

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.

**REPLY BRIEF OF RELATOR
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INTRODUCTION

The Minnesota Department of Commerce (“Relator”) appealed decisions of the Minnesota Public Utilities Commission (“MPUC”) dated April 21, 2009 and July 15, 2009. See *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*; Add. at 8-9. The Relator’s Initial Brief raised issues concerning the MPUC’S conclusion that Minn. Stat. § 16A.151 (2008) did not apply to the money in the Tier 2 Special Fund, 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 has largely failed to address the arguments set forth by the Relator in its Initial Brief. The discussion set forth below addresses the MPUC’s limited arguments concerning Minn. Stat. § 16A.151, the MPUC’s state law authority and federal jurisdiction, and the precedential effect of its prior decisions concerning Minn. Stat. § 16A.151 that directed money recovered by the MPUC be deposited in the State’s general fund. With the exception of the latter argument which the MPUC previously has not addressed, the MPUC’s argument substantially echoes the statements in its *April 21st Order* that lack factual and legal authority.

ARGUMENT

I. THE MPUC ERRONEOUSLY CONCLUDED THAT MINN. STAT. § 16A.151 DOES NOT APPLY TO THE MPAP SERVICE QUALITY STANDARDS.

A. The MPUC Erroneously Argues that the MPAP is not Subject to Minn. Stat. § 16A.151 Because it is Primarily Under the FCC's Jurisdiction.

The MPUC continues to assert incorrectly that its approval of wholesale service quality standards contained in the Minnesota Performance Assurance Plan (“MPAP”) is a federal, not a state matter, such that Minn. Stat. § 16A.151 (2008) does not apply. The MPUC claims the MPAP is merely part of Qwest Corporation’s (“Qwest”) application to the Federal Communications Commission (“FCC”) pursuant to 47 U.S.C. § 271 (“271 Application”), stating further that “[a]pproval of Qwest’s application was solely up to the FCC, not the [MPUC].” MPUC Br. at 14. The MPUC also states that Qwest had to “show overall that its conduct is ‘consistent with the public interest, convenience, and necessity’ in order to satisfy the 14-Factor Competitive Checklist.” *Id.* Similarly, the MPUC states that the FCC used Qwest’s MPAP “in analyzing whether Qwest had opened its market to competition.” *Id.* at 16.

These statements demonstrate the MPUC’s misapplication of its authority, misstatement of federal law and the FCC’s process under 47 U.S.C. § 271, and do not accurately describe the role of the MPAP in Qwest’s 271 Application to the FCC.¹ The

¹ The MPAP was used by Qwest as part of its submission of materials to the FCC not to support checklist compliance to demonstrate that Qwest had opened its local service market to competition, but rather as *evidence* in support of its separate claim that granting its § 271 Application was in the public interest. The “public interest” determination made by the FCC is in addition to the federal 14-point checklist in § 271(c)(2)(B). The 14-point checklist in § 271(c)(2)(B) addresses the physical characteristics of Qwest’s network that were necessary to demonstrate that Qwest had opened its network facilities

MPAP is a state service quality plan over which the FCC recognizes that it has no jurisdiction. *See, e.g., 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).

The MPUC’s arguments misconstrue this key point. The MPAP, as a state service quality plan, is enforceable under Minnesota law including Minn. Stat. § 16A.151. The FCC lacks authority to enforce or modify the MPAP. If Qwest failed to keep its local network facilities available to CLECs in the manner demonstrated by the FCC’s 14-point checklist, the FCC could take enforcement action with regard to Qwest’s long-distance market entry, including revocation of Qwest’s authority to provide interLATA long distance services. *See* 47 U.S.C. § 271(d)(6)(A).² The FCC could not, however, enforce

to competitive local exchange carriers (“CLECs”) so that CLECs could provide service to their retail customers using Qwest’s facilities. As such, it represented the *current* state of Qwest’s efforts to open its network to its competitors at the time Qwest filed its § 271 Application on March 28, 2003. In contrast, the “public interest” requirement in 47 U.S.C. § 271(d)(3)(C) relates to future conduct: it is separate and distinct from the 14-point checklist requirements in 47 U.S.C. § 271(c)(2)(B), and is addressed when a finding is made that the applicant has satisfied the 14-point checklist requirements. Section 271(d)(3)(C) requires a further showing by Qwest beyond the showing that it had met the checklist requirements. In addition to demonstrating that its network was open to competitors, Qwest needed to demonstrate that its network facilities would *remain* open to CLECs *after* receiving FCC approval to enter the interLATA long distance market.

