

No. A09-1493

**STATE OF MINNESOTA
IN COURT OF APPEALS**

In the Matter of Qwest's Minnesota Performance Assurance Plan (MPAP)

Minnesota Department of Commerce,

Relator,

vs.

Minnesota Public Utilities Commission,

Respondent.

**INITIAL BRIEF AND ADDENDUM OF RELATOR
MINNESOTA DEPARTMENT OF COMMERCE**

ALISON C. ARCHER
Assistant Attorney General
Atty. Reg. No. #031934X

445 Minnesota Street, Suite 1100
St. Paul, MN 55101-2128
(651)757-1408

ATTORNEY FOR RESPONDENT
MINNESOTA PUBLIC UTILITIES
COMMISSION

KAREN FINSTAD HAMMEL
Assistant Attorney General
Atty. Reg. No. 0253029

445 Minnesota Street, Suite 1400
St. Paul, MN 55101-2131
(651) 757-1248

ATTORNEY FOR RELATOR
MINNESOTA DEPARTMENT OF
COMMERCE

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. **IS THE COMMISSION'S INTERPRETATION OF MINN. STAT. § 16A.151 IN EXCESS OF ITS AUTHORITY AND AN ERROR OF LAW?**

Decision of the Minnesota Public Utilities Commission: The Minnesota Public Utilities Commission ruled in the negative.

Apposite Authority:

Minnesota Mining and Mfg. Co. v. Travelers Indem. Co.,
457 N.W.2d 175, 182-83 (Minn. 1980).

Minn. Stat. § 16A.151 (2008).

Minn. Stat. § 645.08(3) (2008).

Minn. Stat. § 645.08(1) (2008).

2. **IS THE COMMISSION'S FAILURE TO FOLLOW ITS PRECEDENT ARBITRARY AND CAPRICIOUS?**

Decision of the Minnesota Public Utilities Commission: The Minnesota Public Utilities Commission ruled in the negative.

Apposite Authority:

In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.
624 N.W.2d 264, 277-279 (Minn. 2001).

In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. and Gas Utilities,
768 N.W.2d 112, 120 (Minn. 2009).

3. **IS THE MINNESOTA PUBLIC UTILITY COMMISSION'S DECISION CONSTRUING ITS AUTHORITY OVER THE MPAP AND ITS ROLE WITH RESPECT TO THE TIER 2 SPECIAL FUND IN EXCESS OF ITS AUTHORITY OR OTHERWISE REFLECT AN ERROR OF LAW?**

Decision of the Minnesota Public Utilities Commission: The Minnesota Public Utilities Commission ruled in the negative.

Apposite Authority:

Computer Tool & Eng'g, Inc. v. Northern States Power Co., et al.,
453 N.W.2d 569 (Minn. Ct. App. 1990) *rev. denied*, (Minn. 1990).

Senior Citizens Coalition of Northeastern Minnesota v. Minnesota Pub. Utils. Comm'n, 355 N.W.2d 295 (Minn. 1984)

Peoples Natural Gas Co. v. Minnesota Pub. Utils. Comm'n,
369 N.W.2d 530, 534 (Minn. 1985).

Minn. Stat. § 216A.05, subd. 2 (2008).

- 4. IS THE MINNESOTA PUBLIC UTILITIES COMMISSION'S ORDER CONCLUDING THAT THE PUBLIC INTEREST IS NOT A SIGNIFICANT CONSIDERATION IN ADOPTING WHOLESALE SERVICE QUALITY STANDARDS ARBITRARY AND CAPRICIOUS?**

Decision of the Minnesota Public Utilities Commission: The Minnesota Public Utilities Commission ruled in the negative.

Apposite Authority:

In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.,
624 N.W.2d 264 (Minn. 2001).

In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec and Gas Utilities, 768 N.W.2d 112, 120 (Minn. 2009).

- 5. IS THE COMMISSION'S INTERPRETATION OF ITS JURISDICTION OVER THE MPAP IN EXCESS OF ITS AUTHORITY OR DOES IT OTHERWISE REFLECT AN ERROR OF LAW?**

Decision of the Minnesota Public Utilities Commission: The Minnesota Public Utilities Commission ruled in the negative.

Apposite Authority:

In re Qwest's Wholesale Serv. Quality Standards,
702 N.W.2d 246 (Minn. 2005).

In the Matter of the Application by Qwest Communications Intl., Inc. for Authorization to provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming,
17 F.C.C.R. 26303 (Dec. 23, 2002).

In the Matter of Application by Qwest Communications Intl., Inc. for Authorization to Provide In-Region, InterLATA Services in Minnesota,
18 F.C.C.R. 13323 (June 26, 2003).

47 U.S.C. § 253(b) (2008).

STATEMENT OF THE CASE

This case is a certiorari appeal from a final order and decision of the Minnesota Public Utilities Commission (“MPUC”) pursuant to Minn. Stat. § 237.25 (2008), which provides in relevant part that “[a]ny party to a proceeding before the commission or the attorney general may make and perfect an appeal from the order in accordance with chapter 14.” The Department of Commerce (“Relator”) appeals from the MPUC’s April 21, 2009 *Order Authorizing Grant Program Disbursing Tier 2 Special Fund Balance* (the “*April 21st Order*”); Addendum (“Add.”) at 1-7; and the MPUC’s *Order Denying Reconsideration* dated July 15, 2009; Add. at 8-9.

The MPUC concluded that Minn. Stat. § 16A.151 (2008) did not apply, and, therefore, the Tier 2 Special Fund, which included penalty payments to the State due to Qwest’s failure to meet wholesale service quality standards, need not be deposited into the State’s general fund. Add. at 6. The MPUC directed its executive secretary to establish a grant program to disburse the money in the Tier 2 Special Fund to grantees for K-12 telecommunications projects. Add. at 7. The MPUC reasoned that the terms in the Minnesota Performance Assurance Plan (“MPAP”), and not Minnesota law, governed distribution of the Tier 2 Special Fund, and, therefore, the MPAP required the MPUC to distribute the money according to its terms. Add. at 6. The MPUC was persuaded that the Federal Communications Commission (“FCC”) has authority over the MPAP; such that the MPUC’s role is merely that of a “competitively neutral industry observer.” Add.

at 6. It further concluded that the MPUC's role with respect to the Tier 2 Special Fund could have been fulfilled by any private entity. Add. at 6.

Relator petitioned for reconsideration of the MPUC's *April 21st Order*. Relator asked the MPUC to reconsider its Order and deposit the money in the State's general fund. Alternatively, if the MPUC did not grant reconsideration, Relator asked the MPUC to explain its rationale for not following its precedent in which the MPUC determined that Minn. Stat. § 16A.151 was applicable to service quality matters, and to explain the basis for the MPUC's conclusion that the FCC has authority over the MPAP pursuant to that agency's jurisdiction under 47 U.S.C. § 271 (2008). Motion for Reconsideration (A.9-30).¹ The MPUC denied reconsideration on July 15, 2009, without further elaboration. Add. at 8-9.

Relator asserts that the MPUC's *April 21st Order* establishing a grant program is contrary to Minn. Stat. § 16A.151 (2008), is an abdication of the MPUC's regulatory powers and responsibilities and, as such, is in excess of that authority or affected by other errors of law, and is arbitrary and capricious pursuant to Minn. Stat. § 14.69 (2008).

¹ References to Relator's Appendix are indicated as follows: (A.[page number]).

STATEMENT OF FACTS

This is the second appeal arising from the MPUC's decisions in its wholesale service quality dockets.² The first appeal dealt with the MPUC's authority to require benchmark wholesale service quality standards and impose self-executing remedies to enforce compliance with such standards. *See In the Matter of Qwest's Wholesale Serv. Quality Standards*, 678 N.W.2d 58 (Minn. Ct. App. 2004) ("*Qwest's WSQ Standards I*") (A.31-38); *aff'd in part and rev'd in part*, 702 N.W.2d 246 (Minn. 2005) ("*Qwest's WSQ Standards II*"); (A.39-57). The present appeal relates to the MPUC's authority to earmark penalties paid by Qwest for distribution to third parties rather than to the State's general fund, and also to the MPUC's interpretation of its authority over the MPAP.

To assist in understanding the origin of the wholesale service quality standards applicable to Qwest under the MPAP, generally, as well as the nature of the monies deposited by Qwest in the Tier 2 Special Fund, specifically, Relator includes below a brief history of regulatory changes in the telecommunications industry along with the Commission's various wholesale service quality proceedings leading up to the decision from which Relator appeals.

A. The Regulatory Background.

In 1982, a federal district court approved a Consent Decree that resolved years of antitrust litigation between AT&T and the United States Department of Justice. *See United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v.*

² MPUC Docket Nos. P-421/AM-00-849 and P-421/AM-01-1376, entitled *In the Matter of Qwest's Wholesale Service Quality Standards* and *In the Matter of Qwest's Minnesota Performance Assurance Plan (MPAP)*, respectively.

United States, 460 U.S. 1001 (1983). Prior to the resulting AT&T divestiture on January 1, 1984, local and long distance telecommunications services in Minnesota were provided by Northwestern Bell Telephone Company, which was one of 22 Bell Operating Companies (“BOCs”) and the monopoly provider of telephone service in much of the state. Following divestiture, local services in Minnesota were provided largely by US West Communications, Inc., a Regional Bell Operating Company (“RBOC”) that was formed by combining three BOCs (Northwestern Bell, Mountain Bell, and Pacific Northwest Bell). US West and the other RBOCs continued to provide monopoly local exchange service and in-state *intraLATA* long distance service in their territories, and state utility commissions continued to regulate them. However, *interLATA* long distance services were provided by the transformed post-divestiture AT&T and other competitive long distance carriers such as MCI and Sprint.³ From 1982 to 1996, AT&T and the divested RBOCs operated under the terms of the 1982 Consent Decree.

In 1996, Congress enacted legislation at the urging of the telecommunications industry. The Telecommunications Act of 1996 (the “Act”) provided a means for the BOCs to enter the lucrative *interLATA* long distance market, but *only if* the BOCs opened their local markets to competition. See Pub. L. No. 104-104, 110 Stat. 56, *amending* the Communications Act of 1934 (codified at 47 U.S.C. §§ 151, *et seq.*).

