

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.

RESPONDENT'S BRIEF

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LEGAL ISSUES

Does the money in Qwest's Tier 2 Special Fund that was established as part of its application to the Federal Communications Commission when Qwest sought federal approval to enter into the long distance market, and intended to be used for non-competitive purposes to further telecommunications services, have to be deposited into the State's general fund pursuant to Minn. Stat. § 16A.151, which requires that money obtained by state officials in litigation or in settlement of a matter that could have resulted in litigation be deposited into the State general fund?

The Commission ruled in the negative.

Apposite Authority:

Minn. Stat. § 645.16 (2008)

Vlahos v. R&I Constr. of Bloomington, Inc., 676 N.W.2d 672 (Minn. 2004)

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

Owens v. Water Gremlin Co., 605 N.W.2d 733 (Minn. 2000)

STATEMENT OF THE CASE

In 2003, Qwest desired to enter the long distance market, referred to as the interLata market. To gain access to the long distance market, Qwest had to apply to and receive approval from the Federal Communications Commission ("FCC") through what is called the § 271 process. As part of its application, Qwest included the Minnesota Assurance Performance Plan ("MPAP"), a plan to ensure service quality standards for Qwest's Minnesota wholesale customers. Prior to including the MPAP as part of its § 271 application to the FCC, Qwest submitted the MPAP to the Minnesota Public Utilities Commission ("Commission") for approval. Qwest filed the MPAP with the Commission so that the Commission could provide information to the FCC on whether the MPAP provides benefits to the Minnesota long distance market and because the terms of the MPAP authorized the Commission to distribute money deposited into a fund created by the MPAP in a competitively neutral manner to further telecommunication services. The MPAP was not filed with the Commission to settle any actual or potential litigation. The Commission reviewed the MPAP and ultimately issued an order approving it.

The MPAP went into effect in 2003. The MPAP creates a "Tier 2 Special Fund" in which Qwest deposits money based on its wholesale service quality. The contributions then pay for fund administration and residual amounts are to be used in a competitively neutral manner in the telecommunications industry as determined by the Commission. On March 17, 2007, Qwest filed a request with the Commission asking that the Commission disburse remaining monies in the Tier 2 Special Fund in accordance with

the MPAP. The Minnesota Department of Commerce (“Department”) requested that the Commission examine whether § 16A.151 required that disbursements by the Commission from the Tier 2 Special Fund be deposited in the general fund. The parties then filed comments regarding the issue.

The Commission concluded that § 16A.151 does not apply because the money at issue is not from a settlement of litigation or potential litigation. Consistent with this conclusion, the Commission directed that the Tier 2 Special Fund be distributed in accordance with the terms of the MPAP. Therefore, on April 21, 2009, the Commission issued its *Order Authorizing Grant Program Disbursing Tier 2 Special Fund Balance* (“April Order”).

The Department petitioned the Commission for reconsideration. On July 14, 2009, the Commission denied the Department’s petition and issued its *Order Denying Reconsideration* on July 15, 2009. The Department now appeals the Commission’s decision. The Commission’s Orders are fully consistent with the law and reflect the Commission’s reasoned decision-making. The Commission’s decision should be affirmed.

STATEMENT OF FACTS

The Telecommunications Act of 1996

To bring competition to the market for local telecommunications, Congress adopted the Telecommunications Act of 1996 (the “1996 Act”). To that end, the 1996 Act directs Regional Bell Operating Companies (“RBOC”), like Qwest, to permit:

- competing firms to interconnect with its system,

- a competitor to purchase services from the incumbent at wholesale rates for resale, and
- a competitor to rent the use of elements of the incumbent's network, unbundled from undesired elements, on just, reasonable and nondiscriminatory terms.

47 U.S.C. § 251(c).

Thus, a competitor desiring to provide local exchange service may seek agreements with an RBOC related to interconnecting to the RBOC's network, the purchase of finished services for resale, and the purchase of the RBOC's unbundled network elements (UNEs). 47 U.S.C. §§ 251(c), 252(a). If the RBOC and the competitor cannot reach agreement, the applicable state commission may arbitrate the dispute. 47 U.S.C. § 252(b). The Commission has arbitrated many terms for interconnection agreements between Qwest and competitive local exchange carriers.