² 47 U.S.C. § 271(d)(6)(A) provides:

If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing - (i) issue an order to such company to correct the deficiency; (ii) impose a penalty on such company pursuant to subchapter V of this chapter; or (iii) suspend or revoke such approval.

or change the MPAP as a means of addressing violations of federal law such as discriminatory provisioning of facilities by Qwest.

The MPUC adopted the MPAP service quality standards as one option for CLECs who desire to interconnect with Qwest's network in Minnesota. The Tier 2 Special Fund was created pursuant to a provision in the MPAP. (A. 105-27[113-15]). As Relator explained in its Initial Brief, the MPAP has a twofold purpose: one under Minnesota law and another regarding federal law. Relator's ("Rel."). Initial Brief at 11-15. First, the MPAP is the result of a state administrative process in which the MPUC established and approved a state service quality plan pursuant to its state law authority. As part of its delegated authority from the Minnesota Legislature, 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.³ See Rel. Init. Br. at 38-40.

Respondent states that a CLEC can choose the MPAP standards or it can negotiate something different with Qwest for purposes of interconnection. MPUC Br. at 7. In attempting to distinguish the MPAP from other wholesale service quality ("WSQ") standards adopted by the MPUC, Respondent fails to acknowledge that a CLEC may also choose the other WSQ standards for incorporation in its interconnection agreement with

³ 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).

Qwest.⁴ *See id.* at 7, 12. In any of these instances, the interconnection agreement will be submitted to the MPUC for approval. The MPUC will determine as part of its review whether the interconnection agreement is in the public interest. *See* 47 U.S.C. § 252(e)(2) (2008).

Second, the MPAP was for Qwest's benefit to demonstrate to the FCC that Qwest had an MPUC-approved performance assurance plan in place in Minnesota to protect against backsliding after Qwest obtained approval to enter the interLATA long distance market. *Rel. Init. Br.* at 11-13. This second purpose does not diminish the importance of the MPUC's responsibility to enforce the MPAP as a wholesale service quality plan in Minnesota. Indeed, the Telecommunications Act of 1996 expressly preserves state commission authority with regard to wholesale service quality. 47 U.S.C. § 252(e)(3) (2008).

However, the MPUC, in its *April 21st Order*, and again in its brief in this case, fails to recognize that the MPAP established a state service quality plan that is on a par with other WSQ standards.⁵ Moreover, the MPUC states incorrectly: "The MPAP is merely a part of the application that Qwest submitted to the FCC to enter the long distance market." *MPUC Br.* at 14. This inaccurate statement attempts to minimize the importance of the MPAP as a Minnesota-approved service quality plan. Indeed, it is the

⁴ The "WSQ Standards" are those addressed by this court in *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).

⁵ The permanent WSQ Standards established in the MPUC's companion proceeding were also adopted by the MPUC in order that CLECs could incorporate them in their interconnection agreements.

understanding of Relator that CLECs have chosen the MPAP rather than the permanent WSQ Standards because the MPAP includes self-executing payments to CLECs for service quality noncompliance (the Tier 1 payments).⁶ Rel. Init. Br. at 15. Furthermore, Relator reviews and comments on all interconnection agreements submitted to the MPUC, and is aware of no CLEC that has chosen the WSQ Standards, despite the fact that the WSQ Standards included the more restrictive benchmark standards rather than the parity standards that are included in the MPAP. *See id.* at 15, quoting *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]). The MPUC does not disagree with Relator’s conclusion that CLECs have migrated to the MPAP from the WSQ Standards based on the Supreme Court’s decision reversing the WSQ requirement of self-executing payments to CLECs. *See Qwest’s WSQ Standards II*, 702 N.W.2d at 248; (A.41).

