Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
D. Minnesota.

QWEST CORPORATION, a Colorado corporation, Plaintiff,
v.
THE MINNESOTA PUBLIC UTILITIES COMMISSION; and R. Marshall Johnson, in his official capacity as a member of the Minnesota Utilities Commission; Leroy Koppendrayer, in his official capacity as a member of the Minnesota Utilities Commission; Phyllis Reha, in her official capacity as a member of the Minnesota Public Utilities Commission; and Gregory Scott, in his official capacity as a member of the Minnesota Public Utilities Commission, Defendants,
CLEC COALITION; and AT & T Communications of the Midwest, Inc., Intervenors.

No. Civ.03-3476 ADM/JSM.

Aug. 25, 2004.

Peter S. Spivack, Hogan & Hartson L.L.P., Washington, D.C., and Jason D. Topp, and Todd L. Lundy, **Qwest** Corporation, Minneapolis, MN, and Denver, CO, appeared for and on behalf of **Qwest** Corporation.

Steven H. Alpert, Assistant Attorney General, St. Paul, MN, appeared for and on behalf of Defendants.

Dan M. Lipschultz, Moss & Barnett, Minneapolis, MN, appeared for and on behalf of Intervenor the CLEC Coalition; Thomas E. Bailey, Briggs & Morgan, P.A., Minneapolis, MN, appeared for and on behalf of Intervenor AT & T Communications of the Midwest, Inc.

MEMORANDUM OPINION AND ORDER

MONTGOMERY, J.

I. INTRODUCTION

*1 Plaintiff **Qwest** Corporation's ("**Qwest**") Motion for Judicial Review, Declaratory Relief and Injunctive Relief [Docket No. 28] was argued before the undersigned United States District Judge on June 11, 2004. **Qwest** disputes the legality of a liability order ("Liability Order") and two penalty orders (collectively, "Penalty Orders") issued by Defendant the Minnesota Public Utilities Commission ("MPUC" or "Commission") for alleged violations of the 1996 Telecommunications Act ("Act"). For the reasons set forth below, **Qwest's** Motion is denied in part and granted in part.

II. BACKGROUND

This dispute concerns **Qwest's** alleged failure to comply with federal and state telecommunications law. The Act requires incumbent local exchange carriers ("ILECs") such as **Qwest** to lease their networks to competitive local exchange carriers ("CLECs"). *See* 47 U.S.C. § 251(c). Under the Act, **Qwest** must submit interconnection agreements ("ICAs") it forms with CLECs to the MPUC for approval. *See id.* §§ 252(a), (e). Additionally, ILECs must make the terms of ICAs available to CLECs who are not parties to the original agreements. *See id.* § 252(i). [FN1] Non-party CLECs can then "opt-in" and incorporate these provisions into their own ICAs, assuming that they follow "the same terms and conditions, in addition to rates, as those provided in the [original] agreement." 47 C.F.R. § 51.809(a). In exchange for leasing their networks to competitors, the 1996 Act allows ILECs to provide regional long distance services after the FCC determines the company meets certain requirements. *See* 47 U.S.C. § 271. These requirements reflect the legislative intent of opening local telephone service markets to new competitors. *See* Telecommunications Act of 1996, Pub.L. No. 104-104, Purpose Statement, 110 Stat. 56, 56 (1996); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,*

First Report and Order, 11 F.C.C.R. 15499 ¶ 167 (1996) (*"Local Competition Order"*).

FN1. The full text of § 252(i) states, "[a] local exchange carrier shall make available any interconnection service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i).

