 331, 333-34 (Minn. Ct. App. 2005) (holding knowledge of age was not necessary to find a violation of a law prohibiting the sale of marijuana to minors; finding the law creates a "strict liability" offense as to age). The Commission's knowing and intentional standard does not create a strict liability offense because the standard requires a showing that the "actor has knowledge of those facts that are necessary to make the actor's conduct wrongful, and yet the actor has the purpose to do the prohibited thing or cause the result anyway." A8. While this standard does not require knowledge of the law, it does require knowledge of the underlying facts that give rise to the violation. Under a strict liability offense, that is not the case.

AT&T's argument improperly confuses knowledge of the underlying facts with knowledge of the law. Here, the Commission found that the evidence showed that AT&T had knowledge of the underlying facts that gave rise to the violations and that it acted intentionally. A8. The Commission did not impose strict liability on AT&T.

¹⁶ Further, it is well-established that every person conducting business within this state is presumed to know the laws of the state. *See* A8, n. 13.

B. AT&T's Interpretation Of "Knowing And Intentional" Is Contrary To Public Policy.

Not only is the "knowing and intentional" standard applied by the Commission in this case supported by case law and its own precedent, but the Commission's interpretation encourages compliance with the law. AT&T's interpretation of "knowing and intentional" would do just the reverse.

AT&T's interpretation would reward companies that remain ignorant of the law and discourage active compliance with Minnesota's laws. Under AT&T's interpretation, if a company remains ignorant of the law, penalties could never be imposed for a violation because there could never be any evidence that the company "knew its actions were illegal." AT&T Br. at 40. If AT&T's interpretation is adopted, a company rationally might decide to remain ignorant of Minnesota's laws because it could conduct business knowing it will not be penalized even if it breaks the law. *See* Minn. Stat. §237.461 (2007); §237.462 (2004) (authorizing penalties for knowing and intentional violations).

Furthermore, according to AT&T, evidence of knowledge of the law must be very particular. There can only be a finding of a knowing and intentional violation if an AT&T witness admits to personal knowledge of a specific construction of the law and an intent to break that law. *See* AT&T Br. at 40 (arguing evidence that AT&T witness Handal knew of tariff filing requirements was not enough to establish a knowing and intentional violation because Mr. Handal "did not testify that AT&T knew 'switched access services' are 'local services' pursuant to §237.035 ..."). If the test were as AT&T

proposes, any corporation could avoid penalties simply by claiming it did not understand the law applied to the situation at hand. The level of proof demanded by AT&T would be so high that companies engaging in illegal conduct would almost never be penalized.¹⁷

The Commission's interpretation encourages active compliance with Minnesota laws because companies cannot claim ignorance of the law as an excuse. Because the Commission's long-standing interpretation of the "knowing and intentional" standard is well-supported by legal precedent and important policy concerns, it should be upheld. *See In re Henry Youth Hockey Assoc., License No. 02795*, 511 N.W.2d 452, 455 (Minn. Ct. App. 1994), *modified in part on other grounds*, 559 N.W.2d 410 (Minn. 1994). ("[w]hen an agency makes a reasonable interpretation of a statute, it is not the role of this court to change that interpretation").

C. AT&T's Violations Were Knowing and Intentional.

The Commission properly determined that AT&T's violations were knowing and intentional based on the undisputed evidence in the record at the summary disposition phase. *See* A7-A9. It is undisputed that AT&T had a tariff for switched access services. A132. Further, the record shows that AT&T purposefully entered into a contract to provide MCI with switched access services at a rate below AT&T's tariffed rate paid by

¹⁷ If AT&T's interpretation is adopted, its interpretation would logically extend to gas and electric companies as well as telephone providers. *See* Minn. Stat. §216B.27 (imposing a similar standard for violations by electric and gas companies). Certainly the Legislature did not intend to encourage providers of essential services -- telephone, gas, and electric service -- to remain ignorant of the law or avoid penalties based on their own erroneous interpretation of the law. AT&T's interpretation would lead to this absurd result, which the Court should seek to avoid. *See* Minn. Stat. §645.17.

other long distance carriers. *See, id.*; A4, A644-A650. Also, there is no dispute that AT&T did not file the lower MCI rate in a tariff or otherwise with the State at the time, nor does AT&T present any evidence that it intended to do so. A53, A118-A119 (¶126), A130.