Congress recognized that sufficient local competition was unlikely to ensue without an effective passageway for competitors because significant capital investments

³ LATA is the acronym for “Local Access and Transport Area,” defined in Minn. Stat. § 237.57 (2008) as “a geographical area designated by the Modification of Final Judgment in *U.S. v. Western Electric Co., Inc.*, 552 F. Supp. 131 (D.D.C. 1982).”

are necessary to build the infrastructure essential to provide local exchange services. For this reason, the Act provided a “carrot and stick” approach to address the significant barriers to market entry, by requiring BOCs, as incumbent local exchange carriers (“ILECs”), to provide wholesale local services to competitive local exchange carriers (“CLECs”). *See* 47 U.S.C. §§ 251-61 (2008). In return, the Act created a means by which the BOCs could enter the interLATA long distance market if they could demonstrate that their local markets were sufficiently open to competition, and that barriers to CLECs’ entry had been removed, at least insofar as the ILEC was concerned. *See* 47 U.S.C. § 271 (2008); Add. at 11-15 (§ 271 excerpt).

The 1996 Act requires ILECs to unbundle their networks and to make individual network elements available to CLECs on just, reasonable, and nondiscriminatory terms. 47 U.S.C. § 251(c) (2008). Under the terms of the Act, CLECs can seek agreements with an ILEC to interconnect with the ILEC’s network, purchase services at wholesale rates for resale, and purchase unbundled network elements. *See* 47 U.S.C. § 252(a) (2008).

Thus, the BOCs’ opportunity to enter the interLATA long distance market came at a cost to them in terms of decreased market share in the local exchange market. It also required BOCs to demonstrate their respective networks met a number of factors considered necessary for CLECs to compete with them on a nondiscriminatory basis. *See* 47 U.S.C. § 271(d)(2)(B)(i)-(xiv) (2008).⁴ This “Competitive Checklist” includes 14

⁴ The application to the FCC for long distance authority is commonly referred to as a “271 application.”

factors that must be established before the FCC can grant a petition by a BOC to gain entry into the interLATA long distance market. *Id.*

The ILECs control over local network facilities created the potential for them to use anticompetitive tactics such as providing poor service quality to CLECs in order to maintain monopoly control of the local exchange market. Although the 1996 Act preempts state authority over intrastate telecommunications in many other respects, the Act expressly preserves state authority over service quality. 47 U.S.C. § 253(b) (2008). With the implementation of local service competition by CLECs, wholesale service quality became a crucial focus of the MPUC's exercise of its jurisdiction. US West, now Qwest, had to provide CLECs with access to its local network facilities so they could compete with US West, but without wholesale service quality standards in place, the Company had no incentive to provide adequate wholesale service quality. For this reason, adequate wholesale service quality standards and the MPUC's enforcement of such standards, were both essential to ensure that CLECs are able to provide quality local services to their own retail customers.

B. Initial Wholesale Service Standards: "Direct Measures of Quality" In Arbitrated Interconnection Agreements.

The MPUC has addressed wholesale service quality standards and enforcement in three dockets.⁵ The first proceeding involved petitions filed by AT&T and MCImetro and others asking the MPUC to arbitrate interconnection agreements pursuant to

⁵ The MPUC's three wholesale service quality standards dockets are: (1) the AT&T/MCImetro interconnection arbitration, MPUC Docket No. P-442, 5321, 3167, 466, 421/M-96-729,855,909; (2) Qwest's Wholesale Service Quality Standards, Docket No. P-421/AM-00-849; and (3) the MPAP docket, P-421/AM-01-1376.

47 U.S.C. § 252 (2008). *In the Matter of Consolidated Petitions of AT&T Communications of the Midwest, Inc., et al.*, MPUC Docket No. P-442, 5321, 3167, 466, 421/M-96-729, M-96-855, M-96-909, Order Resolving Arbitration Issues and Initiating a U S WEST Cost Proceeding (Dec. 2, 1996) (“AT&T/MCI metro”); (A.58 (first page only)); Order Resolving Issues After Reconsideration and Approving Contract (Mar. 17, 1997); (A.59 (first page only)). One of many issues the MPUC resolved in the AT&T/MCI metro matter was a dispute over wholesale service quality standards, which were termed Direct Measures of Quality (“DMOQs”). The MPUC adopted DMOQs and the associated penalties. *Id.* Numerous CLECs subsequently adopted AT&T/MCI metro’s interconnection agreement under the opt-in provisions of the 1996 Act. *See* 47 U.S.C. § 252(i) (2008). The federal district court upheld the MPUC’s authority to establish wholesale service quality standards and to order remedial enforcement payments in *US West Communications, Inc. v. Garvey*, No. 97-913 ADM/AJB (D. Minn. 1999), 1999 U.S. Dist. Lexis 22042, quoted in *Qwest’s WSQ Standards I*, 678 N.W.2d at 62-63 (A.34-35). However, the service quality standards adopted in the AT&T/MCI metro case were in effect only as long as the interconnection agreements remained in effect.

C. The MPUC’s Second Wholesale Service Quality Docket: Qwest’s Obligation To Implement Permanent Wholesale Service Quality Standards Arising From The U S West/Qwest Merger Docket.

The second MPUC docket involving Qwest wholesale service quality standards arose from Qwest’s merger with US West. *See In the Matter of the Merger of the Parent Corp. of Qwest Communications Corp, et al., and U S WEST Communications, Inc.*,

MPUC Docket No. P-3009, 3052, 5096, 421, 3016/PA-99-1192, Order Accepting Settlement Agreements and Approving Merger Subject to Conditions (June 28, 2000); (A-60-72). As a condition of merger approval, Qwest agreed to cooperate in developing new wholesale service quality (“WSQ”) standards to replace the DMOQs in new interconnection agreements. *Id.* (A.66). Beginning in 2000, subsequent to the final order in the Qwest/US West merger docket, the MPUC addressed Qwest’s WSQ standards in what was expected to be an “expedited proceeding” to develop permanent state WSQ standards (hereinafter, the “WSQ Standards” proceeding).

Despite Qwest’s agreement in the merger proceeding to cooperate in developing new WSQ standards, it took the MPUC nearly three years to complete them. *See Qwest’s WSQ Standards I*, 678 N.W.2d at 61; (A.33). Initially, two separate sets of wholesale service quality standards were presented for MPUC approval. Qwest submitted one set, with parity-based standards much like the MPAP; the other set included benchmark standards and self-executing remedies for CLECs that were favored by all other parties in the proceeding. In March 2002, the MPUC rejected both sets of proposed wholesale service quality standards to explore other alternatives. *Id.*

D. Qwest’s Separate MPAP.

The third wholesale service quality proceeding involved a Performance Assurance Plan (“PAP”) much like the plan Qwest had filed in the WSQ Standards proceeding. Although progress was being made in the WSQ Standards proceeding, Qwest wanted to have an MPUC-approved PAP to include with its § 271 application as evidence to demonstrate, in part, that its § 271 application was in the public interest. *See Qwest’s*

WSQ Standards II, 702 N.W.2d at 249-50; (A.42-43). In late 2001, Qwest had filed with the MPUC the materials it intended to file with the FCC as part of Qwest's § 271 application for interLATA authority. The § 271 materials included another PAP, which essentially was the Colorado PAP and came to be known as the Minnesota PAP (or MPAP) after some MPUC modifications agreed to by Qwest. Qwest filed the materials so that the MPUC could fulfill its consultative role in the FCC's § 271 process, and could consider approval of a "Post-Entry Performance Assurance Plan" (FCC terminology) that Qwest could file at the FCC along with its § 271 application. *See Qwest's WSQ Standards II*, 702 N.W.2d at 249-50; (A.42-43). *See also In re Qwest's Compliance With § 271 of the 1996 Act*, Docket No. P-421/CI-96-1114, Notice and Order (Sept. 11, 2001); (A.73-83).

The primary focus in the § 271 process was Qwest's demonstration to the FCC's satisfaction that it met the requirements of the "Competitive Checklist" in § 271(c)(2)(B) (2008). Congress required the FCC to consult with state commissions with regard to the these 14 factors before making any such determination. 47 U.S.C. § 271(d)(2) (2008). Having a PAP approved by the MPUC is simply one part of what Qwest needed to demonstrate for the FCC's § 271 process in support of its argument that granting Qwest's application would be consistent with the "public interest, convenience, and necessity" pursuant to 47 U.S.C. § 271(d)(3)(C) (2008).

On July 3, 2002, the MPUC adopted the MPAP as a PAP that was available to CLECs in Minnesota, clearly stating that it was approving the MPAP so that Qwest

would have a state-approved plan in place for the § 271 process.⁶ Thus, although the MPAP would be available to CLECs after Qwest received § 271 approval, the development of the MPUC's favored plan (the permanent WSQ Standards) would continue.⁷

On March 28, 2003, while the WSQ Standards proceeding was still pending, Qwest submitted its Minnesota 271 application to the FCC. (A.184). Qwest included the MPAP to support its claim that granting its § 271 application was in the public interest. (A.238).

In earlier § 271 applications for other states, the FCC had provided guidance to BOCs for demonstrating that a § 271 application is in the public interest. The FCC stated that a BOC's demonstration that it was subject to a state performance monitoring and enforcement mechanism with meaningful remedies would constitute "probative evidence" that the BOC would continue to meet its § 271 obligations and that its interLATA entry would be consistent with the public interest. *See, e.g., Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLata Service in New York*, Memorandum Opinion and Order, 15 F.C.C.R. 3953, 4161 ¶ 422, *aff'd*, 220 F.3d 607 (D.C. Cir. 2000) ("BA-NY Order"); (A.166-86[174-75]); and *Application by SBC Communications Inc., Southwestern Bell*

⁶ The MPAP provided for monetary remedies to CLECs and payments to the State of Minnesota if Qwest's wholesale service provisioning fell below its retail service provisioning. *In the Matter of Qwest's Performance Assurance Plan*, MPUC Docket No. P-421/AM-01-1376, Order Adopting Plan and Setting Further Procedural Schedule; (A.84-90). *See also Qwest's WSQ Standards I*, 678 N.W.2d at 61; (A.33).