On February 14, 2002, the Minnesota Department of Commerce ("DOC") filed a complaint ("DOC Complaint") against **Qwest** alleging violations of federal and state telecommunications law. *See* Second Am. Verified Compl. ¶ 5 (Bailey Aff. Ex. A). Specifically, the DOC Complaint asserted that **Qwest** had formed twelve secret ICAs with CLECs and had not submitted them to the MPUC. *Id.* ¶¶ 14-25. The DOC Complaint averred that this failure discriminated against CLECs who were not parties to the secret ICAs because these CLECs lacked access to the same favorable terms contained in the agreements with the favored CLECs. *Id.*

The DOC referred the case to the Office of Administrative Hearings for a contested case proceeding before an administrative law judge ("ALJ"). *See* Notice & Order for Hearing (Bevilacqua Aff. Ex. 2). After conducting hearings on April 29 through May 2, 2002, and August 6, 2002, ALJ Allan W. Klein concluded that **Qwest** had knowingly and intentionally violated §§ 251 and 252 of the Act by failing to file twelve ICAs. *See* Findings of Fact, Conclusions, Recommendation, and Memorandum ("ALJ Report") at Conclusion ¶ ¶ 2- 5 (Bevilacqua Aff. Ex. 3). These unfiled ICAs included six agreements with Eschelon Telecom Inc. ("Eschelon"), three with McLeodUSA Telecommunications Service, Inc. ("McLeodUSA"), and one each with Covad Communications Company ("Covad"), USLink, Inc. ("USLink"), and a group of ten CLECs ("Small CLECs"). *Id.* ¶¶ 37, 78, 89, 119, 151, 168, 232, 270, 283, 292, 316, and 348. The ALJ also determined that **Qwest** " knowingly and intentionally" discriminated against other CLECs because **Qwest** had not made provisions of the twelve ICAs available to them. *Id.* ¶¶ 46, 59, 67, 77, 88, 105, 115, 140, 150, 167, 187, 198, 207, 215, 223, 231, 242, 250, 258, 266, 282, 291, 304, 313, 344, and 354.

*2 On November 1, 2002, the MPUC issued a liability order adopting the ALJ's Report and establishing a comment period regarding remedies. *See* Liability Order at 7 (Bevilacqua Aff. Ex. 4). The MPUC found that **Qwest** had "knowingly and intentionally" violated both federal and state law by failing to file the twelve ICAs, creating discriminatory conditions on resale, and infringing state anti-discrimination statutes. *Id.* at 4-7.

The MPUC issued two orders assessing penalties and restitutional relief, the first on February 29, 2003, and the second on April 30, 2003. *See* Order Assessing Penalties ("Penalty Order I") at 1 (Bevilacqua Aff. Ex. 5); Order After Reconsideration On Own Motion ("Penalty Order II") at 1 (Bevilacqua Aff. Ex. 6). In Penalty Order I, the MPUC imposed a penalty of $25.95 million after considering several factors outlined in Minn.Stat. § 237.462, subd. 3. *See* Penalty Order I at 7-18. The MPUC, basing its actions on state law, also granted restitutional relief to CLECs, authorizing remedies that included credits and discounts for certain services. *Id.* at 19-22. In Penalty Order II, the MPUC reconsidered portions of Penalty Order I, but ultimately retained the $25.95 million penalty and many of the restitutional remedies from Penalty Order I. Penalty Order II at 12-13. **Qwest** filed a Complaint appealing the Liability and Penalty Orders on June 19, 2003.

III. DISCUSSION

Qwest seeks judicial review, declaratory judgment and injunctive relief to prevent enforcement of the Liability Order and the Penalty Orders.

A. Standard of Review

Title 47 U.S.C. § 252(e)(6) authorizes federal district court review of state commission