Further, the 1996 Act generally prohibits an RBOC from providing interLATA long distance services within the service area in which the RBOC is the incumbent local service provider. 47 U.S.C. § 271(a). However, § 271 of the 1996 Act provided a mechanism through which an RBOC could petition the FCC for permission to enter the interLATA (long distance) market in its state upon fulfillment of certain requirements. The requirements were included on a 14-factor Competitive Checklist. *See* 47 U.S.C. § 271(c)(2)(B). The RBOC had to persuade the FCC that the RBOC's conduct is "consistent with the public interest, convenience, and necessity." 47 U.S.C. § 271(d)(3)(C).

To demonstrate compliance, a RBOC may offer, as one part of its overall application, post-entry “performance assurance plans.” Those plans generally provide expectations for service quality, provide for monitoring of service quality, and provide for consequences if the expectations are unfulfilled. A performance assurance plan is one mechanism through which an RBOC could demonstrate to the FCC one aspect of the 14-point checklist: that it had irreversibly opened its local service market to competition. (A.274-276.)¹ A performance assurance plan functions as a standard set of terms that a competitor could choose to incorporate into its interconnection agreement with the RBOC. (Add.2.)² While state commissions had the authority to file comments with the FCC, much like any other person could file comments, only the FCC is authorized to grant or deny approval of an RBOC’s application under § 271. (See A.238-240, 286.)

Qwest’s Entry into the Long-Distance Market

As part of its choice to enter the long distance market, on March 28, 2003, Qwest filed an application with the FCC “for authority to provide in-region, interLATA services originating in the state of Minnesota.” (A.238.) Qwest had no legal obligation to enter the long distance market. In order to demonstrate that the local service market shall remain irreversibly open, Qwest voluntarily undertook the MPAP. (MPAP § 19.1 (“This MPAP represents Qwest’s voluntary offer to provide performance assurance.”) at A.127.) Prior to submitting its § 271 application to the FCC, Qwest filed the MPAP document

¹ Following the format adopted by the Department, items in the Department’s Appendix will be referenced as “A.____.”

² Following the format adopted by the Department, items in the Department’s Addendum will be referenced as “Add.____.”

with the Commission. (Add.3.) The Commission issued an order approving the MPAP on July 29, 2002. (A.84-90.)

The MPAP was among the items that the FCC relied upon in granting Qwest authorization to enter the long-distance market.³ (Add.3.) Specifically, the FCC found that the MPAP provided assurance that the local market will remain open to competition. (A.274.) The FCC issued its order granting Qwest interLATA long distance authority in Minnesota on June 26, 2003. (A.238 “[w]e grant the application based on our conclusion that Qwest has taken the statutorily required steps to open its local exchange markets in Minnesota to competition.”) Qwest’s effective date for entry into the interLATA long distance market in Minnesota was July 7, 2003; therefore, the MPAP went into effect on August 1, 2003, the first full month after gaining entry to the interLATA market. (A.286.) The FCC retains authority over Qwest’s ability to be in the long distance market. “The [FCC] has a responsibility not only to ensure that Qwest is in compliance with section 271 today, but also that it remains in compliance in the future.” (A.285.)

The MPAP has two provisions that relate to wholesale service quality and financial contributions to two funds based on Qwest’s performance. Contributions to the funds are based on technical formulas found in the MPAP. (See A.105-126.) The Tier 1 Fund distributes money directly to identified competitors. (Add.3.) The second fund, the Tier 2 Special Fund, pays for the MPAP administration. (Add.3, 6.) The Tier 2 Special Fund uses include paying a technical advisor or consultant, audits of Qwest’s

³ Again, no law required a § 271 application contain a performance assurance plan.

performance measurement and reporting, or other administrative expenses. (MPAP § 10.6 at A.115.) The MPAP further provides that the Commission may determine how to use any balance remaining in the Tier 2 Special Fund balance after paying for administration. The MPAP requires that any remaining monies must be used in a competitively neutral manner in the telecommunications industry. (Add.3, *citing* MPAP § 10.7 at A.115.)