⁷ On August 2, 2002, the MPUC request comments on using the MPAP as the basis for the WSQ Standards. *Qwest's WSQ Standards II*, 702 N.W.2d at 250; (A.42).

Tel. Co., and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas, Memorandum Opinion and Order, 15 F.C.C.R. 18354, 18559-60 ¶ 420 (2000), *appeal dismissed*, AT&T v. FCC, No. 00-1295 (D.C. Cir. 2001) (“*SWBT-Texas Order*”); (A.217-36).⁸

On June 26, 2003, the FCC granted Qwest’s § 271 application. The MPAP went into effect on August 1, 2003. In August 2002, the MPUC had requested comments about using the MPAP as the basis for the permanent standards in the WSQ Standards proceeding. *See Order Adopting WSQ Standards* at 22-23, Docket No. P-421/AM-00-849 (July 3, 2003) (“*July 2003 Order*”); (A.164-65). On July 3, 2003, nearly three years after initiating the WSQ proceeding and within days of the FCC’s approval of Qwest’s § 271 application, the MPUC adopted benchmark standards in the WSQ Standards docket. *Id.* The MPUC concluded that adoption of its chosen WSQ Standards with benchmark standards and remedies would fulfill the MPUC’s “duty to promote high quality service and the development of competitive local phone markets.” (A.164). Under the terms of the MPAP, a CLEC must opt-in to either the MPAP or WSQ Standards, but cannot have both plans. (A.105-27) (MPAP Compliance Filing, Exhibit K, Feb. 18, 2003).

Therefore, as of August 1, 2003, when the MPAP went into effect, CLECs had two WSQ plans from which to choose. The MPUC stated:

⁸ Relevant portions of these orders are included in Relator’s appendix.

Most recently the Commission approved its MN WHSQ Plan. The PAP and the MN WHSQ Plan have a similar structure and most of the terms are identical, but the plans differ in some respects. Most notably, the PAP generally directs Qwest to serve CLECs' wholesale needs on the same basis that it serves its own retail operations (the so-called "parity standard"); in contrast, the MN WHSQ Plan contains more instances where Qwest is directed to meet fixed performance goals (called "benchmarks"). The MN WHSQ Plan is also in effect today, although CLECs claim that Qwest declines to implement it.

In the Matter of Qwest's WSQ Standards, Docket No. P-421/AM-00-849, Order Accepting Affidavit and Adopting Partial Stay, at 4 (Feb. 17, 2004) ("*February 2004 Order*"); (A.128-142[131]).

Qwest appealed the MPUC's July 3, 2003 WSQ Standards decision. This Court affirmed the MPUC in all respects, finding that the MPUC had authority to impose benchmark WSQ standards on Qwest and to enforce compliance with the standards through self-executing payments. *Qwest's WSQ Standards I*, 678 N.W.2d at 65-66; (A.36-37). On further appeal, the Minnesota Supreme Court affirmed the decision with respect to the benchmark standards, but reversed the decision on the PUC's authority to impose self-executing penalties. *Qwest WSQ Standards II*, 702 N.W.2d at 248; (A.41).

CLECs had been instrumental in developing the permanent WSQ Standards and preferred the benchmark standards included in the WSQ Standards to the parity standards of the MPAP. However, after the Supreme Court reversed the MPUC's decision as to MPUC-imposed self-executing payments, CLECs chose the parity-based MPAP self-executing payments agreed to by Qwest. Thus, it appears that Qwest's competitors agreed with the MPUC's assessment that a self-enforcing remedy scheme was important as a meaningful way to enforce WSQ standards. See *Order Adopting Wholesale Service*

Quality Standards at 16, 23, Docket No. P-421/AM-00-849 (July 3, 2003) (“*July 2003 Order*”); (A.143-65[158, 165]).

E. The Tier 2 Special Fund.

The MPAP provides for two types of self-executing payments in the event Qwest fails to comply with the wholesale service quality standards: (1) Qwest must make payments to CLECs (Tier 1 payments); and (2) Qwest must make payments to the State (Tier 2 payments) for non-conforming service based upon the aggregate of all CLEC data for each applicable performance measurement that is not met. (A.112-115 [8-11]). Section 16.8 of the MPAP illustrates that the MPAP is an alternative to other service quality rules such as the WSQ Standards. It provides:

16.8 If Qwest believes that some Tier 2 duplicate payments that are made to the state under other service quality rules, Qwest may make the payments to a special interest bearing escrow account and then dispute the payments via the ALJ. If Qwest can show that the payments are indeed duplicative, it may retain the money (and its interest) that are found to duplicate other state payments. Otherwise the money will go to the Tier 2 Special Fund.⁹

(A.123).

Unlike Tier 1 remedies to individual CLECs, Qwest’s payments to the Tier 2 Special Fund are penalty payments to the State based generally on Qwest’s harm to competition and, thus, harm to the overall public interest. *See Order on Reconsideration Amending Performance Assurance Plan*, at 13; (A.91-104[103]). Payments to the Tier 2 Special Fund are based on Qwest’s failure to meet performance standards on an

⁹ The most current revision of the MPAP can be accessed at the following URL: http://www.qwest.com/about/policy/sgats/SGATSdocs/minnesota/MN-3rd-revised-6th-amend-Exhibit-K-062207_Clean.doc

aggregate CLEC basis rather than an individual CLEC basis. An aggregate CLEC measurement is an appropriate penalty basis because it is difficult or impossible to quantify the harm to competition in Minnesota when Qwest provides below-par wholesale service quality in violation of the MPAP standards. *See, e.g., Qwest's WSQ Standards II*, 702 N.W.2d at 262; (A.53) Thus, the MPUC, as an agency of the state, is to recover, by means of the Tier 2 Special Fund, penalty payments made by Qwest to the State for harm to the public interest based on § 10 of the MPAP. *See* (A.113-115). The MPUC's *April 21st Order* states to the contrary that the Tier 2 Special Fund payments are based on Qwest's harm to private interests. *Add.* at 6.

The MPUC expressed concerns about the MPAP section which "directs Qwest to deposit penalty monies into the 'Tier 2 Special Fund' to pay for the auditor, the independent monitor, and other purposes." *Order on Reconsideration Amending Performance Assurance Plan*, at 13 (A.91-104[103]). With regard to the provisions for the Tier 2 Special fund, the MPUC further stated that since the MPAP was crafted for use in Colorado, it "may not entirely conform to Minnesota law," and that additional changes to the MPAP, or perhaps even statutory changes, could be warranted. *Id.* The MPUC further stated that it "will solicit comments from all parties about what changes are needed to fully implement the Tier 2 Special Fund" and "will authorize its Executive Secretary to establish a schedule for receiving such comments." *Id.* Ordering Paragraph 9 provides: "The Executive Secretary shall establish a schedule for a comment period to finalize draft PAP language and/or legislation on the Tier 2 Special Fund issue." *Id.* at 14 (A.104). No comment period was ever established pursuant to Paragraph 9.

Qwest continues to file service quality reports with the MPUC and to make Tier 1 payments to CLECs. Qwest also has made Tier 2 payments to the Tier 2 Special Fund since it obtained § 271 approval. By April 8, 2009, the Tier 2 Special Fund totaled approximately \$2.9 million. Transcript at 2-3, April 8, 2009 Agenda Meeting; (A.287-96[288]). Qwest asked the MPUC to take control of the Tier 2 Special Fund, and to establish a grant program to distribute the contents of the Tier 2 Special Fund according to the terms in the MPAP. On April 21, 2009, the MPUC granted Qwest's request. Relator filed a Motion for Reconsideration on May 12, 2009; this motion was denied on July 15, 2009, without further explanation of the *April 21, 2009* Order. See Add. at 8-9.

SCOPE OF REVIEW

An appeal from a decision and order of the MPUC may be commenced in accordance with Minn. Stat. ch. 14. Minn. Stat. § 237.25, subd. 1 (2008). 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). In a judicial review of an agency decision:

the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, 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.

Minn. Stat. § 14.69 (2008).

The court reviews the MPUC's factual findings to determine whether they are supported by substantial evidence and its conclusions to determine whether they are arbitrary and capricious. *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277-279 (Minn. 2001) ("*Blue Cross & Blue Shield*"). While the reviewing court may give substantial deference to an agency's fact-finding process, such is not the case when the agency acts in its legislative capacity. *Quinn Distrib. Co., Inc. v. Quast Transfer, Inc.*, 181 N.W.2d 696, 699 (Minn. 1970); *Brinks, Inc. v. Minnesota Pub. Utils. Comm'n*, 355 N.W.2d 446, 449 (Minn. Ct. App. 1984). When an agency acts in a legislative capacity, the standard of review is whether the agency exceeded its statutory authority. In contrast, when it acts in its quasi-judicial capacity, the standard of review is the substantial evidence test. *In Re Request for Serv. in Qwest's Tofte Exch.*, 666 N.W.2d 391, 395 (Minn. Ct. App. 2003). When the agency acts in both capacities, the Court will review the case using both standards. *Id.*

Reviewing courts are not bound, however, by an agency's decisions on questions of law and need not defer to the agency's expertise. *No Power Line, Inc. v. Minnesota Envtl. Quality Council*, 262 N.W.2d 312, 320 (Minn. 1977). An agency's interpretation of the statutes it administers is entitled to some deference only "where (1) the statutory language is technical in nature, and (2) the agency's interpretation is one of long-standing application." *Arvig Tel. Co. v. Northwestern Bell Tel. Co.*, 270 N.W.2d 111, 114 (Minn. 1978); *see also Geo. A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988). In

contrast, no deference is appropriate when the agency interprets statutes not within its area of expertise. *See id.* This Court retains the authority to review *de novo* errors of law which arise when an agency decision is based on the meaning of words in a statute. *See In re Denial of Eller Media Co.'s Application for Outdoor Adver. Permits*, 664 N.W.2d 1, 7 (Minn. 2003).