B. The Terms of the MPAP are Subject to Minnesota Law.

The MPUC continues to assert incorrectly that the terms of the MPAP control its authority over the Tier 2 Special Fund. That is, the MPUC claims that by its terms the MPAP does not allow distribution of the Tier 2 Special Fund to the State’s general fund under Minn. Stat. § 16A.151. The MPUC does not respond to Relator’s argument that

⁶ Although the MPUC’s more stringent WSQ standards remain in effect, the decision of the Minnesota Supreme Court in the WSQ appeal has caused CLECs to migrate to the MPAP because Qwest agreed to pay self-executing remedies to CLECs as part of the MPAP (the Tier 1 payments). *See* Minnesota Performance Assurance Plan, Exhibit K, (App. 105-27); and *In re Qwest’s Wholesale Serv. Quality Standards*, 702 N.W.2d 246 (Minn. 2005) (“*Qwest’s WSQ Standards II*”).

Commission-approved terms do not override a statutory mandate. Rel. Br. at 38-40. Rather, the MPUC simply reiterates the statements included in its *April 21st Order*. As Relator's initial brief explains, state law governs the MPUC's authority and applies to the terms of the MPAP. The MPUC derives no authority based on the provisions of the MPAP. *Id.* Any decision made without statutory authority or in excess of statutory authority would be deemed void or subject to collateral attack. *See State ex rel. Spurck v. Civil Serv. Bd.*, 32 N.W.2d 583, 586 (1948).

Thus, it is irrelevant what the MPAP provisions allow if such terms do not comply with Minnesota law. The MPUC itself implicitly recognized this legal principle when it stated that it would solicit comments regarding whether the Tier 2 Special Fund provisions in the MPAP were consistent with Minnesota law.⁷ *In the Matter of Qwest's Minnesota Performance Assurance Plan (MPAP)*, Order On Reconsideration Amending Performance Assurance Plan at 13, and 14, ¶ 9, MPUC Docket Nos. P-421/AM-01-1376; P-421/AM-00-849 (Nov. 26, 2002); (A. 91-104[103-104]). As shown Relator's Initial Brief and explained below, Minn. Stat. § 16A.151 requires distribution of the Tier 2 Special Fund to the State's general fund.

⁷ For example, the MPAP includes a provision consistent with state law that allows the MPAP to go into effect only upon FCC approval of Qwest's 271 Application. The MPUC's brief, in support of its argument that the MPAP is merely a part of Qwest 271 Application and not subject to Minn. Stat. § 16A.151, asserts that there is nothing that would have prevented Qwest from withdrawing the MPAP; Relator notes that such action would have been irrelevant according to the clear language in Section 18.1 of the MPAP adopted by the MPUC. *See* Exhibit K; (A. 126).

C. The Fact that Qwest was not Required to Propose the MPAP does not Alter Application of Minn. Stat. § 16A.151 to its Terms.

The fact that neither Minnesota or federal law required Qwest to propose wholesale service quality standards by filing the MPAP does not alter the application of Minn. Stat. § 16A.151 to its terms. The MPUC argues that “[n]either the state nor federal law mandated that the MPAP be filed. Further, Qwest’s discretionary decision to provide the MPAP as part of its § 271 application did not settle any litigation.” *Id.* As noted previously above, the fact that the FCC considered the MPAP along with Qwest’s 271 Application must not be confused with the status of the MPAP as an approved state service quality plan subject to the jurisdiction of the MPUC and governed by Minnesota law. The MPUC cited no authority to support a conclusion that the terms of the MPAP are not subject to Minnesota law or, specifically, to Minn. Stat. § 16A.151. Relator discusses in the next section of this Reply Brief, the provisions of Minn. Stat. § 16A.151 such as its application to money recovered by agencies in litigation or in settlement of matters that could have resulted in litigation.