The MPAP applies only to those local service providers that incorporate the MPAP terms into their interconnection agreements. (Add.6.) The local service providers and Qwest negotiate their interconnection agreement terms; the parties are free to negotiate a substitute performance assurance, or no such assurance at all. (Add.6.) The Commission's role regarding the Tier 2 Special Fund is limited to disbursing the amounts beyond those used to administer the fund. (Add.6.) Nowhere in the Tier 2 Special Fund provisions does the term penalty appear. Additionally, the MPAP is not called a "settlement" and does not contain a release of claims, or any description of any litigation, or potential litigation, that the MPAP resolves.

State Wholesale Service Quality

The Commission has adopted state wholesale service quality standards, which are separate from the performance measures in Qwest's MPAP. In 2000, the Commission initiated proceedings to develop wholesale service quality standards ("WSQS"). (A.143.) On July 3, 2003, the Commission issued its *Order Adopting Wholesale Service Quality Standards* ("WSQS Order"). In that proceeding, Qwest suggested that the Commission use its MPAP as the state's WSQS, except Qwest opposed the use of the MPAP's

payment regime in connection with the standards. (A.144.) In fact, Qwest disputed the Commission's legal authority to require Qwest to make payments to competitors for failing to comply with service quality standards. (A.157.) In issuing the WSQS Order, the Commission declined to utilize the MPAP and instead ordered parties to comply with more stringent standards. (A.164-165.) In making that decision, the Commission recognized that it was acting in both a quasi-judicial and quasi-legislative capacity. (A.155.) "Establishing service quality standards is an inherently legislative function, relying on the exercise of judgment to balance competing policy considerations." (A.155.) Again, the state WSQS are separate and distinct from the performance measures in Qwest's MPAP and are not at issue in this case.

Tier 2 Special Fund Proceeds

On March 17, 2007, Qwest filed a petition with the Commission pursuant to the MPAP requesting that the Commission disburse the then remaining money in the MPAP's Tier 2 Special Fund according to the MPAP. (Add.1.) The Department opposed disbursement according to the MPAP terms, arguing that disbursement is governed by § 16A.151, which requires money received by the state as part of litigation or in settlement of possible litigation to be deposited in the state general fund. (Add.1.) The parties filed several rounds of comments, including their legal analysis regarding whether § 16A.151 applies to the Tier 2 Special Fund balance. (Add.1.)

The Commission met on April 8, 2009 to consider the matter. (Add.1.) On April 21, 2009, the Commission issued its order granting Qwest's request that the Commission disburse the Tier 2 Special Fund in accordance with the terms of the MPAP.

Accordingly, in its April Order, the Commission authorized disbursement of the Tier 2 Special Fund to schools and libraries to be spent for telecommunications purposes. (Add.5, 7.) There is no dispute that the Commission's disbursement plan corresponds with the terms of the MPAP. On May 12, 2009, the Department filed its Motion for Reconsideration. (Add.8.) On July 15, 2009, the Commission denied Department's motion. (Add.9.)

SCOPE OF REVIEW

An appeal from a decision and order of the Commission may be commenced in accordance with Minn. Stat. ch. 14. Minn. Stat. § 216B.52, subd. 1 (2008). 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). On appeal from an agency decision, 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).

The court reviews the Commission's factual findings to determine whether they are supported by substantial evidence or whether its conclusions 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*"). Substantial evidence for purposes of appellate review of an administrative agency's decision is: 1) such evidence as a reasonable mind might accept as adequate to support a conclusion; 2) more than a scintilla of evidence; 3) more than some evidence; 4) more than any evidence; and 5) evidence considered in its entirety. *Cable Communications Bd. v. Nor-West Cable Communications P'ship*, 356 N.W.2d 658, 668 (Minn. 1984) (citations omitted).