actions. This Court possesses supplemental jurisdiction over any state law claims under 28 U.S.C. § 1367. In considering appeals of state commission orders, federal courts apply *de novo* review to questions of federal law. *See Mich. Bell Tel. Co. v. MFS Intelnet of Mich. Inc.*, 339 F .3d 428, 433 (6th Cir.2003); *S.W. Bell Tel. Co. v. Apple*, 309 F.3d 713, 717 (10th Cir.2002); *MCI Telecomm. Corp. v. Bell Atlantic Pa.*, 271 F.3d 491, 517 (3d Cir.2001); *S.W. Bell Tel. Co. v. Pub. Util. Comm'n*, 208 F.3d 475, 481 (5th Cir.2000); *GTE S., Inc. v. Morrison*, 199 F.3d 733, 742 (4th Cir.1999). The arbitrary and capricious standard applies to district court review of state commissions' factual findings and application of law to fact. *See Mich. Bell*, 339 F.3d at 433; *SW Bell*, 208 F.3d at 482; *US W. Communications, Inc. v. Hamilton*, 224 F.3d 1049, 1052 (9th Cir.2000). Thus, the Court will review *de novo* whether the Liability Order and Penalty Orders violate the Act, but will review the MPUC's factual findings under the arbitrary and capricious standard.

B. Legality of the Restitutional Remedies

Qwest challenges the Penalty Orders' imposition of restitutional remedies on numerous legal grounds. First, **Qwest** argues that state law does not authorize the MPUC to grant equitable relief and that the restitution imposed here is equitable in character. The MPUC contends Minnesota telecommunications statutes permit it to grant restitutional remedies, including discounted rates, rebates and credits designed to rectify **Qwest's** past discriminatory behavior. [FN2]

FN2. As a threshold matter, the parties disagree on which standard of review federal district courts should apply when reviewing state commissions' interpretations of state law. While both **Qwest** and the CLEC Intervenors assert that the arbitrary and capricious standard controls this review, the MPUC states that review is *de novo*. However, as explained below, the MPUC lacks authority under Minn.Stat. § § 237.081, 237.461 and 237.462 to order restitutional relief, even assuming that the more deferential arbitrary and capricious standard applies.

***3** The MPUC, "being a creature of statute, has only those powers given to it by the legislature." *Peoples Natural Gas Co. v. Minn. Pub. Utils. Comm'n*, 369 N.W.2d 530, 534 (Minn.1985) (internal quotation omitted). Consequently, the MPUC may not impose restitutional remedies absent express or implied statutory authority. *Id.* Because state telecommunications law does not expressly allow the MPUC to grant restitutional relief, the relevant inquiry is whether implied authority permits the Commission's actions. In interpreting the extent of the MPUC's implied powers, "express statutory authority need not be given a cramped reading...." *Id.* However, as Justice Simonett cautioned, "any enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature." *Id.*

The MPUC argues that Minn.Stat. §§ 237.081, 237.461 and 237.462 authorize imposition of restitutional relief. Section 237.461 is a competitive enforcement statute which permits the MPUC to seek criminal prosecution, recover civil penalties, compel performance, or take "other appropriate action." *See* Minn.Stat. § 237.461 subd. 1. Section 237.462, also a competitive enforcement statute, emphasizes that "[t]he payment of a penalty does not preclude the use of other enforcement provisions...." Minn.Stat. § 237.462, subd. 9. Finally, § 237.081, a complaint statute, authorizes the MPUC to "make an order respecting [an unreasonable, insufficient, or unjustly discriminatory] ... act, omission, practice, or service that is just and reasonable," and to "establish just and reasonable rates and prices." Minn.Stat. § 237.081, subd. 4.

A fair reading of these statutes vests the MPUC with broad statutory authority to regulate the telecommunications market in Minnesota. However, the critical issue is whether this power includes the authority to impose equitable relief. In *Peoples Natural Gas*, the Minnesota Supreme Court held that the MPUC lacked statutory authority to order a natural gas utility to refund revenue collected in violation of a MPUC order. *Peoples Natural Gas Co.*, 369 N.W.2d at 535-36. The court reached a different conclusion in *In re*

Minnegasco, 565 N.W.2d 706, 713 (1997), holding that the MPUC had statutory authority to order a recoupment remedy where Minnegasco incurred losses from an illegal rate order the MPUC issued. Finally, in *In re New Ulm Telecom, Inc.,* 399 N.W.2d 111, 121-22 (Minn.Ct.App.1987), a Minnesota Court of Appeals panel reviewed § 237.081 and determined that the MPUC lacked jurisdiction to award equitable relief. [FN3]