The additional evidence presented in the penalty phase of the proceeding confirmed that AT&T knew that switched access rates were required to be filed in a tariff and yet AT&T intentionally provided MCI with switched access service at a unique, unfiled rate that was below the tariffed rates paid by other customers. AT&T witness Handal, who negotiated the agreement, testified he knew that tariffs are to disclose all terms, and access rates are tariffed. *See* A477, A490, A515, A521, Admin. R. No. 171 (Ex. 18). The same witness admitted that he knew the MCI rate was less than the tariffed rate and AT&T intended the rate to be less. *See* A477, A493, A540.

Further, there is no question that the record shows AT&T as a corporation knew that switched access is a service subject to Minnesota's tariff requirements. *See* A132 (switched access tariff filed by AT&T); *In the Matter of AT&T*, 1996 WL 467758 (order authorizing AT&T to provide local service, including switched access service, which states that tariffs are required for local services); *AT&T v. Central Office*, 524 U.S. at 221-23 (holding regulated telephone providers can only charge tariffed rates). Yet, AT&T intentionally provided MCI with a unique rate that was filed in a tariff or otherwise, and that was much lower than its tariffed rate for the same service. *See* A644-A650, A132, A493, A540. Thus, substantial evidence in the record supports the Commission's conclusion that AT&T committed knowing and intentional violations of

the statutes and rules requiring filing of rates and prohibiting unreasonable discrimination.¹⁸ See A7-A11; A56-A62. This Court should affirm the Commission's determination that AT&T's violations were knowing and intentional. See A7-A9.

III. THE COMMISSION PROPERLY IMPOSED A REASONABLE PENALTY ON AT&T FOR ITS KNOWING AND INTENTIONAL VIOLATIONS.

Having found that AT&T knowingly and intentionally violated key telecommunications statutes and rules, the Commission imposed a penalty on AT&T for its illegal conduct pursuant to Minn. Stat. §237.462. A11-A17. The Commission retained penalty authority under this statute by virtue of the savings provisions in Minn. Stat. §645.35. Based on its careful and thorough review of the penalty factors set forth in Minn. Stat. §237.462 and the evidence relating to each factor, the Commission imposed a

¹⁸ AT&T erroneously claims that the decision was based solely on allegations and AT&T was denied an opportunity to rebut the Department's claims. AT&T Br. at 39-40. To the contrary, the ALJ's determination was based on undisputed facts established by the Second Unfiled Agreement, AT&T's switched access tariff, and facts in the Department's verified complaint. See A644-650; A120; A132; PCApp. 1-32; A53. The Baker affidavit, filed by AT&T in opposition failed to present any evidence disputing the facts establishing AT&T's knowing and intentional violations. Rather, it simply contained an unsupported assertion is that AT&T did not intend to break the law. See Admin. R. No. 125 (Affidavit of Natalie J. Baker); A410, A421-A422, A427, A430 (Baker conceding that she was not aware of the Second Unfiled Agreement when it was negotiated and only learned about it after the fact). More importantly, as discussed above, evidence of intent to break the law is not required. Thus, the affidavit failed to establish any material facts in dispute. See *Hunt v. IBM MidAmerica Employees Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986) (summary judgment is proper where nonmoving party fails to provide the court with specific facts indicating that there is a genuine issue of material fact for trial). Finally, AT&T had a full opportunity to present additional evidence on whether the violations were knowing and intentional in the penalty phase.

penalty of \$1000 per day, for a total of \$552,000. A12-17. The penalty imposed is modest, at the low end of the range of possible penalties, and should be upheld.

A. The Commission Retained Authority To Impose Penalties On AT&T In This Case.

The Legislature's general savings statute, Minn. Stat. §645.35, attaches to Minn. Stat. §237.462, to preserve the Commission's penalty authority in this case. Because this proceeding commenced long before the repeal of Minn. Stat. §237.462, the Commission's authority was retained for this proceeding. AT&T's arguments to the contrary are without merit.

