

COURT OF APPEALS
DISTRICT I

WISCONSIN BELL, INC.
(d/b/a Ameritech Wisconsin),
a Wisconsin corporation,

Petitioner-Respondent-
Cross-Appellant,

v.

Appeal No. 02-2783

Circuit Court Case
No. 01-CV-11200

PUBLIC SERVICE COMMISSION
OF WISCONSIN,
Respondent-Appellant-
Cross-Respondent,

MCI TELECOMMUNICATIONS
CORPORATION, WORLDCOM
TECHNOLOGIES, INC., AT&T
COMMUNICATIONS OF
WISCONSIN, L.P. and TCG
MILWAUKEE (d/b/a AT&T Local Services),

Co-Appellants.

COMBINED BRIEF OF RESPONDENT-
CROSS-APPELLANT AMERITECH WISCONSIN

Appeal from the Circuit Court of Milwaukee County
The Honorable Timothy J. Dugan, Presiding

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ISSUES PRESENTED FOR REVIEW

1. Does the Public Service Commission of Wisconsin (the “Commission”) have authority to impose penalties?

Trial Court: No.

2. Was the performance “remedy plan” imposed by the Commission an unauthorized penalty, because it requires payments without regard to the existence or amount of damage?

Trial Court: Yes.

3. Did the Commission err when it imposed the “all transactions” scheme without any evidence in the record?

Trial Court: Not Answered.

4. Did the Commission violate the Eighth Amendment and the Due Process Clause by imposing an excessive penalty on Ameritech Wisconsin?

Trial Court: Not Answered.

5. Do the doctrines of waiver and estoppel suffice to create Commission authority to impose penalties?

Trial Court: No.

6. Was the Circuit Court's decision to enter a stay within its discretion, and is the Commission's challenge to that decision moot?

Trial Court: As to the merits of the stay, yes. As to mootness, not answered.

STATEMENTS AS TO ORAL ARGUMENT AND PUBLICATION

Ameritech Wisconsin does not believe oral argument is crucial given the extensive briefing and oral argument already conducted before the Circuit Court. Ameritech Wisconsin acknowledges, however, that oral argument may be helpful given the volume of the record and some of the more technical background to this case, and stands prepared to participate in oral argument. While this case presents a straightforward application of existing law that precludes the Commission from imposing penalties, publication may be useful to provide further guidance to the Commission and to the industries that it regulates.

STATEMENT OF THE CASE

I. Nature Of The Case

On September 25, 2001, the Commission ordered Ameritech Wisconsin to implement what the Commission

labeled a “remedy” plan. The plan would have required Ameritech Wisconsin to make automatic monthly payments (totaling approximately \$2.5 million for the first month alone) to competitors or to the Commission itself in the event Ameritech Wisconsin did not meet certain performance standards in providing services to its competitors. The Commission claimed authority to order this scheme under Wis. Stat. §§196.37(2) and 196.219(4).

The Circuit Court, however, recognized the Commission’s order for what it was. After a hearing and two rounds of briefs, the court’s Judge Dugan held that the Commission’s plan was not a “remedy” plan at all, but a *penalty* plan. The principal flaw in the Commission’s plan was that it would have punished Ameritech Wisconsin for *compliance* with the law and with its competitors’ requests. This was not by accident but by design. If there had been a shortfall in performance for *some* specified number or percentage of transactions – a shortfall as trivial as missing less than one percent of due dates for installing a particular product or service – the Commission’s plan would have punished Ameritech Wisconsin by assessing equal payments on all transactions measured, even those for which the due

date was *not* missed. The Circuit Court correctly found that such punitive payments cannot possibly be a “remedy” for damage, because they are levied on transactions where there was no damage. Thus, because the Commission “cannot impose a penalty” under Wisconsin law, Judge Dugan concluded that “the Commission exceeded its authority ... when it approved a plan that imposed a penalty.” R.65¹ p.21 (Appendix of Respondent-Cross-Appellant (“App.”) p.21).