FN3. The unpublished decision of *In re the Members of MIPA,* No. C0-97-606, 1997 WL 793132, at *3 (Minn.Ct.App. Dec. 30, 1997) held that § 237.081, subd. 4, authorized the MPUC to order refunds. The decision broadens the holding of *In re Minnegasco* because it permits refunds for losses that resulted from a telecommunications company's actions, rather than an unlawful MPUC order. *Id.* However, as an unpublished order, the case is not controlling. *See Vhalos v. R & I Constr. of Bloomington, Inc.,* 676 N.W.2d 672, 676 n. 3 (Minn.2003) (stressing that unpublished opinions of the court of appeals are not precedential and discouraging reliance on them as authority).

Based on this case law, the MPUC lacked implied statutory authority to order restitution in the Penalty Orders. First, no published authority from the Minnesota courts has held that §§ 237.081, 237.461 and 237.462 permit imposition of equitable remedies. Rather, in *In re New Ulm,* the court held that § 237.081 does not give the MPUC jurisdiction to award equitable relief. *See* 399 N.W.2d 111, 121-22. Second, while the specific remedy at issue in *In re New Ulm* was equitable estoppel, there is no legally distinguishable difference between this remedy and the restitution granted in the Penalty Orders. *Id.* Finally, the *Minnegasco* court's narrow holding that the MPUC can order a recoupment remedy to rectify its own mistake in issuing an illegal order does not suggest that the Commission possesses broad authority to grant equitable relief under the circumstances here. *In re Minnegasco,* 565 N.W.2d at 711-13. Therefore, because the MPUC lacked statutory authority to impose equitable relief, the restitutional remedies from the Penalty Orders are invalid and must be vacated. [FN4]

FN4. Because the MPUC lacks statutory authority to award equitable relief, **Qwest's** other arguments concerning the Penalty Orders' restitutional remedies will not be addressed.

C. Legality of the $25.95 Million Penalty

*4 **Qwest** also contests the legality of the $25.95 million penalty imposed in the Penalty Orders.

1. The Penalty's Validity Under State Law

First, **Qwest** argues that the MPUC violated state law in assessing the penalty amount because the Commission failed to consider the requisite statutory factors. Instead, **Qwest** avers that the MPUC imposed a figure it hoped would "incentivize" **Qwest** to accept the Penalty Orders' restitutional relief.

Minn.Stat. § 237.462 authorizes the MPUC to order monetary penalties. *See* Minn.Stat. § 237.462, subd. 1. In determining the amount of a penalty, the MPUC must consider the following nine factors: (1) the willfulness or intent of the violation; (2) the gravity of the violation, including the harm to customers or competitors; (3) the history of past violations; (4) the number of violations; (5) the economic benefit gained by the person committing the violation; (6) any corrective action taken or planned by the person committing the violation; (7) the annual revenue and assets of the company committing the violation; (8) the financial ability of the company to pay the penalty; and (9) any other factors that justice may require. *See* Minn.Stat. § 237.462, subd. 2.

Qwest argues that the MPUC improperly considered these statutory factors only as justification after setting the penalty at an amount sufficient to motivate **Qwest** to accept the restitutional relief of dubious legality. The hearing transcript does support the MPUC's intention to impose a penalty that would encourage **Qwest** to accept the restitutional remedies and implement more competitive practices. *See* Tr. of 02/04/03 at 288, 294 (Bevilacqua Aff. Ex. 28). However, this goal does not automatically invalidate the $25.95

million penalty, as monetary penalties are inherently designed to change behavior. *See Duquesne Light Co. v. E.P.A.*, 791 F.2d 959, 960 (D.C.Cir.1986) (noting that government may assess penalties to obtain desired behavior). Rather, the pivotal issue is whether the MPUC analyzed the statutory factors and whether its conclusions justify imposing a $25.95 million penalty.