Whether an agency has exceeded its statutory authority is also a question of law which is reviewed *de novo*. *Info Tel Communications, LLC. Minnesota Pub. Utils. Comm'n*, 592 N.W.2d 880, 884 (Minn. Ct. App. 1999); *St. Otto's Home v. Minn. Dep't of Human Servs.*, 437 N.W.2d 35, 39-40 (Minn. 1989). With regard to following the agency's own precedent, the Minnesota Supreme Court cited with approval the Eleventh Circuit's widely accepted concise articulation of the arbitrary and capricious standard in *McHenry v. Bond*, 668 F.2d 1185, 1192 (11th Cir. 1982), that:

An administrative agency concerned with furtherance of the public interest is not bound to rigid adherence to precedent. This does not mean, however, that an agency may abandon its own precedent without reason or explanation. An agency must either conform to its prior norms and decisions or explain the reason for its departure from such precedent. ...(citations omitted) (internal quotation marks omitted).

In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. and Gas Utils., 768 N.W.2d 112, 120 (Minn. 2009) ("2005 AAA Charges"). The Minnesota Supreme Court found the standard developed by the federal courts to be persuasive, stating,

When an agency seeks to deviate from its prior decisions, the agency is charged with setting forth a reasoned analysis for the change. If a reasoned explanation is provided, the courts then review that explanation to determine whether the explanation was arbitrary and capricious.

Accordingly, we conclude that an agency must generally conform to its prior norms and decisions or, to the extent that it departs from its prior norms and decisions, the agency must set forth a reasoned analysis for the departure that is not arbitrary and capricious.

Id.

A decision is arbitrary and capricious if the decision reflects the agency's will and not its judgment. *Blue Cross & Blue Shield*, 624 N.W.2d at 277. To satisfy the arbitrary and capricious test, the agency must explain the connection between the facts found and choices made. *Id.*

ARGUMENT

I. THE MPUC ERRED IN CONCLUDING THAT MINN. STAT. § 16A.151 DOES NOT APPLY TO DISTRIBUTING THE MONEY IN THE TIER 2 SPECIAL FUND.

The MPUC erred as a matter of law in concluding that Minn. Stat. § 16A.151 (2008) (amended 2009, repealing subdivision. 2(e)) does not apply to the Tier 2 Special Fund monies. *See Add.* at 10. Specifically, the MPUC incorrectly concluded that payments to the Tier 2 Special Fund are not paid as a result of settlement of an administrative action that could have resulted in litigation. *Add.* at 5. The MPUC proceeded on an erroneous theory of statutory construction when it misconstrued the proper meaning of the terms “settlement,” “litigation,” and “administrative action.”

The Tier 2 Special Fund was created pursuant to a provision in the MPAP. The MPAP's purpose is twofold. First, it is the result of a state administrative process that established service quality standards available to CLECs. The MPUC has the responsibility to enforce wholesale service quality in Minnesota pursuant to any MPUC-approved plan chosen by CLECs to incorporate in their MPUC-approved interconnection

agreements with Qwest.¹⁰ Second, the MPAP was for Qwest's benefit to demonstrate to the FCC that Qwest had an MPUC-approved PAP in place in Minnesota to protect against backsliding after Qwest obtained approval to enter the interLATA long distance market. This second purpose does not diminish the importance of the MPUC's responsibility to enforce wholesale service quality in Minnesota. Indeed, the 1996 Act expressly preserves state commission authority with regard to wholesale service quality. 47 U.S.C. § 252(e)(3) (2008).

A. Standard Of Law: Minn. Stat. § 16A.151.

Minnesota Statute § 16A.151 requires money recovered by a state agency on behalf of the State of Minnesota to be deposited in the State's general fund, with limited exceptions. The statute states in relevant part as follows:¹¹

Subdivision 1. State funds; general fund. (a) This subdivision applies, notwithstanding any law to the contrary, except as provided in subdivision 2.

(b) A state official may not commence, pursue, or settle litigation, or settle a matter that could have resulted in litigation, in a manner that would result in money being distributed to a person or entity other than the state.

(c) Money recovered by a state official in litigation or in settlement of a matter that could have resulted in litigation is state money and must be deposited in the general fund.

Subd. 2. Exceptions. (a) If a state official litigates or settles a matter on behalf of specific injured persons or entities, this section does not prohibit distribution of money to the specific injured persons or entities on whose behalf the litigation or settlement efforts were initiated. If money recovered

¹⁰ While interconnection agreements do reflect the parties' private interests, whether they are also in the public interest is a consideration for approval of such agreements by state commissions. 47 U.S.C. § 252(e)(2).

¹¹ See Add. at 10 (copy of Minn. Stat. § 16A.151).

on behalf of injured persons or entities cannot reasonably be distributed to those persons or entities because they cannot readily be located or identified or because the cost of distributing the money would outweigh the benefit to the persons or entities, the money must be paid into the general fund.

...

Subd. 3. Definitions. For purposes of this section:

(1) "litigation" includes civil, criminal, and administrative actions;

(2) "money recovered" includes actual damages, punitive or exemplary damages, statutory damages, and civil and criminal penalties; and

(3) "state official" means the attorney general, another constitutional officer, an agency, or an agency employee, acting in official capacity.

The payments made by Qwest to the Tier 2 Special Fund clearly fall within the reach of § 16A.151. As discussed below, the definitions set forth in § 16A.151, subd. 3 remove any doubt that the MPUC is required to deposit the money in the State's general fund.

B. The MPUC Incorrectly Concluded That The MPAP Proceeding Was Not A Matter That Could Have Resulted In Litigation.

"A state official may not commence, pursue, or settle litigation [including administrative actions], or settle a matter that could have resulted in litigation, in a manner that would result in money being distributed to a person or entity other than the state." Minn. Stat. § 16A.151, subd. 1(b) (2008). The MPUC erroneously concluded that § 16A.151 did not apply in this instance because the MPAP does not reflect a settlement of a matter that could have resulted in litigation pursuant to § 16A.151. *April*

21st Order; Add. at 5. The MPAP itself, the relevant statutes, and FCC orders simply do not support such a conclusion.

Minnesota Statute § 14.69(d) provides that an agency decision will be reversed if it is affected by an error of law. This Court retains the authority to review *de novo* errors of law which arise when an agency decision is based on the meaning of words in a statute. See *In re Eller Media Outdoor Adver. Permits*, 664 N.W.2d at 7. The MPUC's interpretation of Minn. Stat. § 16A.151, a statute that is not within its area of expertise, is entitled to no deference. *Arvig Tel. v. Northwestern Bell*, 270 N.W.2d at 114.

The consolidated WSQ proceedings, from which this appeal arises, have been the subject of litigation or potential litigation from the outset. The MPUC initiated the WSQ Standards proceeding in 2000 after it approved a merger between US West and Qwest.¹² The proceeding later incorporated consideration of Qwest's PAP, which Qwest wanted the MPUC to adopt as the state's permanent WSQ plan. The two dockets were addressed together, as discussed in the MPUC's WSQ Standards *July 3 Order*. (A.143-65). Litigation in the courts over the MPUC's *July 3 Order* did, in fact, occur after the MPUC adopted the WSQ Standards, and further litigation could have been pursued by any aggrieved party immediately following the adoption of the MPAP. There remains the potential for future litigation challenging any MPUC decision that makes modifications to the plan. Thus, since the MPAP both is an alternative to the WSQ Standards and an

¹² In the WSQ Standards proceeding, Docket No. P421/AM-00-849, parties settled some disputed issues, and the MPUC eventually adopted a permanent state plan--the Minnesota WSQ Plan--*after* it approved the MPAP, Docket No P421/AM-01-1376.

agreement which the MPUC has stated that it has the authority to modify, there is potential for additional litigation of the MPAP.¹³

Minnesota Statute § 16A.151 does not limit its definition of litigation to actions actually pursued in state or federal courts. The definition of “litigation” in Minn. Stat. § 16A.151, subd. 3(1) expressly includes “administrative actions.” If the Minnesota Legislature authorizes the MPUC to make a decision or to perform an act, that decision or act is an “administrative action.” All proceedings before the MPUC are administrative actions, whether they are rulemaking proceedings, contested cases, complaint proceedings, investigations or other matters. The MPUC’s administrative decisions are reflected in the orders that it issues, which are only issued if a majority of at least a quorum of Commissioners votes on an issue. Minn. Stat. § 645.08(5) (2008). Both the WSQ Standards proceeding and the MPAP proceeding were typical administrative actions, with the MPUC deciding issues raised by parties to the actions.

It is clear that the Legislature intended MPUC proceedings to come within the ambit of Minn. Stat. § 16A.151. When the words of a law are clear and free from ambiguity, the letter of the law will not be disregarded in favor of its spirit. Minn. Stat. § 645.16 (2008). Under § 645.16, the court looks to the plain meaning of a statute when interpreting legislative intent and will construe the law to give effect to all its provisions.

The word “action” is defined generally in Minn. Stat. § 645.45(2) (2008) as “any proceeding in any court of this state.” With the word “administrative” in front of “action,” § 16A.151 must be construed to include proceedings before administrative

¹³ The present appeal also involves litigation.

agencies pursuant to Minn. Stat. § 645.08(3) (2008) (general words construed to be restricted in their meaning by preceding particular words).

Thus, a proceeding that approves wholesale service quality issues clearly is an administrative action under a plain reading of § 16A.151. The MPAP and the companion WSQ docket are both administrative actions that resulted in appealable MPUC orders that reflected the MPUC's decisions. Resolution of these two administrative actions was reached after processes that included numerous parties. Any of these parties could have appealed the MPUC's decisions. In fact, Qwest appealed the MPUC's WSQ Standards *July 3 Order* in Docket No. P421/AM-00-849 to both the Minnesota Court of Appeals and the Minnesota Supreme Court. *See Qwest's WSQ Standards II*, 702 N.W.2d 246; (A.39-58) (affirming Commission authority to establish service quality standards). The present appeal is Relator's appeal of the most recent MPUC decision in the MPAP docket.

Since the definition of "litigation" in Minn. Stat. § 16A.151, subd. 3 specifically includes "administrative actions," the Legislature has dispelled any notion that litigation only includes matters pursued in the state and federal courts. Administrative actions vary greatly in nature. Section 16A.151 appears to recognize this by not limiting the type of agency administrative actions that may result in money being recovered by the State.

Moreover, nothing in § 16A.151 or other statutes exempts the MPUC from the statute's requirements. By enacting § 16A.151, the Minnesota Legislature instructed *all* state agencies that they lack discretion to designate recipients or uses for money the agencies recover for the state; rather, the statute provides that the Legislature will make

such decisions following distribution to the general fund. Thus, any MPUC authority to make grants was overridden by § 16A.151.