The plain language of Minnesota Statute §645.35 directs that, where a proceeding is commenced before the repeal of a law, the case will proceed and be concluded under the laws in effect at the time the proceeding began. This statute provides in part:

The repeal of any law shall not affect any right accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the law repealed....

Minn. Stat. §645.35 (emphasis added). The Legislature intends that this general savings provision attach to the repealed law unless the Legislature has clearly expressed a contrary intent in the repealing statute itself. *State v. Chicago Great Western Railway Co.*, 222 Minn. 504, 509-10, 25 N.W.2d 294, 297 (Minn. 1946) ("*Chicago Great Western*").

Furthermore, the Minnesota Supreme Court has stated that Section 645.35 keeps alive penalty authority under a repealed statute where the proceeding is commenced prior to the repeal of the law, *unless* the Legislature specifically intended that Minnesota

Statute §645.35 not apply. *Id.* at 297-98. In *Chicago Great Western*, the State brought suit against certain railroad companies pursuant to a statute authorizing penalties for the abandonment of railroad tracks by railroad companies without the consent of the state railroad and warehouse commission. 25 N. W. 2d at 296. After the action was commenced, the Legislature repealed the statutes authorizing the penalties and related laws. The repealing statute specifically provided that “Section 645.35 shall not be construed to apply to this act.” *Id.* at 298. The trial court dismissed the action and the State appealed. The Minnesota Supreme Court examined the applicability of Section 645.35 to that case and determined that the Legislature had clearly intended to preclude the application of Section 645.35 to the repealed statutes at issue there. *Id.*

More importantly for this case, the Minnesota Supreme Court also concluded that if the language exempting the application of Section 645.35 had not been included in the repealing statute, Section 645.35 would have attached and the penalty authority would have been maintained for that proceeding. The Minnesota Supreme Court stated “[t]hus, under the statutory general savings clause [Section 645.35], the instant case [involving the imposition of penalties] would not have stopped where the repeal found it. *It would have proceeded and been concluded under the laws in existence when the suit was initiated.*” *Id.* at 297-98 (emphasis added). Therefore, Section 645.35 attaches and maintains the applicability of penalty statutes in existence at the time a proceeding is commenced unless there is a clear legislative intent to the contrary.

In this case, the DOC filed its Amended Verified Complaint against AT&T in October 2005. A1. The DOC’s complaint requested that the Commission impose

penalties pursuant to Minn. Stat. §237.462 against AT&T for its alleged unlawful conduct. A124 (¶47). Minnesota Statute §237.462 was in effect in October 2005 at the time the DOC filed its complaint. The statute was not repealed until August 1, 2006, after this proceeding had already been ongoing for a substantial period of time. *See* (1999 Minn. Laws ch. 224, §7, *as amended by*, 2004 Minn. Laws ch. 261, art. 6, §3 and 2005 Minn. Laws First Special Sess. ch. 1, art. 4, §117 (Add. 67, 71, 75)).

There is no evidence of any legislative intent to exempt the repeal of Minnesota Statute §237.462 from the general savings provisions of Minnesota Statute §645.35. The law providing for its repeal by sunset simply states that this statute “expires” on a given date. *Id.* If the Legislature had intended to exclude this repeal from the application of Minn. Stat. §645.35, it would have done so expressly like it did in the session law at issue in *Chicago Great Western*. *See* 25 N.W.2d at 298 (providing that “Section 645.35, shall not be construed to apply to this act”); *see also, Olsen v. Special Sch. Dist. #1*, 427 N.W.2d 707, 710 (Minn. Ct. App. 1988) (involving a repeal of a law where the Legislature expressly provided that the repeal applies “to all cases pending or brought on or after that date.”) Therefore, Minn. Stat. §645.35 directs that the Commission retains its penalty authority provided in Minn. Stat. §237.462 for this proceeding because Minn. Stat. §237.462 was in existence at time the proceeding commenced.