The Penalty Orders' discussion of the § 237.462 factors reveals that the MPUC properly penalized **Qwest** under state law and that the MPUC's factual findings were not arbitrary and capricious. First, the MPUC found that **Qwest** willfully violated both federal and state anti-discrimination laws by failing to file the twelve agreements and providing preferential treatment to some CLECs. *See* Penalty Order I at 3-4, 7; *see also* 47 U.S.C. §§ 251(b)(1), (c)(2)(D), 252(a) and (e); Minn.Stat. §§ 237.09, 237.121 subd. 5, 237.60 subd. 3. **Qwest** concedes that it had notice that at least some of the ICAs should have been filed, and that this failure violated the Act. Thus, the MPUC had sufficient evidence to support its willfulness finding. *See* Mem. in Support at 36; *see also* Penalty Order I at 7-8. Concerning factors two through four, the MPUC determined that **Qwest's** actions impeded fair competition and harmed customers and non-party CLECs, that **Qwest** had a history of similar anti-competitive behavior, and that **Qwest** committed twenty-six individual violations. *See* Penalty Order I at 8-12. Further, the MPUC found that **Qwest** benefitted economically from its actions because in return for its private arrangements with CLECs Eschelon and McLeodUSA, the two companies maintained neutrality during proceedings for **Qwest's** § 271 application. *Id.* at 13.

***5** The remaining factors also support the penalty. The MPUC recognized some value in a few of **Qwest's** suggested corrective actions. *Id.* at 13-17. However, the Commission rejected **Qwest's** proposals because **Qwest** "failed to take responsibility for its anti-competitive ... behavior." *Id.* at 14. Additionally, the MPUC determined that some proposed remedies might actually retard competition, and that some suggestions benefitted rather than penalized **Qwest.** *Id.* at 13-17. Finally, the MPUC concluded that a penalty of $25.95 million would not unreasonably impact **Qwest** financially, and hoped it would motivate **Qwest** to "desist in the future from anti-competitive behavior." *Id.* at 18.

Review of the MPUC's analysis reveals strong evidentiary support for the $25.95 million penalty based on the statutory factors in Minn.Stat. § 237.462. Therefore, the penalty is valid under Minnesota law.

2. The Penalty's Validity Under the Preemption Doctrine

Qwest argues further that the $25.95 million penalty violates § 252(i) of the Act and is thus invalid under the preemption doctrine. Specifically, **Qwest** asserts that the MPUC impermissibly found discrimination under state law without regard to § 252(i). Under § 252(i), ILECs like **Qwest** must make the terms of ICAs available to CLECs who are not parties to the original agreements. *See* 47 U.S .C. § 252(i). Non-party CLECs can then "opt-in" and incorporate these provisions into their own ICAs if they follow "the same terms and conditions, in addition to rates, as those provided in the [original] agreement." 47 C.F.R. § 51.809(a). **Qwest** argues that before finding that discrimination resulted from its failure to file the twelve ICAs, the MPUC must first evaluate whether CLECs could opt-in under § 252(i). Additionally, **Qwest** contends that § 252(i)'s allegedly more rigorous discrimination analysis preempts penalty assessment under authority of state law provisions.

Preemption is based on the Supremacy Clause of Article VI of the United States Constitution. U.S. Const. art. VI, cl. 2. The Supremacy Clause invalidates state laws that interfere with or are contrary to federal law. *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991). Congressional intent determines whether federal law preempts state law, and "may be explicitly stated in [a federal] statute's language or implicitly contained in

its structure and purpose." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Absent an express Congressional command, state law is still preempted if it "actually conflicts with federal law," or if federal law "thoroughly occupies a legislative field...." *Id.* (internal citation omitted).