C. The MPUC's Resolution Of The MPAP Proceeding, With Modifications Agreed To By Qwest, Constitutes A "Settlement" Of A Matter That Could Have Resulted In Litigation.

The MPUC's resolution of the MPAP proceeding, with modifications agreed to by Qwest, constitutes a "settlement." There is no definition of the term "settle" or "settlement" in Minn. Stat. § 16A.151 and, thus, they are construed according to their definition or common and approved usage. *See* Minn. Stat. § 645.08(1) (2008).

The American Heritage Dictionary defines "settle" as "conclude (a dispute, for example) by a final decision...[t]o decide (a lawsuit) by mutual agreement of the involved parties without court action...[T]o reach a decision; determine...[t]o come to an agreement, especially to resolve a lawsuit out of court." American Heritage Dictionary of the English Language (4th Ed. 2000). "Settlement" is defined as "the act or process of settling" and also as an "arrangement, adjustment, or other understanding reached." *Id.* Thus, the definition of "settlement" is not restricted to formal written agreements between parties or between a party and the MPUC.

Further, the word "settlement" appears throughout the statutes that the MPUC administers. *See, e.g.*, Minn. Stat. §§ 237.076, 237.764, 237.765, 216B.16, and 216B.1645 (2008). The MPUC reviews and approves many full and partial settlements as well as formal and informal settlements of administrative actions. There is no particular definition of the term in statute or rule, and the Relator is not aware of any previous distinction made by the MPUC for certain types of settlements in resolution of

MPUC proceedings. To the contrary, by issuing orders approving and adopting service quality plans, the MPUC has treated settlements and voluntary agreements or commitments of parties to such plans in the same manner that it treats settlements in other MPUC proceedings.

Chapter 237 of the Minnesota Statutes includes a general provision for settlements in MPUC proceedings, and provides a standard of review for the MPUC to use in determining whether to accept a settlement of a matter within its authority. This is the standard used consistently by the MPUC in reviewing all settlements or stipulated agreements. Minn. Stat. § 237.076 (2008) provides in relevant part:

Settlement; procedures. Subdivision 1. Settlement. In proceedings before the commission, interested parties are encouraged to enter into settlements of their disputes. ...If all parties agree to a stipulated settlement of the case or a part of the case, the settlement must be submitted to the commission.

Subd. 2. Procedures. The commission *may accept a settlement upon finding that to do so is in the public interest and is supported by substantial evidence.* ... (Emphasis added.)

There is no material difference between wholesale service quality proceedings before the MPUC and other MPUC proceedings involving disputed issues. As counsel for Qwest acknowledged at the MPUC's August 26, 2008 Agenda Meeting, "this [the MPAP] is a negotiated resolution to ensure performance." Transcript at 6 (Aug. 26, 2008); (A.297-310[298]). The fact that the "negotiated resolution" of the MPAP served a dual purpose is not a distinction with a difference. That is, the MPAP proceeding establishes a Qwest service quality plan for Minnesota (the MPAP) which also was used by Qwest to support its § 271 application to the FCC. The MPUC's authority to approve

and adopt an MPAP is the same as for other “administrative actions” before the MPUC. A party’s standing to appeal that decision is also no different than other administrative actions before the MPUC. Any MPUC order may be appealed to this Court. Minn. Stat. § 237.25 (2008).

Since the Minnesota Supreme Court determined, in *Qwest’s WSQ Standards II*, 702 N.W.2d 246, that the MPUC lacks the authority to impose self-executing remedies, the MPUC’s adoption and approval of Qwest’s voluntary commitment to make payments under the MPAP is settlement of a matter that may avoid litigation in the courts. Without the commitment by Qwest to make such payments in the event of noncompliance with the MPAP, the MPUC might have decided not to adopt the MPAP. Moreover, even if Qwest had not agreed to the MPAP’s self-executing remedies, remedies to address noncompliance would exist. The MPUC has authority to make findings of fact as to whether Qwest complies with the MPAP and, in the case of noncompliance, to then refer the matter to the Minnesota Attorney General’s Office for recovery in district court of civil penalties pursuant to Minn. Stat. § 237.461 (2008). Following successful recovery of penalties in district court, the MPUC would be required to deposit any money so recovered into the State’s general fund pursuant to Minn. Stat. § 237.461, subd. 4 (2008). However, civil penalty cases are costly and time consuming. Such cases also are unnecessary regarding Qwest’s noncompliance with the MPAP because CLECs opted to include the MPAP with its self-executing remedies in their interconnection agreements with Qwest

Furthermore, the nature of the MPAP agreement is similar to consent orders, which reflect a settlement between a state agency and a private entity. *See, e.g., Minnesota Mining and Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 182-83 (Minn. 1980) (“3M”). In the 3M case, the Court concluded that the legal obligation in the form of a “consent order” with the Minnesota Pollution Control Agency (“MPCA”) to remedy injuries to the state’s natural resources under state law arising from the MPCA’s legal process, was equally as coercive as a traditional civil lawsuit seeking compensation in the form of a civil judgment for injury to property. *Id.* at 183.

Like the consent order in the 3M case, the form of the payments to the Tier 2 Special Fund and the vehicle that requires Qwest to make the payments to the Tier 2 Special Fund (i.e., the MPAP agreement approved by the MPUC in lieu of one or more actions to enforce service quality in state district court) do not change the nature of Qwest’s obligation. Qwest agreed to be legally obligated to make the payments to CLECs individually, and to the State through payment to the Tier 2 Special Fund. The Tier 2 payments recognize harm to the overall public interest by harm to competition stemming from Qwest’s noncompliance with WSQ standards. Both the consent order in the 3M case and the MPUC’s MPAP approval resulted from settlement by agreement of an obligation or duty on the part of the regulated entity that establishes an enforceable order.

In concluding that the consent orders in 3M imposed a legal obligation on 3M and other companies, the Court also referenced *Jostens Inc. v. CAN Ins./ Cont’l Cas. Co.*, 403 N.W.2d 625, 631 (Minn. 1987) (a settlement agreement imposed a legal obligation to pay

on the part of the insured). The court concluded that the consent orders were backed by the availability of a civil judgment against the insured persons to compel them to either clean up a site or reimburse the MPCA for expenses incurred in cleaning up the contamination itself. *Id.* Like the MPAP, the consent orders issued by the MPCA resulted from voluntary commitments to be bound by certain terms in the orders issued by the state agency. The MPAP, also like the PCA's consent orders, is backed by the availability of a civil judgment against Qwest to compel Qwest to make payments pursuant to the terms of the MPAP. *See* Minn. Stat. § 237.461 (2008).

The MPUC's resolution of the MPAP proceeding, with modifications agreed to by Qwest, constitutes a "settlement" of a matter that could have resulted in "litigation," as these terms are used in Minn. Stat. § 16A.151. The MPUC's conclusion to the contrary incorrectly interprets Minnesota law and should be reversed.

D. The April 21st Order Incorrectly Concludes That There Must Be A Duty Owed To The State For Minn. Stat. § 16A.151 To Apply.

The April 21st Order incorrectly concludes that "[b]ecause the MPAP did not arise from any legal duty owed to the state, the proceeds of the Tier 2 Special Fund could not have resulted from litigation for breach of such a duty, or in settlement of litigation." Add. at 5. This sweeping statement is incorrect and has no basis in law or fact. Again, the MPUC's interpretation of Minn. Stat. § 16A.151 is entitled to no deference and is reviewed *de novo*. *Arvig Tel. v. Northwestern Bell*, 270 N.W.2d at 114.

The MPUC misconstrues the type of duty that might exist in litigation leading up to a settlement that must comply with Minn. Stat. § 16A.151. The MPUC appears to

assume that since the MPUC did not require Qwest to propose the MPAP, the MPUC has only the authority granted by the MPAP and, thus, Qwest has no duty to the State. Such an interpretation is in error. First, Qwest is obligated to comply with the MPUC's orders. Second, the very nature of a settlement can be a desire on the part of one or more parties to avoid litigation as to the nature and extent of any duty or obligation. Finally, there is no requirement that there be a duty owed to the State of Minnesota in order for the MPUC to have authority over the MPAP or over any other administrative action.

By agreeing to be obligated to make payments under the MPAP, Qwest created a duty to perform according to its agreed-upon (settled) terms or to pay penalties for unsatisfactory performance. In the MPAP, Qwest agreed to be obligated to CLECs and to the State. (A.105-127). By approving the MPAP, and by allowing it to be incorporated into Qwest's interconnection agreements with CLECs, the MPUC has approved (i.e., "agreed to" or "settled") Qwest's obligations according to the MPAP's terms, and agreed *de facto* not to pursue an action in court to enforce penalty payments in the event of Qwest's unsatisfactory performance as long as Qwest is meeting its payment obligations. Thus, by agreeing to the terms in the MPAP, Qwest and the MPUC agreed that Qwest would be obligated to make payments under the terms of the MPAP instead of litigating damages or penalties in a court of law. The obligation to make Tier 2 payments is a duty that Qwest owes to the State. The MPUC's conclusion that no duty exists is incorrect and should be reversed.

E. The MPUC's Failure To Follow Precedent Is Arbitrary And Capricious.

The MPUC previously has concluded that Minn. Stat. § 16A.151 governs the disbursement of service quality penalty funds resulting from a stipulation reached through negotiation. In this case, however, the MPUC did not follow its precedent. It also failed to distinguish the present action from two prior orders in which the MPUC relied on § 16A.151. The Relator expressly requested without success that the MPUC address the two prior cases in this regard, and to explain why it did not adhere to its clear precedent. (A.29-30).

In one of the prior cases, the MPUC agreed with the Office of the Attorney General and Xcel Energy that § 16A.151 governed disbursement of service quality penalty funds recovered as the result of Xcel Energy's violations of required service quality standards. *See In re Approval of the Merger of N. States Power Co. and New Century Energies, Inc.*, Order Directing Disbursement of 2003 Service Quality Penalty, Docket No. E,G-002/PA-99-1031 (May 26, 2005) ("*Xcel Penalty Order*"); (A.255-58). The MPUC recognized that the general rule applied, requiring deposit of service quality penalty payments of \$100,000 in the general fund, unless the money could be distributed pursuant to the exception in Minn. Stat. § 16A.151, subd. 2(a), allowing distribution to injured persons. The service quality penalties at issue were the result of a negotiated settlement that modified the existing service quality plan in the merger proceeding regarding Northern States Power Company (d/b/a Xcel Energy) and New Century Energies, Inc. (A.311-314).