A reviewing court may not substitute its own judgment for that of an administrative agency when the finding is properly supported by the evidence. *Vicker v. Starkey*, 265 Minn. 464, 470, 122 N.W.2d 169, 173 (1963). Courts defer to the agency's fact-finding process and it is the challenger's burden to establish that the findings are not supported by the evidence. *Id.*

A decision may be deemed 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 (citation omitted). To satisfy the arbitrary and capricious test, the agency must explain the connection between the facts found and choices made. *Id.* An agency decision is not arbitrary and capricious if the agency, presented with opposing points of view, reaches a reasoned decision that rejects one point of view. *In re Detailing Criteria and Standards*

for Measuring an Electric Utility's Good Faith Efforts in Meeting the Renewable Energy Objectives Under Minn. Stat. § 216B.1691, 700 N.W.2d 533, 539 (Minn. Ct. App. 2005) (citation omitted), *aff'd*, 714 N.W.2d 426 (Minn. 2006). A reviewing court will affirm the agency's decision if it was not arbitrary or capricious "even though [the court] may have reached a different conclusion had it been the fact-finder." *White v. Minnesota Dep't of Natural Resources*, 567 N.W.2d 724, 730 (Minn. Ct. App. 1997).

Further, this Court accords deference to an agency's expertise that is exercised within the scope of its authority. *Blue Cross & Blue Shield*, 624 N.W.2d at 278. Agency decisions are presumed correct and deference should be shown to agency expertise and special knowledge.⁴ *Id.* (citing *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977)).

ARGUMENT

I. SUMMARY OF THE ARGUMENT.

The Department argues that the disbursement of the Tier 2 Special Fund is controlled by Minn. Stat. § 16A.151, which governs distribution of the proceeds of

⁴ The Department's reliance is misplaced on the cases it cites for the proposition that "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." (Dept. Br., p.19.) See *Quinn Distribution Co. Inc. v. Qwast Transfer*, 181 N.W.2d 696, 699 (Minn. 1970) and *Brinks, Inc. v. Minnesota Pub. Utils. Comm'n*, 355 N.W.2d 446, 449 (Minn. Ct. App. 1984). Rather, the two cases simply state the now well-established principle that substantial deference is given to the fact-finding process of an agency. Neither case holds that deference is not accorded to an agency's legislative findings. *Id.* Further, agency decisions which are quasi-legislative in nature "receive extremely limited review on appeal, while quasi-judicial actions are somewhat more closely scrutinized." *Arvig Telephone Co. v. Northwestern Bell*, 270 N.W.2d 111, 116 (Minn. 1978).

litigation or settlements by state officials. The Tier 2 Special Fund was not created as the result of a settlement of a dispute or potential litigation. The facts and law support the Commission's decision to utilize the residual money in the fund in the manner it was intended to be used—to further competitively neutral efforts in the telecommunications industry.

The Department also erroneously equates the MPAP with the state WSQS. The WSQS are separate from the MPAP and were adopted in a different Commission proceeding. Further, the issue before this Court is discrete—whether the Tier 2 Special Fund included in Qwest's MPAP, and the money subsequently deposited into that fund, was paid as part of a settlement of litigation or potential litigation that would require the funds be paid into the State general fund. The Commission's conclusion that the MPAP controls the Commission's distribution of the balance of the Tier 2 Special Fund, not § 16A.151, is well reasoned, supported by the law, and should be affirmed.

II. THE COMMISSION'S DECISION THAT THE TIER 2 SPECIAL FUND BALANCE IS NOT REQUIRED TO BE DEPOSITED INTO THE STATE'S GENERAL FUND BECAUSE IT IS NOT SETTLEMENT OF LITIGATION OR POTENTIAL LITIGATION IS NOT AN ERROR OF LAW.

A. Minnesota Statute § 16A.151 Does Not Govern The Tier 2 Special Fund.

Minnesota Statute § 16A.151, entitled "Proceeds of Litigation or Settlement", governs the disposition of funds collected by the state when a dispute is litigated or settled. The statute states 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.

(Emphasis added.)