Preservation of the Commission’s penalty authority under Minn. Stat. §237.462 in this case by virtue of Minn. Stat. §645.35 also furthers the Legislature’s intent to discourage the type of illegal conduct engaged in by AT&T. Because the DOC filed its

complaint well before the repeal of Minn. Stat. §237.462, AT&T was certainly aware that it could be penalized for its unlawful conduct.

AT&T's arguments to the contrary are without merit. First, AT&T illogically claims that the term "repeal" as used in Minn. Stat. §645.35 does not include the "sunset" or expiration of a law.¹⁹ AT&T Br. at 16. None of the cases cited by AT&T provide any support for its claim because they do not address the question of whether the term "repeal" encompasses the sunset or expiration of a statute for purposes of a general savings statute or other similar law of statutory construction. *See* AT&T Br. at 16-17.

The Minnesota Supreme Court's decision in *Granville v. Minneapolis Public Schools, Special School District No. 1*, 732 N.W.2d 201 (Minn. 2007) on the other hand, soundly refutes AT&T's argument. The *Granville* case considered the scope of the term "repealer" as used in Minn. Stat. §645.36, a law closely related to Minn. Stat. §645.35.²⁰ *Id.* at 205-06. In *Granville*, the Minnesota Supreme Court held that the term "repealer" includes a "sunset" or expiration provision for purposes of Minn. Stat. §645.36. *Id.* The Minnesota Supreme Court found there is no meaningful difference between a law that has been repealed and a law that has expired for purpose of Minn. Stat. §645.36. *Id.*

Because the term "repealer" includes a "sunset" provision, the term "repeal" necessarily includes the "sunset" or expiration of a law. Further, both Minn. Stat.

¹⁹ AT&T's erroneous "sunset" argument should be rejected at the outset because AT&T failed to raise this argument in the proceeding below. *State v. Bd. of Educ. of Indep. Sch. Dist. 173*, 623 N.W.2d 634, 638 (Minn. Ct. App. 2001) ("[g]enerally, failure to raise an issue in an administrative proceeding precludes review on appeal").

²⁰ Section 645.35 deals with the effect of a repeal, and Section 645.36 deals with the effect of a repeal of a repealer.

§645.35 and Minn. Stat. §645.36 deal with the effect of the “repeal” of a statute. Therefore, the *Granville* decision instructs that the term “repeal” includes the “sunset” or expiration of a law for purposes of Minn. Stat. §645.35. *See Angell*, 565 N.W.2d at 479 (courts presume the legislature uses the same term consistently). This Court should also reject AT&T’s argument to the contrary because both a direct repeal and a repeal by sunset have the effect of rescinding the law. Thus, there is no meaningful difference for purposes of Section 645.35.

Second, AT&T errs when it claims that the savings provisions of Minn. Stat. §645.35 only apply to the repeal of a law affecting “vested rights.” *See* AT&T Br. at 18. AT&T’s argument is contrary to the plain language of the statute and is not supported by the cases it cites.

By its terms, Minn. Stat. §645.35 attaches to save more than just laws affecting vested rights. The first sentence of the statute provides:

The repeal of any law shall not affect any rights accrued, any duty imposed, any penalty incurred, *or* any proceeding commenced, under or by virtue of the law repealed.

Minn. Stat. §645.35 (emphasis added). The use of the word “or” in Section 645.35 demonstrates that the Legislature intended the savings protections of Minn. Stat. §645.35 to extend to duties imposed, penalties incurred, and proceedings commenced as well as to “rights accrued.” *See Aberle v. Fairbault Fire Dep’t Relief Ass’n*, 41 N.W.2d 813, 817 (Minn. 1950) (“[t]he word ‘or’ is a disjunctive and ordinarily refers to different things as alternatives”). The Legislature would not have included the language extending the savings protections to any “duty imposed, any penalty incurred, or any proceeding

commenced” if it had intended to protect only vested rights, as AT&T argues. *See* Minn. Stat. §645.16 (“[e]very law shall be construed, if possible, to give effect to all its provisions”).

Because the term “proceeding commenced” is an alternative to “right[] accrued,” the savings provisions of Section 645.35 apply to a “proceeding commenced” regardless of whether vested rights are involved. AT&T’s argument to the contrary is irreconcilable with the plain language of the statute.