In the *Xcel Penalty Order*, the MPUC acknowledged application of Minn. Stat.

16A.151 as follows:

Minn. Stat. § 16A.151, subd. 1(c) states the general rule regarding disposition of penalties such as Xcel's penalty for exceeding the SAIFI [service quality] standard established in the Merger Settlement. . . . However, the state legislature has adopted an exception to that general rule. . . .

The Commission finds that disbursing the penalty amount (\$100,000) to identified Xcel customers is authorized by the language of Subdivision 2(a). This language creates an exception to the general rule that penalty money must be paid into the general fund. The Merger Agreement was approved because, among other things, it contained assurances that the merged company's customers would receive service at a particular standard and that the merged company would incur financial consequences for failure to meet those standards.

Xcel Penalty Order at 3; (A.313). The MPUC determined that § 16A.151 governed penalty disbursement, but that the penalty payments need not be deposited in the State's general fund due to the exception in subdivision 2. *Id.* at 3-4; (A.313-14).

Another case involving service quality penalties involved penalty payments by US West for retail service quality violations pursuant to an agreement. *See In the Matter of USWC Alternative Form of Regulation Plan* (Untitled Order adopting recommendations of MPUC's Consumer Affairs Office), Docket Nos. P421/AR-97-1544; P421/CI-95-648 (Oct. 23, 2003) ("*2003 AFOR Order*"); (A.315-316). The MPUC determined that persons who were harmed by the service quality violation could not be readily located or

identified, and, thus, ordered that the penalty money must be paid into the State's general fund pursuant to Minn. Stat. § 16A.151. *Id.*¹⁴

In the present action, the MPUC did not follow its own precedent that Minn. Stat. § 16A.151 governs penalty disbursement. The facts in the Xcel Energy and US West AFOR dockets are not significantly different from this case. In both cases, penalties arose from violations of service quality standards that were agreed upon or settled and were approved by the MPUC in administrative actions. (A.311-16).

These cases are instructive. They show that in the case of either an electric company or a local telephone company, money recovered by the MPUC pursuant to agreed-upon retail service quality plans for failure to meet standards must be deposited in the State's general fund, unless the statutory exception in § 16A.151, subd. 2 applies. In theory and in practice, there is no substantive distinction between a settlement agreement involving electric service quality standards, a local telephone company's agreement incorporating a service quality plan, or, as in this appeal, a plan that provides for payments to be made for noncompliance with WSQ standards. Thus, the MPUC has clear precedent that it should have followed or, in the alternative, should have articulated a reasonable basis to distinguish its past ruling. *2005 AAA Charges*, 768 N.W.2d at 120.

¹⁴ Relator notes that a prior MPUC order concluded that Minn. Stat. § 16A.151 did not apply to AFOR service quality penalties based on its unexplained interpretation of the words "litigation" and "settlement." However, the Relator's Motion for Reconsideration was granted in that proceeding, and the MPUC concluded that § 16A.151 did not apply retroactively and that its prior ruling was premature. *In the Matter of Qwest Corporation's Alternative Form of Regulation (AFOR) Plan*, Docket No. P-421/AR-97-1544, Order Amending Plan at 3-4 (Aug. 4, 2005); (A.317-20[319-20]); and Order on Reconsideration at 3 (Jan. 20, 2006); (A.321-23[322]).

The Relator asked the MPUC to explain why it did not follow its precedent discussed above, or to distinguish the present case from its precedent. Motion for Reconsideration, (A.9-30). The MPUC declined to explain and denied the Relator's motion for reconsideration. Failure to follow its precedent or to articulate reasons for an inapposite conclusion in this matter constitutes an arbitrary and capricious decision on the part of the MPUC and should be reversed.

II. THE MPUC ERRED IN CONSTRUING ITS AUTHORITY OVER THE MPAP AND IN CONCLUDING THAT ITS ROLE REGARDING THE TIER 2 SPECIAL FUND DOES NOT ARISE FROM THE MPUC'S CAPACITY TO LITIGATE ON BEHALF OF THE STATE, BUT RATHER FROM ITS ROLE AS A "COMPETITIVELY NEUTRAL INDUSTRY OBSERVER."

The MPUC abdicated its regulatory authority and responsibility through its erroneous construction of its role regarding the Tier 2 Special Fund. The MPUC stated incorrectly in its *April 21st Order* that the Tier 2 Special Fund does not arise from the MPUC's capacity to litigate on behalf of the State, but rather from the MPUC's role as a "competitively neutral industry observer." Add. at 6. According to this remarkable view, the MPUC has no authority or duty to enforce the agreed-upon terms in the MPAP. As a result, Qwest's failure to make payments to the Tier 2 Special Fund would be of no consequence because neither the FCC, as discussed in detail in section IV below, nor the MPUC could enforce the MPAP. This would be an absurd result. The MPUC failed to provide any legal basis to support its decision on this issue. Therefore, the MPUC's decision is contrary to its authority to encourage local exchange service competition and regulate service quality and must be reversed.

A. Standard Of Law.

The MPUC has only those powers and duties that the Legislature delegates to it and no others. Minn. Stat. § 216A.01 (2008) provides:

The Public Utilities Commission shall have and possess all of the rights and powers and perform all of the duties vested in it by this chapter and those formerly vested by law in the Railroad and Warehouse Commission.

With regard to the rights, powers and duties formerly vested in the Railroad and Warehouse Commission, Minn. Stat. § 216A.05, subd. 2 (2008) provides in relevant part:

Subd. 2. Powers generally. The commission shall, to the extent prescribed by law:

(1) investigate the management of all warehouse operators and telegraph companies, the manner in which their businesses are conducted and the adequacies of the services which they are affording to the public, and make all appropriate orders relating to the continuation, termination, or modification of all services and facilities with a view to properly promoting the security and convenience of the public;

...

Subd. 4. Performance of commission functions. The commission shall exercise each and every legislative function imposed by law on it.

See also, Minn. Stat. § 216B.08 (2008), which provides: “The exercise of such powers, rights, functions, and jurisdiction is prescribed as a duty of the commission.”

The MPUC must execute the duties that the Legislature delegates to it. The Legislature directed that the MPUC is to consider the goals of fostering and encouraging local exchange service competition in Minnesota in a competitively neutral manner, and has recognized that maintaining service quality is a key factor in fostering competition. *See* Minn. Stat. § 237.011(4) (2008) and Minn. Stat. § 237.011(5) (2008), respectively.

Indeed, the MPUC itself recognized its duty to maintain and improve service quality when it concluded that adoption of WSQ Standards with benchmark standards and with self-executing remedies would fulfill the MPUC's "duty to promote high quality service and the development of competitive local phone markets." *See Qwest's WSQ Standards, Order Accepting Affidavit and Adopting Partial Stay*, at 3 (Feb. 17, 2004) ("Feb. 17 Order"); (A.128-42[130]).

B. Minnesota Courts Have Clearly Ruled That The MPUC Is A Creature Of Statute And That its Powers And Duties Are Set Forth In Statute.

As discussed, the MPUC's statement that there is no legal duty owed to the state by Qwest with regard to WSQ standards under the MPAP is incorrect. Perhaps of greater concern is the MPUC's incorrect statement that its regulatory duty or function regarding MPAP enforcement is limited by the MPAP, and is only a "competitively neutral industry observer." *Id.* at 6.

Minnesota courts have ruled that the MPUC is a creature of statute and that its powers and duties are delegated to it by the Legislature. The legislative grant of authority provides the MPUC with broad regulatory power, the extent of which is measured by the enabling statute. *Computer Tool & Eng'g, Inc. v. N. States Power Co., et al.*, 453 N.W.2d 569, 572 (Minn. Ct. App. 1990) *rev. denied*, (Minn. 1990), *citing Frost-Benco Elec. Ass'n v. Minnesota Pub. Util. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984). Courts must construe such legislative grants of authority in light of the purpose for which the grant was made. *State ex rel. Waste Mgmt. Bd. v. Bruesehoff*, 343 N.W.2d 292, 295 (Minn. Ct. App. 1984).

The MPUC provided no support for its statement that it is simply a “competitively neutral industry observer” concerning matters of WSQ standards. More accurately, the MPUC’s role, as set forth in the statutes above is that of an *industry regulator*. Regulation requires balancing consideration of the needs of the public against those of the public utility. Regulation is a task required of the MPUC because of its expertise in this specialized area. *See Computer Tool & Eng’g*, 453 N.W.2d at 573.

There is no justification for the MPUC’s failure to accept its statutory authority and responsibilities. Certainly, the MPUC cannot dispossess itself of the role the Legislature delegated to it. In *Senior Citizens Coalition of Northeastern Minnesota v. Minnesota Pub. Utils. Comm’n*, 355 N.W.2d 295, 302 (Minn. 1984), the Court emphasized this limitation on the MPUC’s authority to re-write its function, as follows:

The PUC is a state agency of statutory origin. As such, it has only that jurisdiction conferred to it by the legislature. A lack of statutory authority betokens a lack of jurisdiction. (Citations and internal quotation marks omitted.)

Moreover, an administrative agency's decision would be void or subject to collateral attack if the decision was rendered either without statutory authority or in excess of the authority granted. *State ex rel. Spurck v. Civil Serv. Bd.*, 226 Minn. 253, 259, 32 N.W.2d 583, 586 (1948).

The MPUC also cannot abdicate, waive, or limit its functions based on a federal grant of authority. The Minnesota Supreme Court has ruled that even if a federal law authorizes the MPUC to act, the exercise of that authority is dependent upon the existence of enabling state law. *See Senior Citizens Coalition v. PUC*, 355 N.W.2d at

304 (holding that the MPUC could not award intervenor compensation in PURPA-related matters absent state authority to do so).