D. The MPUC has Failed to Establish that Minn. Stat. § 16A.151 does not Apply to the Money It Recovers for Service Quality Noncompliance that is Deposited By Qwest in the Tier 2 Special Fund .

The Respondent did not rebut Relator’s demonstration that Minn. Stat. § 16A.151 requires that money the MPUC recovers for service quality noncompliance must be deposited in the State’s general fund. The MPUC proceeded on an erroneous theory of statutory construction when it misconstrued the meaning of the terms “settlement” and “litigation” in the *April 21st Order*, and again in its brief in this case.

Section 16A.151 provides in relevant part:

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.

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

The MPUC erroneously argues that the MPAP was not a settlement of litigation or a matter that could have resulted in litigation. The MPUC erroneously asserts that since “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 such litigation.” MPUC Br. at 16. The MPUC further asserts that “[t]here was no dispute, claim, or disagreement that the MPAP resolved ... and Qwest did not enter the agreement to settle a dispute.” *Id.* In addition, the MPUC claims there was no litigation or potential litigation, or settlement thereof, that caused the MPAP to be created and filed with the Commission.” *Id.* at 17. Relator disagrees.

The definitions set forth in § 16A.151, subd. 3 remove any doubt that § 16A.151 requires the MPUC to deposit the money in the Tier 2 Special Fund into the State’s general fund. Section 16A.151, subd. 3(1) plainly states that “administrative actions” are “litigation.” The MPAP proceeding is an administrative action. *See* Rel. Init. Br. at 25-26. Issues concerning Qwest’s potential wholesale service quality were of significant concern to CLEC’s and, because their very existence may well have depended on the

details of such standards, agreement of CLECs and the MPUC to Qwest's MPAP, and the MPUC's adoption of them, reasonably can be deemed a settlement. *See id.*

The MPAP proceeding before the MPUC was an "administrative action," as was the WSQ Standards proceeding, both of which clearly resulted in "litigation" as defined in Minn. Stat. § 16A.151. The MPUC argues that the MPAP and the WSQ Standards are completely separate, although it previously recognized the similarity between the WSQ Standards and the MPAP. As the MPUC itself has stated:

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*") (emphasis added); (A.128-142[131]).

In the MPUC's *February 2004 Order*, the MPUC clearly equates the MPAP and the WSQ Standards as two similar service quality plans available for CLECs to choose to include in their Minnesota interconnection agreements with Qwest. The MPUC's arguments to the contrary are incorrect and are inconsistent with its own statements.

The MPUC's approval of the negotiated resolution of the MPAP proceeding, with modifications agreed to by Qwest, constitutes a "settlement" of disputed concerns for purposes of Minn. Stat. § 16A.151. The statute does not define the term "settle" or

“settlement” and, thus, the words must be construed according to their definition or common and approved usage. *See* Minn. Stat. § 645.08(1) (2008). The dictionary definition of “settlement” is not restricted to formal written agreements between parties or between a party and the MPUC. Rel. Init. Br. at 27. The MPUC also has not addressed Relator’s argument that the MPUC previously has made no distinction for certain types of settlements in resolution of MPUC proceedings, and that 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. In fact, two prior MPUC proceedings involved similar service quality settlements. The service quality requirements in the Xcel merger proceeding and Qwest’s AFOR proceeding discussed further below were treated as settlements, and resulted in orders requiring that service quality payments recovered must be deposited in the State’s general fund. There is no material difference between these prior proceedings and the MPAP proceeding. Relator’s Br. at 33-35.