The Circuit Court’s order was a straightforward application of this Court’s decision in *Wisconsin Public Service Commission v. Wisconsin Bell, Inc.*, 211 Wis. 2d 751, 566 N.W.2d 496 (Ct. App. 1997) (“*Wisconsin Bell*”). There, the Court held that the Commission’s role is remedial, and that it does not have statutory authority to seek, much less impose, penalties. As a result, the dispositive issue before the Circuit Court, and here, is simple: Was the plan ordered by the Commission a remedy or an impermissible penalty? On this issue, as well, the Circuit Court correctly applied this Court’s decision in *Wisconsin Bell*. As the Court held in that case, a penalty is something designed to “punish a wrongdoer

¹ “R.” refers to the Circuit Court record. “PSCW-R.” refers to the Commission record.

without regard to the damages caused.” *Wisconsin Bell*, 211 Wis. 2d at 758. The Circuit Court found that the Commission’s plan was designed to punish without regard to the damages caused – indeed, it found absolutely no evidence in the record of any actual damage, and the Commission made no attempt to connect its plan to damage. As the Circuit Court found, the Commission’s “entire focus was upon a monetary inducement to comply with the plan, not damages arising from noncompliance.” R.65 p.17 (App. p.17). Thus, the court concluded, it would be “a tortured twisting of words to avoid calling [the Commission’s plan] a penalty.” *Id.*

None of the Circuit Court’s findings are addressed in Appellants’ briefs. Neither brief even cites (much less distinguishes) this Court’s controlling decision in *Wisconsin Bell*. Instead of rebutting the court’s decision, Appellants try to recast the issue as whether the Commission has power to order *remedies*. They call the Commission-imposed plan a “remedy plan,” but they do not describe its defining features and how they work, and they do not address the analysis of the Circuit Court and the dispositive issue here – whether the Commission’s plan is in fact a penalty.

Over and above the statutory grounds on which the Circuit Court relied, the Commission's plan is invalid for several alternative reasons. The Circuit Court did not reach these issues. Two issues represent alternative grounds on which the Circuit Court's judgment may be affirmed, and are presented here. Two additional grounds would require modification of the Circuit Court's order and its instructions on remand, and they are accordingly presented in the Cross-Appellant portion of this brief.

II. Statement Of Facts Relevant To Review

While Appellants contend that the Commission-imposed plan is a "remedy" they provide little discussion of what the plan actually was, or how it was designed to work, or how it came to be. Those are the real facts relevant to this Court's review, and Ameritech Wisconsin presents them below.

A. The Nondiscrimination Requirements Of The 1996 Act.

Section 251 of the Telecommunications Act of 1996 ("1996 Act" or "Act"), 47 U.S.C. §151 *et seq.*, sets forth the ways in which an incumbent local exchange carrier ("incumbent LEC") like Ameritech Wisconsin is to

accommodate the entry of competing local exchange carriers (“CLECs”) in the local telecommunications market.

Essentially, the incumbent is to provide certain wholesale products and services, as set forth in the Act, on a “nondiscriminatory” basis. 47 U.S.C. §§ 251(c)(2)(D), 251(c)(3), 251(c)(4)(B). The Federal Communications Commission (“FCC”) has explained that the nondiscrimination standard requires an incumbent to provide access to competitors in “substantially the same time and manner” as it provides to itself. *In re Joint Application by SBC Communications Inc. for Provision of In-Region, InterLATA Services in Kansas & Oklahoma*, 16 F.C.C. Rcd. 6237, ¶28 (2001) (“*Kansas & Oklahoma 271 Order*”).

B. Implementation Of The Nondiscrimination Requirements.

As part of the de-regulatory framework required by Congress, the duties established by section 251 are implemented by binding “interconnection agreements” between incumbent and competing LECs. Section 252 of the 1996 Act sets forth a step-by-step procedure by which such agreements are reached, through negotiation (47 U.S.C. § 252(a)(1)), arbitration of unresolved issues (*id.* § 252(b)(1)),

and approval by the applicable state commission (*id.* § 252(e)), followed by federal court review (*id.* § 252(e)(6)).

Ameritech Wisconsin uses *performance measures* to help assess its compliance with the statutory nondiscrimination requirement and the implementing provisions of its interconnection agreements. PSCW-R.64 p.252 (App. p.26). Each month, Ameritech Wisconsin measures and reports its performance of certain functions for CLECs, and for Ameritech Wisconsin's affiliates and retail operations where applicable. *Id.* The performance measures are further divided into separate categories or "disaggregations," such as product, service, or geographical area. *Id.* at 254 (App. p.27). There are approximately 150 performance measures, divided into over 2,000 categories, in all. PSCW-R.64 p.254 (App. p.27).