Statutory terms are to be construed according to their ordinary meaning and the decision maker must apply the plain meaning of the statute. Minn. Stat. § 645.16 (2008); *Vlahos v. R&I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 681 (Minn. 2004) (applying the plain meaning of the words of the statute); *Owens v. Water Gremlin Co.*, 605 N.W.2d 733, 736 (Minn. 2000).

Applying the plain meaning of the statute, Minn. Stat. § 16A.151 does not govern the distribution of the Tier 2 Special Fund. By its terms, that statute governs only money recovered by state officials through litigation or settlement of a matter that could have resulted in litigation. The Tier 2 Special Fund did not result from litigation by state officials, or the settlement of any such litigation or potential litigation.

B. The Commission did not Commence, Pursue, or Settle Litigation, or Settle a Matter that Could Have Resulted in Litigation.

Qwest's involvement in the FCC's § 271 federal process, and the Commission's incidental approval of the MPAP, do not involve litigation, or the settlement of litigation or potential litigation. Neither 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.

The MPAP is merely a part of the application that Qwest submitted to the FCC to enter the long distance market. On March 28, 2003, Qwest filed its § 271 application with the FCC that included, among other things, the MPAP. (A.238.) Approval of Qwest's application was solely up to the FCC, not the Commission. To satisfy the FCC's 14-Factor Competitive Checklist to allow long-distance market entry, Qwest had to show overall that its conduct is "consistent with the public interest, convenience, and necessity." 47 U.S.C. § 271(d)(3)(C). Qwest also had to specifically demonstrate that the local service market shall remain irreversibly open. In order to make that specific demonstration, Qwest voluntarily proposed the MPAP. (A.274.)

The provision at issue in this case is the Tier 2 Special Fund. (MPAP provisions 10.1 through 10.7 at A.113-115.) Through those MPAP provisions, Qwest deposits money into the fund based on Qwest's performance. The MPAP provisions expressly state how the fund is to be disbursed. First, the fund is to pay for MPAP administration costs, which may include payments to a technical advisor or consultant, audits of Qwest's performance measurement and reporting, or other administrative expenses. (MPAP § 10.6 at A.115.) The fund's residual balance then is to be used in a competitively neutral manner in the telecommunications industry. (April Order, p.3, *citing* MPAP § 10.7 at A.115.) The decision on how to spend the "residual" amount is at the discretion of the Commission. (A.115.) The Commission's role regarding the Tier 2 Special Fund

is limited to directing disbursement of the amounts beyond those used to administer the fund.⁵ (Add.6.)

The Commission's involvement with the MPAP prior to Qwest submitting it to the FCC was very limited. (See Add.6.) The Commission agrees with the Department's characterization that "[t]he MPUC's role as a state commission in the FCC § 271 process is purely consultative and limited to the 14-point Competitive Checklist." (Dept. Br., p.45.) The Commission's role regarding the MPAP 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. The FCC, and *only* the FCC, can approve Qwest to enter the interLATA markets.

The Department also points out that "if the FCC disagreed with a state's PAP, the FCC could deny an ILEC's § 271 application." (Dept. Br., p.43.) If the FCC had denied Qwest's § 271 application, there is nothing that would have prevented Qwest from withdrawing the MPAP. It was not mandatory. Qwest did not have to file a state

⁵ In the April Order, the Commission used the phrase "competitively neutral industry observer" to describe the Commission's role in disbursing any residual amount in the Tier 2 Special Fund. (Add.6.) According to the MPAP terms, the residual is to be used in a competitively neutral manner in the telecommunications industry. (MPAP § 10.7 at A.115.) The Department claims that descriptive phrase means that the Commission "abdicated its regulatory authority and responsibility." (Dept. Br., p.36.) In that section of the April Order, the Commission is describing the fact that the MPAP terms give the Commission discretion to disburse amounts remaining in the Tier 2 Special Fund after payment of administrative costs. (Add.6.) By disbursing funds according to the MPAP terms, the Commission is not settling a dispute; it is not utilizing its capacity to litigate on behalf of the state. Rather, the Commission is facilitating the MPAP, which Qwest voluntarily entered into as part of the § 271 process to enter the long distance market. The Commission still retains its regulatory authority over Qwest, and other telecommunication providers, including on issues that relate to service quality.

approved performance assurance plan, or a performance assurance plan at all, with its § 271 application. The FCC utilized Qwest's voluntary plan in analyzing whether Qwest had opened its market to the competition. The Commission helped facilitate part of that process for Qwest.