The Act does not expressly preempt state telecommunications law. Rather, it preserves state commissions' authority to implement state law that is consistent with the Act. *See* 47 U.S.C. §§ 251(d)(3), 252(e)(3), and 253(b). Therefore, the issue is whether the Act implicitly preempts Minnesota's anti-discrimination telecommunications statutes by requiring the MPUC to conduct § 252(i) opt-in analysis before finding that discrimination occurred under state law from **Qwest's** failure to file ICAs.

*6 For § 252(i) to implicitly preempt state law, it must either actually conflict with Minn.Stat. §§ 237.09, 237.121 subd. 5, 237.60 subd. 3, or thoroughly occupy the area of discrimination analysis that regulators should employ when evaluating an ILEC's failure to file an ICA. *Cipollone,* 505 U.S. at 516. First, while § 252(i) and federal regulations limit ICA opt-in to the same terms and conditions in the original ICA, they do not actually conflict with state anti-discrimination statutes. Nothing in § 252(i) or 47 C .F.R. § 51.809(a) requires that opt-in analysis must be conducted before finding that discrimination occurred. Additionally, the FCC has ruled that discrimination results from an ILEC's failure to file simply because non-party CLECs will lack critical information. Specifically, "[r]equiring all contracts to be filed ... limits an incumbent LEC's ability to discriminate among carriers ..." because "public filing of agreements enables carriers to have information about rates, terms, and conditions that an [ILEC] makes available to others." *Local Competition Order,* ¶ 167. Therefore, the MPUC's determination under state law that **Qwest's** failure to file discriminated against non-party CLECs does not conflict with the Act.

Similarly, § 252(i) and 47 C.F.R. § 51.809(a) do not thoroughly occupy the discrimination inquiry. Rather, the Act imposes several requirements concerning ICAs and their provisions, revealing that discrimination from a failure to file exists in numerous forms. For example, §§ 252(a) and (e) require ILECs to file ICAs and to submit them to state commissions for approval, making the information in ICAs readily available to all CLECs. *See* 41 U.S.C. §§ 252(a) and (e). These provisions are designed to minimize disparate and discriminatory access to ICAs and to provide a level playing field. *See* Purpose Statement, 110 Stat. at 56. Additionally, the FCC has adopted a broad view of discrimination, stating that the mere failure to file, in itself, is discriminatory. *See Local Competition Order,* ¶ 167. Further, while Congress implemented the federal Act to open local telephone service markets to new competitors, it expressly preserved state authority to "protect the public safety and welfare" under state law. *See* 47 U.S.C. § 253(b). Consequently, Congress did not intend for § 252(i) to thoroughly occupy discrimination analysis regarding an ILEC's failure to file an ICA. Thus, § 252(i) does not implicitly preempt the MPUC's finding of discrimination under state law. It follows that a penalty granted under these same state statutes does not violate the Act on preemption grounds.

3. The Penalty's Validity Under the Fair Notice Doctrine

Citing the fair notice doctrine, **Qwest** argues additionally that it should not be penalized for failing to file some of the twelve ICAs because it did not know which agreements were subject to the Act's filing requirement. The fair notice doctrine permits a party to challenge application of a rule if there has not been "fair warning that the allegedly violative conduct was prohibited." *United States v. Chrysler Corp.*, 158 F.3d 1350, 1355 (D.C.Cir.1998). **Qwest** avers that the doctrine applies here because the Act does not expressly define "interconnection agreement." Further, **Qwest** contends that no state commission or court, or the FCC had provided a definition before the Complaint was issued

in this matter. Thus, **Qwest** claims it could not have known exactly which agreements should have been filed under § 252.

*7 **Qwest's** argument is unavailing. First, **Qwest's** admission that it failed to file even the agreements it knew were subject to the Act's filing provision seriously undermines the credibility of its "no notice" argument. *See* Mem. in Support at 36. This failure suggests that **Qwest** was willfully blind in determining which agreements should be filed.