AT&T’s argument also failed because the cases AT&T cites do not command the result that AT&T seeks. None of the cases cited by AT&T preclude the application of Minn. Stat. §645.35 to save Minn. Stat. §237.462 in this case.

AT&T cites *United Realty Trust v. Property Dev. & Research Co.*, 269 N.W.2d 737, 743 (Minn. 1978), to try to support its improper interpretation of Minn. Stat. §645.35. The *United Realty* case is distinguishable. The *United Realty* case dealt with a situation where the statutory provision was repealed *before* the proceeding was commenced. 269 N.W.2d at 741 (noting that the repeal by amendment occurred in 1974 and 1975, but the action to foreclose on the mortgage was not brought until 1976). This foreclosure case focused on whether the defense of usury was available under those circumstances. *Id.* at 742-44. The court *did not* examine the issue on appeal here: namely, application of Section 645.35 where a proceeding has already commenced. Nor

did the court hold that Minn. Stat. §645.35 applies only to the repeal of laws affecting “vested rights,” as AT&T erroneously suggests.²¹

Similarly, *State ex rel. Butters v. R.R. & Warehouse Comm'n*, 209 Minn. 530, 296 N.W. 906 (1941), cited by AT&T is distinguishable. In *Butters*, the Legislature expressed a clear intent that the general savings statute was not to apply. The *Butters* case involved an action by a former state agency employee who sought mandamus to compel the agency to reinstate the employee pursuant to a repealed veterans’ preference law. In considering the effect of the repeal, the court looked at the general savings statute “which declare[d] generally that the repeal of a statute shall not ‘affect any right accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the law repealed.’”²² 296 N.W. at 907. The court stated: “*That mandate is controlling unless the later and repealing act manifests a contrary intention.*” *Id.* (emphasis added) In the *Butters* case, there was also a specific savings clause in the old veterans’ law at issue there, in addition to the general savings statute. The court went on to hold that the Legislature had expressly provided that the specific savings clause did not apply and thus clearly intended that the general savings clause would not apply either. *Id.* at 907-08.

Here, however, the Legislature has not manifested an intent that Minn. Stat. §645.35 not apply. As shown above, nowhere did the Legislature provide that Minn.

²¹ Similarly, AT&T erroneously cites *Wichelman v. Messner*, 250 Minn. 88, 107 (1957). This case does not address Minn. Stat. §645.35.

²² The savings statute at issue in *Butters* predated Minn. Stat. §645.35 but included the same language as is in the first sentence of Minn. Stat. §645.35.

Stat. §645.35 does not apply to the repeal of Minn. Stat. §237.462. *See supra* 38. Because there is no contrary legislative intent, the mandate of Section 645.35 is controlling here and the proceeding is to “be [] concluded under the laws in existence when the [proceeding] was initiated.” *See Chicago Great Western*, 25 N.W.2d at 297-98. This critical distinction between this case and *Butters* negates AT&T’s suggestion to the contrary.²³

The other “vested rights” cases AT&T cites also are off point. AT&T Br. at 19-23. These cases do not address the issue of whether the savings language in Minn. Stat. §645.35 extends to repeals affecting “proceedings commenced” separately from “vested rights.”²⁴

Finally, AT&T cites several cases to argue that the Commission only has the authority that the Legislature has provided to it. While it is true that the Commission is a creature of the Legislature and the Legislature can repeal the Commission’s penalty authority, the Legislature has expressed its clear intent through Minn. Stat. §645.35 that the repeal of the Commission’s penalty authority in Minn. Stat. §237.462 does not apply to the AT&T proceeding at issue here because the “proceeding commenced” well before

²³ The cases cited by AT&T at page 15 of its brief are also distinguishable. AT&T fails to note that *Holen v. Mpls. St. Paul Metro Airports Comm’n*, 84 N.W.2d 282, 287 (1957) dealt with the repeal of a statute where the Legislature expressly declared that Section 645.35 did not apply. The other case, *Interstate Power Co., Inc. v. Nobles County Bd. Of Comm’n*, 617 N.W.2d 566 (1957), does not address Section 645.35.