The Commission simply did not order Qwest to enter into the MPAP or to make the Tier 2 Special Fund payments to the state.⁶ Because 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. The MPAP was not developed for state wholesale service quality purposes, but rather for § 271 purposes. The Department has yet to state a claim by which the Commission could have recovered the funds deposited into the Tier 2 Special Fund from Qwest if Qwest had made a business decision either not to seek FCC § 271 approval, or not to submit a performance assurance plan as part of that process.

There was no dispute, claim, or disagreement that the MPAP resolved. Nowhere in the Tier 2 Special Fund provisions does the term penalty appear and Qwest did not enter the agreement to settle a dispute. Indeed, the MPAP is not called a "settlement" and does not contain a release of claims, or any description of any litigation, or potential litigation, that the MPAP resolves. Although the Department claims that the Tier 2

⁶ In fact, the Commission *could not* order the self-executing payment portion of the MPAP given that a very similar provision, ordered by the Commission, was overturned by the Minnesota Supreme Court. *In the Matter of Qwest's Wholesale Service Quality Standards*, 702 N.W.2d 246, 262 (Minn. 2005) ("WSQ") ("We...hold that the [Commission] exceeded its statutory authority in ordering Qwest to make such [self-executing] payments for failure to comply with the wholesale service quality standards.")

payments are for "harm to the public interest" (Dept. Br., p.17), there is nothing in the Tier 2 Special Fund terms indicating the payment is for "harm." The April Order likewise does not reference "harm" to the public.

In support of its position that the Tier 2 Special Fund was part of a settlement, the Department cites to consent orders issued by other agencies. (See Dept. Br., pp.30-31.) The MPAP, and specifically the Tier 2 Special Fund provisions, is not a consent order. Specifically, the Department refers to the 3M case, describing that case's consent order as a legal obligation by the company, imposed by an agency, "to remedy injuries to the state's natural resources under state law arising from the [Minnesota Pollution Control Agency's] legal process." (Dept. Br., p.30.) In other words, the Minnesota Pollution Control Agency ("MPCA") entered into an agreement with 3M to settle MPCA's claim against 3M for violations of the law. In this case, there are no violations, or alleged violations, of any law. Qwest and the Commission did not enter into an agreement to end a legal dispute. Rather, the Commission helped facilitate Qwest's § 271 application to become a long distance provider.

The Department also tries to allude to some litigation that may possibly occur in the future as a basis for requiring the Tier 2 Special Fund be disbursed to the general fund. (See Dept. Br., pp.24-25.) But there was no litigation or potential litigation, or settlement thereof, that caused the MPAP to be created and filed with the Commission. Rather, the MPAP was an assurance *to the FCC* to allow Qwest to enter the interLATA market. As the Commission stated in its April Order, the MPAP and the incorporated Tier 2 Special Fund is not a settlement payment with the reasoning that it is distinct from

a payment that Qwest could be ordered to make in a legal proceeding to enforce the Commission's rules. (*See* Add.6.) Qwest did not violate the law and the Commission did not order payment based on a violation. Therefore, Commission's decision that the Tier 2 Special Fund balance should be disbursed according to the MPAP's terms should be affirmed.

III. THERE IS NO COMMISSION PRECEDENT THAT ADDRESSES THE ISSUE BEFORE THIS COURT.

The Department erroneously argues that the Commission's decision is arbitrary and capricious because the Commission has failed to follow its precedent and failed to provide an explanation for deviating from that precedent. The Department's argument is without merit because there is no Commission precedent applicable to the case at hand.