Second, despite the absence of a definition in the Act, other sources outlined the scope of § 252 and provided notice. For example, § 271 includes a comprehensive checklist of items that must be included in ICAs before an ILEC may receive authority to provide regional long distance service. *See* 47 U.S.C. § 271(c)(2). This list reveals that any agreement containing a checklist term must be filed as an ICA under the Act. *Id.* While the checklist does not include every possible term that may arise in an agreement, its exhaustive recitation shows that Congress adopted a broad view of ICAs. *Id.* Consequently, **Qwest's** argument that § 271 failed to specify that dispute resolution and escalation clauses in particular must be filed lacks merit.

Qwest received additional notice from the *Local Competition Order,* where the FCC broadly interpreted the Act's filing requirement. In the *Local Competition Order,* the FCC stated that any agreements concerning rates, terms, conditions, and interconnection, service and network elements must be filed. *Local Competition Order,* ¶ 167. **Qwest** correctly states that the FCC did not address **Qwest's** petition for a declaratory ruling on the scope of § 252(a) until October 4, 2002, after the DOC filed a Complaint initiating this case. *See In re Qwest Communications Int'l Inc. Petition for Declaratory Ruling,* 17 FCCR 19337 ¶ 1 (2002) (Bevilacqua Aff. Ex. 8). However, the FCC's comprehensive view of ICAs in the *Local Competition Order,* which predates the DOC Complaint, gave **Qwest** fair notice that it should have filed all twelve agreements at issue. *See Local Competition Order,* ¶ 167.

Third, evidence from the ALJ hearing shows that the telecommunications industry generally understood the filing provision's limits despite lack of an explicit definition of "interconnection agreement." The ALJ found that while the parties involved in the hearing proposed numerous definitions for ICAs, at the core all included "any contractual agreement or amendment thereto, whether negotiated or arbitrated, between an ILEC and another telecommunications carrier, that concerns the rates, terms or conditions for provision of interconnection, services or network elements." ALJ Report ¶¶ 28-29. Further, **Qwest's** broad definition of interconnection agreement in its own materials emphasizes that **Qwest** understood its responsibilities under the Act. *See id.* ¶¶ 24, 160. Therefore, the fair notice doctrine does not require abatement of the $25.95 million penalty.

4. The Penalty's Validity Under the Excessive Fines Clause

*8 Finally, **Qwest** argues that the penalty violates the Eighth Amendment's Excessive Fines Clause. *See* U.S. Const. amend. VIII, cl. 2. The Eighth Amendment's prohibition on excessive fines applies to the States through the Fourteenth Amendment's Due Process Clause. *See Cooper Indus. Inc. v. Cooper Leatherman Tool Group, Inc.,* 532 U.S. 424, 433-34 (2001). In the criminal context, the Supreme Court has ruled that a fine is unconstitutionally excessive if the amount is grossly disproportional to the gravity of the offense. *See United States v. Bajakajian,* 524 U.S. 321, 334-35 (1998). Relevant factors in this analysis include legislative intent in establishing fines, and the difference between the penalty and the actual damages caused by the offense. *Id.* at 336-37; *see also State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 418 (2003).

While the Supreme Court has not considered whether the gross disproportionality test pertains to administrative penalties, other courts have adopted this approach. *See Kelly v. U.S. E.P.A.,* 203 F.3d 519, 524 (7th Cir.2000). Applying the test to the case at bar, this Court must uphold the $25.95 million penalty unless

it greatly outweighs the harm caused by **Qwest's** violations of state and federal law.

The $25.95 million penalty is not unconstitutionally excessive because **Qwest** has not proven that this amount is grossly disproportional to its offenses. The penalty is consistent with the intent of the Minnesota Legislature and falls within statutory limits. Minn.Stat. § 237.462 permits the Commission to assess penalties of $10,000 a day for each violation of state telecommunications laws. *See* Minn.Stat. § 237.462, subd. 2. A related statute outlining court enforcement of these same telecommunications laws authorizes civil penalties of up to $55,000 per day for each violation. *See* Minn.Stat. § 237.461, subd. 3. The MPUC imposed the maximum fine of $10,000 a day for two violations, but assessed $2500 for the other ten infractions. *See* Penalty Order I at 4. Because the $25.95 million penalty does not exceed statutory limits, but falls below the possible maximum, it coincides with legislative policy and favors a finding of constitutionality. *See Bajakajian,* 524 U.S. at 334-35.