Nor is there significant difference as the MPUC asserts between the MPAP and the “consent order” agreed to by the Minnesota Pollution Control Agency and 3M, which created a legal obligation on the part of 3M for payments in settlement of prior violations of law. *See* Rel. Init. Br. at 30; and *Minnesota Mining and Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 182-83 (Minn. 1980) (“3M”). The MPUC argues that Qwest and the MPUC did not enter into such an agreement to end a legal dispute. MPUC Br. at 17. However, the two agreements differ primarily by the fact that the 3M consent order

resolved past violations and the MPAP provides for monetary settlement in the event of future violations of service quality standards. Furthermore, counsel for Qwest acknowledged that the MPAP is “a negotiated resolution to ensure performance.” Transcript at 6 (Aug. 26, 2008); (A.297-310[298]).

Since the Minnesota Supreme Court determined 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 if Qwest fails to comply with the MPAP requirements. *See Qwest’s WSQ Standards II*, 702 N.W.2d 246. Similar to the 3M consent order, Qwest’s commitment to make payments in the event of noncompliance with the MPAP is a negotiated “settlement.”

Even if Qwest had not agreed to the MPAP’s self-executing remedies, remedies to address noncompliance with the MPAP exist in the form of a civil action (litigation) against Qwest for noncompliance with an MPUC order pursuant to Minn. Stat. § 237.461 (2008). The MPUC did not address Relator’s discussion concerning the MPUC’s ability to recover service quality penalties in district court, which would then be deposited into the State’s general fund pursuant to Minn. Stat. § 237.461, subd. 4 (2008). In the MPAP proceeding, 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. Rel. Init. Br. at 30. The Tier 2 payments recognize that noncompliance with the service quality standards in the MPAP would result in harm to the overall public interest by impeding competition. 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.

The MPAP, also like the PCA's consent order, 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 "litigation" or 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.

II. THE COMMISSION'S FAILURE TO FOLLOW OR TO EXPLAIN ITS DEVIATION FROM PRIOR DECISIONS INVOLVING DISTRIBUTION OF FUNDS FOR NONPERFORMANCE OF SERVICE QUALITY STANDARDS IS ARBITRARY AND CAPRICIOUS.

The MPUC's failure to follow or, in the alternative, to explain its deviation from, prior decisions involving distribution of funds for nonperformance under service quality plans is arbitrary and capricious. *Rel. Init. Br.* at 33-36. Two prior MPUC decisions ruled that monies recovered by the MPUC under MPUC-approved service quality plans (as to sums not directed to compensate persons injured) must be deposited in the State's general fund under Minn. Stat. § 16A.151 (2008). *Id.* at 33-35.

The MPUC's Brief incorrectly argues that there is no precedent on whether Minn. Stat. § 16A.151 requires the MPUC to pay to the State's general fund the residual Tier 2 funds it recovers under the MPAP. *MPUC Br.* at 18. The MPUC mischaracterizes the

issue of distribution of the Tier 2 Special Fund as an issue of first impression for the MPUC.⁸ MPUC Br. at 18. Relator strongly disagrees with these assertions.

Respondent's analysis is flawed for six reasons. First, Respondent fails to acknowledge that the plan at issue is a service quality plan similar to service quality plans in two earlier orders,⁹ the *Xcel Penalty Order* and the *2003 AFOR Order*. See Rel. Init. Br. at 33. Respondent appears to consider the *2003 AFOR Order* and the *Xcel Penalty Order* to have been implicitly overruled or reconsidered by a later MPUC order. MPUC Br. at 20. However, the MPUC's Order on Reconsideration issued in 2006 explicitly held that its 2005 Order Amending Plan was premature and that Minn. Stat. § 16A.151 should not be applied retroactively.¹⁰ See *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]). Respondent fails to acknowledge that the MPUC's Order on Reconsideration was silent as to overruling its precedent created in the MPUC's

⁸ Respondent stated in relevant part: "Prior to this case, the Commission had never before addressed whether payments made as part of a plan submitted voluntarily for federal law purposes are subject to Minn. Stat. § 16A.151." MPUC Br. at 18.

⁹ 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); and *In the Matter of USWC Alternative Form of Regulation Plan* (Untitled Order adopting recommendations of MPUC's Consumer Affairs Office), Docket Nos. P-421/AR-97-1544; P421/CI-95-648 (Oct. 23, 2003) ("*2003 AFOR Order*"); (A.315-316).