²⁴ Many of these cases focus on constitutional questions involving “vested rights” that are irrelevant to the issue here. *See, e.g., Donaldson v. Chase Secs. Corp.*, 216 Minn. 269, 274 (1943), *aff’d* 325 U.S. 304 (1945); *See also Olsen v. Special Sch. Dist. #1*, 427 N.W.2d 707, 711 (Minn. App. 1988) (discussing “vested rights” as a constitutional question separately from the analysis of the application of Minn. Stat. §645.35).

the repeal of Minn. Stat. §237.462. *See Chicago Great Western*, 25 N.W.2d at 297-98 (penalty authority is saved by Section 645.35 where, as here, there is no clear legislative intent to the contrary). Therefore, under the plain language of Minn. Stat. §645.35, the repeal of Minn. Stat. §237.462 does “not affect” the Commission’s authority to impose penalties in this case.

B. The Penalty Imposed By The Commission Is Reasonable And Supported By The Record

An agency’s determination of a penalty “is not a factual finding but an exercise of discretionary power.” *In re Haugen*, 278 N.W.2d 75, 80 n. 10 (Minn. 1979). The penalty imposed by the Commission is well within its discretion, is supported by the record, and is based on its sound judgment.

Minn. Stat. §237.462 (2004) authorizes penalties ranging from \$100 to \$10,000 *per day per violation* for knowing and intentional violations of Minn. Stat. §§237.09, 237.121, 237.16, and implementing rules. Add. 15. The statute lists several factors that the Commission is to consider when assessing a penalty under that provision, none of which is determinative. *Id.*

A penalty is authorized in this case because AT&T knowingly and intentionally violated Sections 237.09 and 237.121, and Minn. R. 7812.2210, which implements Section 237.16. *See id.*²⁵ In determining the penalty amount, the Commission carefully

²⁵ AT&T claims that the Commission erred as a matter of law by imposing penalties for violations of Sections 237.07, 237.74, and 237.60. AT&T Br. at 24, n. 5. As the ALJ’s report clarifies, however, the imposition of penalties on AT&T pursuant to Section 237.462 is only for AT&T’s violations of Sections 237.09, 237.121, 237.16 and rules (Footnote Continued on Next Page)

considered each of the penalty factors. *See* A12-A17. Based on evidence in the record, the Commission assessed a penalty of \$1000 per day for a total of \$552,000. *Id.*

AT&T errs when it argues the penalty is arbitrary and not supported by the record. First, contrary to AT&T's assertions, the Commission correctly determined that the evidence demonstrates that AT&T's violations were intentional. *See supra* 28 - 35. Further, AT&T's violations were willful. AT&T fails to acknowledge in its brief that "[w]illfull conduct" includes a "disregard for governing statutes and an indifference to their requirements, or a careless disregard of statutory requirements." *In re Henry Youth Hockey Assoc.*, 511 N.W.2d at 456; *see also* CIVJIG 25.40 ("Willful conduct: A person behaves willfully when he or she knows or *has reason* to know that an act is prohibited ... and intentionally does it anyway"; emphasis added).

AT&T acted with careless disregard for the law. AT&T as a corporation knew or had reason known that its rates in the MCI contract were required to be included in a tariff or price list and that it could only charge tariffed rates. *See* A2-A3 (setting forth the legal framework). Further, AT&T knew switched access service was a tariffed service and yet AT&T intentionally gave MCI a rate below the tariffed rate. *See* A132 (switched access tariff), A644-A650 (Second Unfiled Agreement), A477, A490, A493, A515, A521 (AT&T witness Handal testimony showing he knew the rate provided to MCI was less than tariffed rate and he knew tariffs were to include all terms). AT&T's lead negotiator

(Footnote Continued From Previous Page)

promulgated thereunder. A35; A19 (¶1). Further, because the Commission treated all the violations of law as a single violation for penalty purposes, AT&T could show no prejudice even assuming it was correct.

who was responsible for compliance with the law, concedes he did not even bother to determine whether the MCI rate should be filed. A490, A525-A526, A535-A536. AT&T's illegal conduct was willful, committed without regard for the law.