The MPUC further erred in concluding that the MPAP conferred on it the authority to distribute the Tier 2 Special Fund in a manner contrary to the terms of Minn. Stat. § 16A.151. *See* Add. at 6. The MPUC's authority is purely a matter of state statute. The Legislature tells the MPUC what it is to do and how it is to do it. *Peoples Natural Gas Co. v. Minnesota Pub. Utils. Comm'n*, 369 N.W.2d 530, 534 (Minn. 1985). "Neither agencies nor courts may under the guise of statutory interpretation enlarge the agency's powers beyond that which was contemplated by the legislative body." *Id.*, quoting *Waller v. Powers Dept. Store*, 343 N.W.2d 655, 657 (Minn. 1984).

In summary, the MPUC has a duty to regulate all aspects of telecommunications in a manner consistent with Chapter 237 and the goals expressed therein, including the directive to regulate competition in the local exchange market in a manner that promotes fair and reasonable competition and which prescribe standards for quality of service. *See* Minn. Stat. § 237.16, subs. 8(7) and 8(9) (2008). If it agrees on a plan for voluntary payments to be made to the State for service quality violations, the MPUC has a duty to enforce such a plan. If it recovers money on behalf of the State, the MPUC has a duty to distribute that money as directed by the Legislature in Minn. Stat. § 16A.151, which is to put it in the State's general fund. The MPUC has no express statutory authority to give grants to K-12 telecommunications projects. The MPUC simply cannot divert penalties to an entity other than the State's general fund, however worthy the grantee may be.

The MPUC's duties do not contemplate a role for the MPUC as a "competitively neutral industry observer" and do not permit the MPUC to act outside the authority granted to it by establishing a grant process for K-12 telecommunications projects. Clearly, the MPUC erred in so concluding, and its decision should be reversed.

III. THE *APRIL 21ST ORDER* FINDING THAT THE PUBLIC INTEREST IS NOT A SIGNIFICANT CONSIDERATION IN ADOPTING WSQ STANDARDS IS ARBITRARY AND CAPRICIOUS.

The MPUC's *April 21st Order* finding that the public interest is not a significant consideration in adopting WSQ standards is arbitrary and capricious and is not based on evidence in the record. The *April 21st Order* concludes, without analysis or support, that the MPUC's other decisions on service quality standards are applied generally to telecommunications service providers in order to promote the public interest, in contrast to the MPAP that primarily promotes the private interests of CLECs and Qwest. Add. at 6. The record fails to support this finding.

While it is true that the MPAP promotes CLECs' private interests by requiring parity-based service quality and self-executing payments to CLECs for Qwest's sub-parity performance, the MPAP also serves an important public interest function. By requiring Qwest to provide adequate service quality to CLECs, the public interest in promoting competition is served. In order for CLECs to provide adequate service quality to their retail customers, and, therefore, be competitive with the level of retail service quality provided by Qwest, the MPAP allows CLECs a reasonable opportunity to compete with Qwest for these customers. Promoting competition in the local service market is a key component of the overall public interest the MPUC must consider in

making its decisions. Inadequate wholesale service quality to CLECs harms retail competition and, thus, harms the public interest. Furthermore, the self-executing payments to the State under the MPAP that Qwest has deposited in the Tier 2 Special Fund mainly benefit public, not private (CLEC) interests; the payments are based on aggregate CLEC data and, as such, reflect overall harm to the overall public interest (harm to local competition) due to Qwest's failure to comply with its WSQ obligations under the MPAP.

It is unclear why the MPUC would conclude that the public interest is not a significant consideration in the MPUC's adoption of WSQ standards. Qwest relied on the MPAP, in its § 271 application to the FCC, as a demonstration that its § 271 application was in the *public* interest. Similarly, in the November 26, 2002 *Order on Reconsideration Amending Performance Assurance Plan*, the MPUC acknowledged the MPAP's public interest role. (A.91-104). Specifically, regarding the MPUC's discretion and authority to grant motions for reconsideration and amend the MPAP, the MPUC reasoned: "Ultimately, this Commission must be guided in this matter by its statutory duty to ensure that Qwest acts in the public interest for the citizens of Minnesota." (A.94). The MPUC also stated that much of the language of the Colorado PAP which was incorporated in substantial part for Minnesota in the MPAP, "establishes policies that are the most consistent with the facts, the law, and the *public interest*." *Id.* (emphasis added).

To avoid a finding that its decision is arbitrary and capricious, an agency must explain the connection between the facts found and choices made. *Blue Cross & Blue*

Shield, 624 N.W.2d at 277. The MPUC failed to do so. The MPUC' finding in the *April 21st Order*--that the MPAP primarily promotes private interests--is based on its will and not its judgment, and therefore is arbitrary and capricious.

IV. THE MPUC ERRED IN CONCLUDING THAT THE FCC HAS JURISDICTION AND AUTHORITY OVER THE MPAP.

The MPUC erroneously concluded that the FCC has authority over the MPAP as part of the FCC's § 271 authority. The MPUC disregarded the additional information provided in the Relator's motion for reconsideration, which explained the FCC's limited use of PAPs in § 271 proceedings is merely to provide evidence to support a determination that § 271 approval is in the public interest. The FCC's authority to grant or deny a § 271 application does not supplant the MPUC's authority over wholesale service quality. For example, if the FCC disagreed with a state's PAP, the FCC could deny an ILEC's § 271 application. The FCC does not have authority to alter the state's WSQ standards.

A. Standard Of Law.

The FCC's § 271 authority does not supersede state authority over wholesale service quality, as demonstrated by 47 U.S.C. §§ 252(e)(3) and 253(b) (2008). These sections expressly preserve state regulatory authority over service quality. Section 252(e)(3) provides:

(3) Preservation of authority. Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

Section 253(b) provides:

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

47 U.S.C. § 271(d)(2)(B) (2008) requires the FCC to consult with the state public utility commission as follows:

(B) Consultation with State commissions. Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c) of this section.

47 U.S.C. § 271(c) (2008) is the 14-point Competitive checklist. *See App.-__.*

B. The MPUC Erred In Concluding That The FCC Has Jurisdiction And Authority Over The MPAP.

The *April 21st Order* confuses the FCC's role in granting or denying Qwest's § 271 application for interLATA authority in Minnesota, with the MPUC's authority to establish the WSQ standards applicable to Qwest in order to ensure adequate competition for local exchange service in Minnesota. The MPUC stated:

As noted above, the MPAP arose in the context of Qwest's anticipated § 271 petition to the FCC. The role of state officials in this matter was limited. The choice to file this petition was entirely Qwest's, and the jurisdiction to grant or deny the petition was entirely the FCC's. This Commission's role was simply to determine whether or not to file comments with the FCC and, if so, to convene proceedings for developing facts and considering alternatives, and to draft the comments.

Add. at 5.

The MPUC correctly noted that its role in the FCC's § 271 application process is limited, but it incorrectly suggested that the MPUC's role also was limited as to

determining WSQ standards applicable to Qwest in Minnesota. The MPUC's role as a state commission in the FCC's §271 process is purely consultative and limited to the 14-point Competitive Checklist. However, the MPUC has a primary and continuing role in regulating wholesale service quality. The deliberations of the three Commissioners present and voting on April 8, 2009 at the MPUC's Agenda Meeting demonstrate confusion in this regard as shown below in the limited discussion that took place prior to the MPUC's decision that is reflected in the *April 21st Order*:

COMMISSIONER PUGH: Madam Chair, I wasn't present when this proceeding first took place, so my knowledge is only through what I've read from prior dockets and arguments of counsel and discussions with staff. ...It's been my impression that the ... MPAP arose ... quite separate and apart from any action by this Commission, any threat or potential for penalty or litigation by our Commission to force this result. I think this would be outside of the scope of the result that we could have reached.

In essence, we -- the Commission approves the plan, the Commission was designated with some decision power as to what to do with funds, I suspect that some other entity could have been named in the agreement to have control, and the fact that we get to make a decision on what's to be done, I don't know -- shouldn't convert it to something that then falls under the statute in question.

So I'd tend to support [a decision] which would indicate that the PUC can exercise its authority that was vested in the agency by the agreement of the parties and that we can then make a designation of the funds to the schools, which would be for a public purpose. ...

COMMISSIONER WERGIN: Commissioner Pugh, you just said something really interesting. And that's -- you said it was approved by the Commission, which I understand. But you said any (sic) in the MPAP, basically anyone could have been given control of these funds. Did I hear that correctly?

COMMISSIONER PUGH: ...[T]hat's what I said. Whether I'm right, I'm not sure.

COMMISSIONER WERGIN: ... I think that makes a pretty substantial difference. Because if this could have been written, for instance, that -- I don't know, you name the organization, could have had control of the distribution, that's significantly different.

COMMISSIONER PUGH: Madam Chair, I guess what I was saying by that is the funds could have been in a depository, which they actually are, and distribution of the funds could have been delegated to First Trust or somebody like that. I suspect there would have been a mechanism for some approval, whether that be this Commission, the Department and this Commission, I mean, some mechanism. But, in essence, the way it was written, and the funds kind of look like ours, and when, in fact, I think they're the funds that are a result of the agreement, they've accumulated, there is no longer -- there's a limited need for audit and investigation, that's why there's extra money. And the agreement said let's let the Commission make a decision as to where those funds should go if we're ever in that state. But it wasn't as though they're vested to the PUC if there's an excess over those needed for investigation and audit.

CHAIR REHA: Yeah I think what's particularly telling is that I think we could have allowed Qwest to determine how to distribute these funds. And maybe with some auditing or oversight of that nature to make sure that it was, you know, done voluntarily submitted this plan could have retained that authority to distribute that money tells me that it certainly doesn't fit into 16A.151.

...

COMMISSIONER WERGIN: ... I do see the differences in this being part of an FCC order and in the fact that it could have been easily written to be outside the purview of the PUC for control. I'm a little bit skeptical of even my own self at this point in time because I understand both arguments very well.

Transcript at 22-35 (April 8, 2009); (A.287-96[293-96]). Following the discussion quoted above, the MPUC voted unanimously to distribute the Tier 2 Special Fund to

entities other than the State's general fund by means of a grant process administered by its executive secretary.¹⁵ *Id.* at 35; (A.296).

As Relator's May 12, 2009 Motion for Reconsideration explained, the MPUC's decision misconstrued the FCC's 271 process and the MPUC's authority over state service quality.