Additionally, **Qwest** has not shown that the penalty greatly exceeds the damages caused by its failure to file the ICAs. *State Farm Mut. Auto. Ins. Co.,* 538 U.S. at 418. While ALJ Klein discussed the difficulty of quantifying the exact damages that resulted from **Qwest's** offenses, hearing testimony demonstrated that CLECs were actually harmed because they lacked access to unfiled agreement terms. *See* ALJ Hearing ¶ 374. The ALJ concluded that damages "would amount to several million dollars for Minnesota alone." *Id.* Therefore, the penalty is not grossly disproportional to actual damages. *State Farm Mut. Auto. Ins. Co.,* 538 U.S. at 418.

*9 **Qwest's** reliance on *Bajakajian* is misplaced. In *Bajakajian,* the Supreme Court held that requiring the defendant to forfeit over $350,000 for failing to report exported currency violated the Excessive Fines Clause. 524 U.S. at 337-38. The Court concluded that the defendant's crime "was solely a reporting offense," because it was legal for the defendant to transport money out of the United States and his failure to report was not related to any other illegal activity. *Id.* In this case, **Qwest's** failure to file ICAs was not merely a reporting offense. By keeping the terms of select ICAs private from all CLECs, **Qwest** hampered competition in Minnesota's telecommunications industry. *See* Penalty Order I at 3-4 and 7-9. Further, the maximum fine under the Sentencing Guidelines for Defendant Bajakajian was only $5000, far less than the amount of money forfeited, unlike the $25.95 million penalty here which falls well below the statutory maximum. *Bajakajian,* 524 U.S. at 337- 38; *see also* Minn.Stat. § 237.462, subd. 2. Therefore, the $25.95 penalty is within constitutional bounds.

D. Legality of the Liability Order

Qwest also contests the portion of the Liability Order which concluded that **Qwest** discriminated against CLECs who were not parties to the secret ICAs. *See* Liability Order at 4-6. In its Liability Order argument, **Qwest** reasserts its view that the MPUC should have conducted opt-in analysis before concluding that **Qwest's** actions were discriminatory.

Again, **Qwest's** argument lacks merit. As discussed above, discrimination may result from an ILEC's failure to file ICAs beyond the opt-in concerns under § 252. *See supra* Part B. The FCC's *Local Competition Order* adopts a broad view of discrimination, and the FCC has ruled that discrimination can result merely from an ILEC's failure to file ICAs. *See Local Competition Order,* ¶ 167. Further, the MPUC determined that **Qwest** violated Minnesota anti-discrimination statutes because the terms in the secret ICAs were not available to all CLECs. *See* Penalty Order I at 9-10. Because the MPUC properly determined that **Qwest's** actions were discriminatory, the Liability Order is valid.

IV. CONCLUSION

Based on the foregoing, and all the files, records and proceedings herein, IT IS HEREBY ORDERED that:

1. Plaintiff **Qwest** Corporation's appeal of

Minnesota Public Utilities Commission Orders [Docket No. 1] is GRANTED as to the Penalty Orders' restitutional remedies.

2. **Qwest** Corporation's appeal of the Liability Order and the Penalty Orders' $25.95 million penalty is DENIED. The portions of the Penalty Orders relating to restitutional remedies are vacated.

LET JUDGMENT BE ENTERED ACCORDINGLY.

2004 WL 1920970 (D.Minn.)

Motions, Pleadings and Filings (Back to top)

. 0:03CV03476 (Docket) (Jun. 19, 2003)

END OF DOCUMENT