The data in these performance measures are typically compared against *standards*. There are two types of standards. The first standard is used where Ameritech Wisconsin performs a wholesale function for CLECs, and performs an analogous function in serving its own retail customers. In those cases, the level of retail performance for the month sets the standard against which wholesale

performance is measured – namely, the standard is to have “parity” between wholesale and retail. PSCW-R.64 p.256 (App. p.29). The second standard applies where there is no comparable retail operation against which to assess wholesale performance. In such cases, a pre-set “benchmark” (typically specifying that a certain percentage of transactions should be completed within a given time interval) has been established. *Id.* p.255 (App. p.28).

The FCC has “found that performance measurements provide valuable evidence” regarding an incumbent’s compliance with statutory requirements. *Kansas & Oklahoma 271 Order*, ¶31. At the same time, however, the FCC has “emphasize[d]... that we do not view each particular metric as wholly dispositive.” *Id.* Rather, the ultimate question – whether the incumbent has complied with the Act’s nondiscrimination standard – “can only be decided based on an analysis of specific facts and circumstances.” *Id.* ¶29. Thus, “[w]here a statistically significant difference exists” between wholesale performance and the applicable standard, “we will examine the evidence further” – considering, for example, the degree, duration and explanation for that disparity – to “make our ultimate

determination of whether the statutory nondiscrimination requirements are met.” *Id.* ¶31.

C. Enforcement.

Interconnection agreements are “binding” (47 U.S.C. § 252(a)(1)) and enforceable contracts. Congress also sought to induce compliance by offering incumbents a *quid pro quo* embodied in section 271. If an incumbent LEC demonstrates compliance with a statutory “checklist” (47 U.S.C. § 271(c)(2)(B)), and the existence of “one or more binding [interconnection] agreements that have been approved under section 252” (*id.* § 271(c)(1)(A)), it can apply for and receive approval from the FCC to compete in the long-distance market (*id.* § 271(d)). In evaluating an incumbent’s application, the FCC consults with the applicable state commission, which presents its recommendations as to whether the incumbent has complied with the statutory checklist. *Id.* §271(d)(2)(B).

D. Ameritech Wisconsin’s Initial Proposal.

1. Overarching Principles.

This appeal concerns a different enforcement mechanism known as a “remedy plan.” On December 15, 1999, the Commission initiated on its own motion Docket No.

6720-TI-160. PSCW-R.3. In the course of that docket, Ameritech Wisconsin and the intervening CLECs agreed upon, and the Commission approved, a set of performance measurements and standards. PSCW-R.1 p.14 (App. p.52). The parties also agreed on a series of enhancements to systems and procedures. *Id.* at 13-14 (App. p.51-52).

Ameritech Wisconsin further proposed that it would offer a voluntary contractual remedy plan: liquidated damages to be paid to CLECs and/or the State in the event of specified failures to meet performance standards. PSCW-R.64 pp.283-86 (App. pp.30-33); PSCW-R.65 (Ex.19) (text of proposed plan) (App. pp.91-110). Ameritech Wisconsin's proposal was essentially identical to contractual plans offered by its affiliates in Texas, Kansas, and Oklahoma. PSCW-R.64 pp.283-84 (App. pp.30-31); *Kansas & Oklahoma 271 Order*, ¶270 (stating that plans for Kansas and Oklahoma "are nearly identical to the current Texas Performance Remedy Plan"). All of these affiliates have received approval from the FCC to enter the long-distance market under section 271 of the 1996 Act.

The proposed plan was contractual in nature, to be implemented as an amendment to an interconnection

agreement upon acceptance by a CLEC. PSCW-R.65 (Ex. 19) at §5.5 (App. p.95). In keeping with the plan's contractual origins (and with the FCC's admonition that a shortfall in a performance test does not necessarily show discrimination), a CLEC adopting the plan would have agreed not to use the payment of remedies or the existence of the underlying plan "as evidence that Ameritech has discriminated in the provision of any facilities or services under Sections 251 and 252" of the 1996 Act, or as "an admission of liability or culpability for a violation of any state or federal law or regulation." *Id.* §6.2 (App. pp.95-96).