1. The FCC accepted the MPAP as one indicator that Qwest's § 271 application was in the public interest.

At the time that Qwest filed its Minnesota § 271 application with the FCC, the factors that the FCC would review to decide whether a § 271 application is in the public interest were well established. The FCC did not require that BOCs be obligated under a state PAP, but it also did not discourage them. The FCC discussed this in its order granting a Bell Atlantic § 271 application in 1999:

429. ... Although the Commission strongly encourages state performance monitoring and post-entry enforcement, we have never required BOC applicants to demonstrate that they are subject to such mechanisms as a condition of section 271 approval. The Commission has, however, stated that the fact that a BOC will be subject to performance monitoring and enforcement mechanisms would constitute probative evidence that the BOC will continue to meet its section 271 obligations and that its entry would be consistent with the public interest.

BA-NY Order, 15 F.C.C.R. 3953, 4164; (A.177). The FCC noted with approval in the *BA-NY Order*--the first § 271 application that it granted--that the New York Commission required Bell Atlantic to submit to a comprehensive performance enforcement mechanism called the Amended Performance Assurance Plan or "APAP" upon receiving

¹⁵ As discussed, the MPUC has no express statutory authority to direct money anywhere but to the State's general fund.

authorization to provide interLATA services under § 271. The APAP had been developed through a 16-month process with interested parties and which was then submitted to the New York Commission for adoption.

The FCC noted that the public interest analysis pursuant to § 271(d)(2)(B) differed from the 14-point checklist analysis in that it was appropriate to consider commitments made by the applicant to be subject to a state service quality monitoring and enforcement framework for the future. *Id.* at 4165-66, n.1323, (A.172-173). Significantly, the FCC stated that its “examination of the New York [APAP] is solely for the purpose of determining whether the risk of post-approval non-compliance is sufficiently great that approval of its § 271 application would not be in the public interest.” *Id.* at 4166, n.1326 (emphasis added); (A.179). With regard to continuing jurisdiction over the APAP, the FCC stated:

We also note with approval that *the APAP* “*will be enforceable as a New York Commission order,*” and that failure by Bell Atlantic to comply with the terms of these mechanisms could subject the company to penalties in the amount of \$100,000 per day. . . . *Complaints alleging that Bell Atlantic is not complying with these state-crafted mechanisms thus would be directed to the New York Commission rather than the FCC.*

BA-NY Order, at 4171, n. 1353, (A.174) (emphasis added).

Three years later, in its order granting § 271 approval for nine of the 14 states in Qwest’s region, the FCC again discussed the public interest analysis in light of Qwest’s filing of performance assurance plans to be in place in nine of the 14 Qwest states. Again, the FCC acknowledged continuing state authority over WSQ standards:

440. . . .In prior orders, the Commission has explained that one factor it may consider as part of its public interest analysis is whether a

BOC would have adequate incentives to continue to satisfy the requirements of section 271 after entering the long distance market. Although it is not a requirement for section 271 authority that a BOC be subject to such performance assurance mechanisms, the Commission previously has stated that the existence of a satisfactory performance monitoring and enforcement mechanism would be probative evidence that the BOC will continue to meet its section 271 obligations after a grant of such authority. The nine state PAPs, in combination with the respective commission's active oversight of its PAP, and these commissions' stated intent to undertake comprehensive reviews to determine whether modifications are necessary, provide additional assurance the local market in the five application states will remain open.

...

445. . . . We further note that state commissions have the ability to incorporate new measures into their PAPs We note that competitive LECs have been involved in the development of these plans, and we anticipate that they will provide input in those forums which will review the plans in the future. . . .

446. Second, we find that the current language in the PAPs does not unduly limit the state commission's ability to change their respective PAPs. . . . [T]he ability of state commissions to modify or update measurements is an important feature because it allows the PAP to reflect changes in the telecommunications industry and in individual states. . . .¹⁶

In the Matter of the Application by Qwest Communications Intl., Inc. for Authorization to provide In-Region, InterLATA Servs. in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming, 17 F.C.C.R. 26303, 26544-50 (Dec. 23, 2002) ("*Nine-State Order*"); (A.195-201). Most important for purposes of this appeal, however, is the FCC's statement that the FCC "has found before that PAPs *are administered by state commissions and derive from authority the states have under state law* or under the federal Act." *Id.* at 26549-50, ¶ 446. (Emphasis added.) (A.200).

¹⁶ The remainder of paragraph 446 discusses separate provisions in each of the PAPs concerning state authority to make changes to a PAP and Qwest's ability to challenge in court that states authority, possible appeals, and more. *See* (A.200-01).

Also notable is the further statement that “states have latitude to create plans that ultimately vary in their strengths and weaknesses as tools for post-section 271 authority monitoring and enforcement.” *Id.* at 26550-51, ¶ 447; (A.201-02).

In its June 26, 2003 decision granting Qwest’s Minnesota § 271 application, the FCC noted that the MPAP closely resembles the PAPs that it reviewed in the *Nine-State Order* and another Qwest § 271 order, that it incorporated the key elements of the Colorado plan, and that the MPUC and Qwest “mutually agreed” to additional language. *In the Matter of Application by Qwest Communications Intl., Inc. for Authorization to Provide In-Region, InterLATA Servs. in Minnesota*, 18 F.C.C.R. 13323, 13360-62, ¶¶ 69-72 (June 26, 2003); (A.237-286[274-276]). The FCC stated,

After an open proceeding including Qwest and competitive LECs, on June 20, 2002, the Minnesota Commission decided to adopt the Colorado Plan with modifications. After further proceedings, on November 26, 2002 the Minnesota Commission ordered Qwest to file the PAP consistent with new approved language. On March 17, 2003, Qwest submitted a revised PAP incorporating commission-ordered language and two additional provisions. The Minnesota Commission and Qwest mutually agreed on the remaining new language changes on April 8, 2003. Qwest filed the revised agreement on April 30, 2003 with the PAP becoming effective on the date of section 271 approval for Minnesota.

Id. at 13361, ¶ 70; (A.275).

The FCC’s § 271 orders clearly show that the FCC did not adopt or assert authority over state PAPs as part of granting § 271 approval, but rather that the FCC reviewed key elements in the plans as part of its public interest analysis for purposes of § 271 authority. The FCC examined state PAPs to determine whether they were likely to provide sufficient incentives to foster post-entry Checklist compliance and provide

assurances that the local market would remain open after the BOC receives § 271 authorization in the state. As the FCC has clearly stated in numerous § 271 orders, the only purpose of the PAPs in the § 271 process is that of probative evidence of the public interest; i.e., that a BOC has a state service quality plan in place that includes meaningful penalties for noncompliance, and that the plan was adopted by a state commission and is subject to continuing review, modification, and enforcement by the state commission.

The FCC simply reviewed certain portions of the MPAP that it deemed appropriate for the “public interest” requirement in 47 U.S.C. §271(d)(2)(B). Further, any post-approval action by the FCC would be related to enforcing § 271, leaving the state commissions to enforce the state PAPs. This fact, that the FCC’s authority is only related to enforcement of § 271, not enforcement of the MPAP, is a key element that the MPUC misconstrued.

2. **The MPUC’s *April 21st Order* incorrectly concluded that the use of the MPAP as evidence in the § 271 process completely supersedes state authority over the plan and that the MPUC’s role is defined by the MPAP.**

While the *April 21st Order* readily acknowledges that the MPUC has continuing authority to modify the MPAP, it erroneously concluded that its authority came from the MPAP and not from its state law authority over service quality enforcement. The rationale in the *April 21st Order* is thus inconsistent with state law and with the FCC’s orders discussed above. The MPUC completely disregarded the FCC’s interpretations of its own authority under the federal Act, and it failed to explain the reasons for its conclusion that the FCC’s § 271 authority extended to the MPAP. The MPUC’s orders

are silent on this issue, despite the fact that the Relator raised it in legal briefing to the MPUC. *See Add.* at 1-9.

The excerpts from transcripts quoted above show that the three Commissioners present were under the misimpression that the MPAP was part of the FCC process only, and outside the “purview” of the MPUC. This erroneous assumption appears to serve as the foundation for the erroneous conclusion in the *April 21st Order* that the MPUC’s role is limited with respect to service quality enforcement when the plan is one that is filed as evidence in an FCC § 271 proceeding, and that the MPUC’s authority over the Tier 2 Special Fund derives from the MPAP alone and is not affected by Minn. Stat. § 16A.151.

The FCC’s orders recognize that Congress left intact state commissions’ authority such that the MPUC continues to have authority over Tier 2 Special Fund monies pursuant to its continuing authority over wholesale service quality. The MPUC failed to appropriately consider state law, federal law and the FCC’s orders. Moreover, the MPUC’s conclusions are without sufficient explanation to conclude that the decisions represent the MPUC’s judgment and not its will. For this reason, such decisions are arbitrary and capricious, and should be reversed.

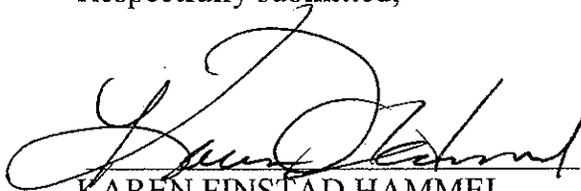
CONCLUSION

By enacting § 16A.151, the Legislature has eliminated any MPUC authority to establish grant programs, and required that money recovered by the PUC be deposited in the State’s general fund. The MPUC’s decision to establish a grant program aimed at K-12 telecommunications projects, and the MPUC’s failure to reconsider the decision, is based on numerous errors of law, exceeds the MPUC’s authority, and is arbitrary and

capricious Accordingly, the Relator respectfully requests that the *April 21st Order* be reversed.

Dated: November 5, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Karen Finstad Hammel', written over a horizontal line.

KAREN FINSTAD HAMMEL
Assistant Attorney General
Atty. Reg. No. 0253029

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
Tel: 651.757.1248

ATTORNEY FOR RELATOR
MINNESOTA DEPARTMENT
OF COMMERCE

CERTIFICATE OF COMPLIANCE

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

The undersigned certifies that the Brief submitted herein contains 13,976 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.



Karen Hennrich