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. The two prior Commission decisions cited by the Department do not address the issue before the Court and are fully distinguishable.

The Department cites the Commission's May 26, 2005 order in *In re Approval of the Merger of Northern States Power Co. and New Century Energies, Inc.* ("NSP Order"). In that case, the Commission examined whether penalty funds paid by NSP pursuant to a settlement brought under state law should go to the general fund or to the affected customers pursuant to Minn. Stat. § 16A.151. (A.311-314.) No party disputed that the penalty payments in that case were subject to Minn. Stat. § 16A.151. (A.312.) In its 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.)

The *NSP Order* is inapplicable to the case at hand. The *NSP Order* only addressed the applicability of Minn. Stat. § 16A.151 to penalty payments made pursuant a settlement entered into for state law purposes. As discussed above, the Tier 2 Special Fund payments at issue here are not payments made pursuant to a settlement. *See supra*, at 13-18. Thus, contrary to the Department's claim, the *NSP Order* does not establish any precedent relevant to this case.

Similarly, the Department's reliance on the Commission's October 23, 2003 order in *In the Matter of the USWC Alternative Form of Regulation Plan* is misplaced. In that order, the Commission briefly examined whether certain penalty payments to the state by Qwest pursuant to an Alternative Form of Regulation ("AFOR") Plan were subject to Minn. Stat. § 16A.151. AFOR plans are authorized by Minn. Stat. § 237.76-772. The Order summarily concluded that Minn. Stat. § 16A.151 requires that the AFOR funds be paid either to the general fund or refunded to ratepayers. (A.315-316.)

However, in an August 4, 2005 Order, the Commission reached a different conclusion. In that Order, the Commission found that Minn. Stat. § 16A.151 does not apply to AFOR payments because the "funds were not recovered from litigation or settlement, but are the result of a plan arising from a statutorily-defined regulatory process...." (A.319-320.) On reconsideration, the Commission determined that it did not need to reach the issue of whether Minn. Stat. § 16A.151 requires the AFOR payments to

go to the general fund because the statute was enacted after the AFOR plan was adopted and the Legislature did not provide for retroactive application of Minn. Stat. § 16A.151. (A.323.) By issuing its January 20, 2006 Order on Reconsideration, the Commission in effect superseded its conclusions in the two prior AFOR orders, including the October 2003 order cited by the Department.

In any event, the AFOR orders do not provide any precedent relevant to this case. First, this case does not involve payments pursuant to an AFOR plan adopted pursuant to state law. Instead, this case involves Tier 2 payments made pursuant to the MPAP, which was voluntarily offered by Qwest for purposes of the federal § 271 process. Second, as the discussion above highlights, the AFOR orders are limited to the specific facts before the Commission and do not establish any sort of broad principle regarding the applicability of Minn. Stat. § 16A.151.

Because neither of the Commission decisions cited by the Department apply to the issue at hand, the Department errs when it claims that the Commission failed to follow its precedent. Similarly the Department is mistaken when it argues that the Commission should have explained why it deviated from its precedent because there is no precedent applicable to this case. Further, the Commission provided a reasoned explanation regarding why Minn. Stat. § 16A.151 does not apply to the Tier 2 funds. Its position is well supported by the law and should be affirmed.

IV. THE COMMISSION'S AUTHORITY OVER GENERAL SERVICE QUALITY ISSUES IS NOT IN CONFLICT WITH THE COMMISSION'S DECISION THAT THE TIER 2 SPECIAL FUND DEPOSITS NOT BE DISTRIBUTED TO THE GENERAL FUND.

The Department mistakenly argues that the MPAP is part of the wholesale service quality docket. (Dept. Br., p.24.) The MPAP is not a broad mechanism to ensure service quality, as it applies only to those local service providers that incorporate the MPAP terms into their interconnection agreements. (Add.6.) The local service providers and Qwest negotiate their interconnection agreement terms; the parties are free to negotiate a substitute performance assurance, or no such assurance at all. (Add.6.)