Second, contrary to AT&T's assertion, evidence in the record shows that AT&T's violations were grave. Tariff filing requirements and anti-discrimination laws are the heart of the regulatory system. Mr. Doyle, a DOC manager with over 20 years experience, testified that violations of these requirements harm the integrity of the regulatory process. *See* A37 (quoting Doyle testimony); *see also* A159, Admin. R. No. 150 at 3 (Ex. 3-Doyle Rebuttal Testimony). The Commission in its expertise agreed. A13-A14. AT&T seeks to avoid responsibility for its illegal conduct by improperly diminishing the importance of Mr. Doyle's testimony.

AT&T also ignores that AT&T and MCI obtained a cost advantage over other long distance carriers as a result of the reduced rates in First and Second Unfiled Agreements. A13. AT&T does not and cannot dispute this finding. By failing to file the unique rates, AT&T and MCI "provided secret subsidies to each other's long distance operations, and not to other carriers." A13. The Commission logically determined, based on the evidence and its expertise that "[t]his conduct distorts the market, harms competition, and ultimately harms consumers." *Id.* *See also* A37, A158, A160.

Third, AT&T's claim that it received "no benefit" from the Second Unfiled Agreement ignores that the First and Second Unfiled Agreements were a package deal and the benefit to AT&T must consider the effect of both agreements taken together. *See* A39; PCApp. 130-136. AT&T's motivation for these bi-lateral deals was to realize

savings for its long distance operations from unfiled access rates, well below the tariffed rates. *See* A477, A482-83, A493, A540 (AT&T's Handal testifying that the rate in the First and Second Unfiled Agreements is below the tariffed rate and is the same as prior agreements). The record shows that that AT&T realized a significant economic benefit by entering into the two bi-lateral agreements. *See* A39; Admin. R. Nos. 154, 155, and 165 (Exs. 7A, 7B, and 15 showing the savings realized as a result of the agreements). AT&T's witnesses' claims to the contrary are mere assertions, not supported by any documentation. AT&T ignores the testimony of its own witness Handal who conceded that the First and Second Unfiled Agreements were in AT&T's interest and "had dollar values in them that helped settle all the other disputes that we had." *See* A547; PCApp. 130-136 (Ex. 25).

Finally, the Commission's consideration of the other factors is also based on substantial evidence. *See* A15-A17. The Commission noted the amounts paid as part of settlements by other carriers, but recognized the differences between a settlement payment and a penalty imposed after a finding of a knowing and intentional violation of the law. *See* A15-A17; A19; A41. The Commission also recognized that it had imposed a higher penalty of up to \$10,000 per day on Qwest for its unfiled agreements.²⁶ A16.

²⁶ By a December 26, 2007 order, the Commission revised the penalty amounts imposed on Qwest for its unfiled agreements. The revised penalty for Qwest's agreements involving rate reductions is \$5000 per day, still much more than the \$1000 per day imposed on AT&T. *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, 2007 WL 4976248 (Minn. P.U.C.).

Based on the evidence of the seriousness of AT&T's intentional violations, the evidence of benefits to AT&T, along with the evidence of resulting harm, the Commission concluded that a meaningful sanction is necessary for AT&T's illegal conduct. A16-A17. The Commission determined the evidence supports a penalty of \$1000 per day for a total of \$552,000. This amount can easily be paid by AT&T, whose parent company reported over \$63 billion in annual revenues in 2006. *See* A15-A17. The Commission noted that the penalty is at the low end of the statute's penalty range but determined it would be "adequate to command the attention of AT&T without imperiling the carrier's finances." A17. Thus, the Commission's decision to impose a \$1000 per day penalty on AT&T for its knowing and intentional violations of important telecommunications statutes and rules is supported by substantial evidence and is based on its judgment, not its will. *See In re: Grand Rapids Public Utilities Commission*, 731 N.W.2d at 871.

CONCLUSION

The Commission's order is consistent with the law, fully supported by the record and well-reasoned. Based on the foregoing, the Commission respectfully requests the Court affirm the Commission's order.

Dated: May 5, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

WITH MINN. R. APP. P 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 13,328 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare this Brief.


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