¹⁰ In the 2003 AFOR proceeding in its Motion for Reconsideration, Relator acknowledged that "determining whether § 16A.151 applies retroactively is a difficult question of legal interpretation, and agree[d] to defer to the Commission's judgment in this matter." *In the Matter of Qwest Corporation's Alternative Form of Regulation (AFOR) Plan*, Order on Reconsideration at 2 (Jan. 20, 2006).

2003 AFOR Order (and followed in the *Xcel Penalty Order*), in which the agency held that Minn. Stat. § 16A.151 required payment to the general fund. MPUC Br. at 19-20. See also, Rel. Init. Br. at 35, n.14. The Order was also silent as to the MPUC's 2005 decision in the *Xcel Penalty Order*. *Id.* While the Relator views the 2006 Order on Reconsideration as implicitly deferring a final decision as to whether the MPUC is overruling its precedent applying § 16A.151 to recovery under Qwest's second AFOR Plan, Relator further notes that any overruling of prior precedent without a reasoned explanation as to why it should not apply is also arbitrary and capricious. See *In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. and Gas Utils.*, 768 N.W.2d 112, 120 (Minn. 2009) (“[T]o 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.”).

The *Xcel Penalty Order* involved an MPUC-approved service quality plan that was negotiated as part of a settlement.¹¹ Rel. Br. at 33-36. The MPUC stated that Minn. Stat. § 16A.151 requires it to pay any recovery it receives under the service quality plan to the State's general fund unless an exception identified in subdivision 2(a) provides otherwise; the MPUC then identified such an exception, and distributed the recovery accordingly. Rel. Init. Br. at 33-34; *Xcel Penalty Order* (A.313). The *Xcel Penalty Order* constitutes important precedent that Respondent failed to follow or to adequately explain the grounds for not applying to the MPAP settlement.

¹¹ Relator's argument applies as well to the precedent created in the *2003 AFOR Order*.

Second, the MPUC fails to recognize that the “payments made as part of [the MPAP service quality] plan” are similar to payments made as part of the service quality plan involved in the *Xcel Penalty Order*. Rel. Br. at 33-34. The MPUC fails to follow the precedent established in the *Xcel Penalty Order* or to adequately explain its deviation from such precedent.

Third, the MPUC attempts unsuccessfully to distinguish the *Xcel Penalty Order* from its MPAP decision on the basis of the type of payment involved. MPUC Br. at 19.

Specifically, the MPUC states:

In its [*Xcel Penalty Order*], the Commission did note that Minn. Stat. § 16A.151 applies to “penalties such as Xcel’s penalty for exceeding the SAIFI standard established in the Merger Settlement,” but it did not address whether other types of payments like those at issue here are subject to Minn. Stat. § 16A.151. (A.313-314).

Id. at 18-19.¹² No material difference exists as to type of payment for purposes of applying Minn. Stat. § 16A.151.

A plain reading of the statutory language demonstrates its application to a broad array of payments including but not limited to “penalties.”¹³ The statutory term “money recovered” is defined as follows:

“money recovered” includes actual damages, punitive or exemplary damages, statutory damages, and civil and criminal penalties.

Minn. Stat. § 16A.151, subd. 3(2) (2008). The term “money recovered” clearly encompasses payments for nonperformance of the MPAP service quality standards.

¹² SAIFI is a service quality measure that stands for “System Average Interruption Frequency Index.” *Xcel Penalty Order* (A.312).

¹³ The MPUC adds that “no party” to the service quality plan issue addressed in the *Xcel Penalty Order* “disputed that the penalty payments” were required to be paid to the general fund. MPUC Br. at 18. Clearly, the parties and the Commission correctly applied Minn. Stat. § 16A.151 in the Xcel merger docket.