The Department also incorrectly characterizes the MPAP as a settlement by claiming that the MPAP terms settle in advance of any service quality issues that may occur in the future. Specifically, the Department argues:

Thus by agreeing to the terms of 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.

(Dept. Br., p.32.)

The MPAP was not a settlement of any existing service quality issues. There was no release or other agreement between the Commission and Qwest whereby the MPAP in any way replaces the Commission's service quality enforcement authority. The Commission simply did not waive its ability to enforce service quality claims. In fact, the Department acknowledges that subsequent to the FCC granting Qwest's long-distance application which included the MPAP, the Commission issued its order in the broader WSQ docket. (See Dept. Br., p.14.) The MPAP is separate from the WSQS docket and

does not conflict with the Commission's on-going authority to regulate telecommunications companies.

V. THE COMMISSION DID NOT MAKE AN ARBITRARY FINDING.

The Department argues that the Commission's April 21 Order is arbitrary and capricious because the Order "[found] that the public interest is not a significant consideration in adopting WSQ standards...." (Dept. Br., p.41.) This contention is based on a mischaracterization of the Commission's findings regarding the difference between the MPAP and state service quality rules.

In the April Order, the Commission explained the distinction between the MPAP and general service quality rules by noting that:

the MPAP primarily promotes parties' private interests. Unlike service quality rules, the MPAP applies only to local service providers that incorporate its terms into their interconnection agreements; those providers are free to negotiate substitute performance assurances, or no such assurances at all.

(Add.6.) Simply because the Commission found that the MPAP "primarily promotes parties' private interests," does not mean that the Commission implicitly found that the public interest is not also a significant consideration in adopting WSQS, or even the MPAP. To the contrary, as the Department itself has recognized, the Commission considered the public interest in deciding whether to approve the MPAP. (Dept. Br., p.42; A.94 (stating "[e]xcept as discussed below, the Commission concludes the language of the CPAP [which the Commission adopted in the MPAP] establishes policies that are the most consistent with the facts, the law, and the public interest.")) Similarly, the Commission considered the public interest when it adopted the WSQS.

Furthermore, contrary to the Department's suggestion, the Commission's finding that the MPAP primarily promotes private interests is fully supported by the record. As noted in the April Order, unlike general service quality standards, the MPAP's service measures only apply where agreed to by the other telecommunications carrier. (*See* A.105, 122 (Sections 1.1, 16.1, 16.3; providing that the telecommunications carrier, or "CLEC," has to opt-in to the MPAP before it applies to Qwest service provided to that CLEC).) Certainly the MPAP helps promote service quality for providers who have chosen to incorporate the MPAP into their interconnection agreements and thereby benefits their customers, but it is not the primary means by which the Commission promotes wholesale service quality.

Indeed, the Commission expressly decided not to adopt the MPAP as the generic state WSQS applicable to Qwest but instead adopted more stringent standards. (*See* A.164-165.) Thus, because the Commission's finding regarding the primary purpose of the MPAP is fully supported by the record and well-reasoned, the Department's argument to the contrary should be rejected. *See In re Quantification of Environmental Costs*, 578 N.W.2d 794, 799-801 (Minn. Ct. App. 1998) (accordng substantial deference to the fact finding processes of the Commission; upholding the Commission's decision where it was supported by sufficient evidence and based on a reasonable explanation.); *In re the Application of Grand Rapids Public Utilities Commission To Extend Its Assigned Service Area*, 731 N.W.2d 866, 871 (Minn. Ct. App. 2007) (stating a Commission decision will not be disturbed where it is supported by substantial evidence).

In any event, the Commission's finding regarding the primary purpose of the MPAP does not affect the ultimate conclusion reached by the Commission that Minn. Stat. § 16A.151 does not apply to the Tier 2 Special Fund. The purpose of the MPAP is not a determinative factor under the statute. See Minn. Stat. § 16A.151.

CONCLUSION

Creation of MPAP, and the Tier 2 Special Fund provision, was not a result of settlement of litigation, or potential litigation. The Commission's decisions regarding that plan, and the mechanism to disburse the Tier 2 Special Fund balance, should be affirmed.

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