Fourth, Respondent asserts that the service quality plan applied in the *Xcel Penalty Order* is distinguishable from the MPAP service quality plan because the former was “a settlement brought under state law” and was settled “for state law purposes.” Respondent’s Br. at 18-19. However, the MPUC fails to acknowledge that the MPAP matter was also settled. The MPAP service quality plan was a negotiated resolution to ensure Qwest’s performance of the agreed-upon MPAP service quality standards. See Rel. Init. Br. at 28 (quoting counsel for Qwest); see also (A.297-310[298]). The agency also ignores the fact that both matters were approved by the MPUC under authority provided by Minnesota law. In the case of the MPAP, the MPUC’s authority to approve the settlement derived from its state law authority over service quality, and as expressly preserved by federal law. Rel. Init. Br. at 9, 21-22, and 27-30.

Fifth, the MPUC claims the MPAP payments are different from the *Xcel Penalty Order* payments because the latter settlement served “state law purposes” while the MPAP is “a plan submitted voluntarily for federal law purposes[.]” MPUC Br. at 18-19. The MPUC does not develop its argument in this regard and offers no law or facts to support such a distinction. Moreover, the MPUC fails to address the fact that the FCC has expressly stated that that the performance assurance plans like the MPAP “derive from authority the states have *under state law* or the federal act.” *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]), citing *In the Matter of the Application by Ameritech Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA*

Services in Michigan, Memorandum Opinion and Order, 12 F.C.C.R. at 20748-50, ¶¶ 393-98 (June 30, 2000) (emphasis added).

The service quality plans submitted for MPUC approval in the Xcel merger docket that gave rise to the *Xcel Penalty Order* and the MPAP plan, both were voluntarily submitted for MPUC approval. Moreover, both service quality plans served the state law purposes of ensuring adequate provision of service quality, while the MPAP also furthered Qwest's federal interests. Rel. Br. at 33-42. The fact that the MPAP also served in part to support Qwest's federal § 271 Application to enter the interLATA long distance market does not transform the MPUC's MPAP proceeding into a federal proceeding. See Rel. Br. at 43-51.

Finally, although not addressed by the MPUC, Relator notes that the *Xcel Penalty Order* concerned a retail service quality plan¹⁴ while the MPAP is a wholesale service quality plan. Relator agrees that there is no material difference for precedential purposes as to payments made under a retail as opposed to a wholesale service quality plan. The MPUC has authority under Minnesota law to regulate both retail and wholesale service quality. *Id.* Respondent correctly makes no distinction for purposes of applying Minn. Stat. § 16A.151 between monies recovered by the agency under an MPUC-approved retail service quality plan (*Xcel Penalty Order* and *2003 AFOR Order*) and a state-approved wholesale service quality plan (MPAP) for purposes of applying Minn. Stat. § 16A.151.

¹⁴ The MPUC's *2003 AFOR Order* also concerned a retail service quality plan voluntarily submitted to the MPUC for approval pursuant to state law.

For the reasons discussed, Respondent failed to follow its precedent of applying Minn. Stat. § 16A.151, as articulated in the *Xcel Penalty Order* and the *2003 AFOR Order*, to the monies recovered by the MPUC for nonperformance of the MPAP service quality standards, and failed to explain its deviation from the *Xcel Penalty Order*. In addition, for the reasons stated in Relator's initial brief, the MPUC failed to follow its precedent in the *2003 AFOR Order*, which it had not expressly overruled by explaining its deviation from prior precedent. Therefore, the Commission's MPAP decision is arbitrary and capricious. Rel. Br. at 33-36.

CONCLUSION

The MPUC adopted the MPAP pursuant to the state law authority delegated to the agency by the Minnesota Legislature. The MPUC's conclusion that Minn. Stat. § 16A.151 does not apply to the MPAP incorrectly interprets Minnesota Law. Further, the MPUC's failure to follow its precedent is arbitrary and capricious. Therefore, the MPUC's *April 21st Order*, however well-intentioned, should be reversed and the MPUC should be required to deposit the money in Tier 2 Special Fund into the State's general fund.

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Respectfully submitted,



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