2. Mechanics Of Assessing Remedies.

Ameritech Wisconsin proposed to test performance by applying statistical analysis to wholesale and retail results, both on individual measures and in the aggregate. To the extent performance fell short, Ameritech Wisconsin proposed to calculate remedies (with a few exceptions not pertinent here) on a "per occurrence" basis, by multiplying the number of "occurrences" of substandard performance by a remedy "base" amount intended as a liquidated damage. PSCW-R.65 (Ex. 19) at §8.2 (App. p.99-101). The calculation (which appears at sections 11.1.2 and 12.1.2 of the proposed plan,

PSCW Ex. 19 (App. pp.105-107) is best illustrated by an example. Assume that Ameritech Wisconsin filled 1,000 orders for resale residential phone service for CLEC A, but for 70 orders Ameritech Wisconsin missed the due date for installation, yielding a rate of missed due dates of 7 percent. A rate of 50 missed due dates would have passed the applicable statistical “parity” test, but because Ameritech Wisconsin missed 20 more due dates, the per-occurrence factor would be 20. In other words, remedies would be paid on each of the 20 missed due dates that caused Ameritech Wisconsin to fall short of the applicable performance test.

In this way, payments would be directly tied to the specific transactions for which a CLEC received substandard service and might have been damaged, and to the degree of disparity between wholesale and retail performance. If Ameritech Wisconsin had missed 200 of the 1,000 due dates, the number of occurrences would have increased from 20 (70 misses minus 50 allowed by the parity test) to 150 (200 misses minus 50 misses allowed). Conversely, if Ameritech Wisconsin had missed only 51 of 1,000 due dates, the number of occurrences on which remedies would be paid would decrease from 20 to 1.

Ameritech Wisconsin next proposed that the number of substandard occurrences would be multiplied by a “base” remedy amount set forth in the proposed plan. PSCW-R.65 (Ex. 19) at §8.2 (App. p.99-101). The base amount for the first month of disparity is \$150, so if Ameritech Wisconsin had passed the test for this measure in the preceding month, the remedy plan would take the per-occurrence factor of 20 above, multiplied by \$150, for a remedy of \$3,000. These payments would be calculated and assessed each month. PSCW-R.65 (Ex. 19) at §§10.1, 10.3 (App. pp.103-104).

E. Commission Proceedings and Decision.

Although the CLECs participating in the Commission docket agreed with the underlying performance measures and standards, they proposed an entirely different payment plan. In particular, they proposed that payments be calculated on a “per measure” basis – that is, as a specified amount for each measurement category that showed a shortfall, regardless of the number of occurrences or total transactions within that category. PSCW-R.65 (Exs. 9-10, 14). In its September 25, 2001, Commission Decision, the Commission adopted a payment plan of its own making, and ordered Ameritech Wisconsin to implement it. The Commission rejected the

CLEC proposal (PSCW-R.1 p.11 (App. p.49)), but imposed its own plan when it “modified substantially” the plan proposed by Ameritech Wisconsin (*id.* at 24 (App. p.62) in several respects.

The most significant change ordered by the Commission was in the method for calculating the amount to be paid. As noted above, Ameritech Wisconsin proposed that remedies be calculated on the number of “occurrences”: If Ameritech Wisconsin misses 51 due dates, and a rate of 50 would have passed the applicable performance test, Ameritech Wisconsin pays remedies on the excess 1 occurrence that caused it to fall short. The Commission Decision, however, called for payments “on all transactions that were included in that measure of performance.” PSCW-R.1 p.26 (App. p.64). In other words, Ameritech Wisconsin would pay not only for the difference between actual performance and compliant performance (the excess occurrence of 1), and not only for the transactions for which the due date was missed (the total missed due dates of 51), but for all 1,000 transactions, whether or not the due date was missed. R.6 (“Ehr Aff.”) ¶21 (App. p.119). For exceeding by any degree the 50 missed due dates “allowed” under the

performance standard, Ameritech Wisconsin would have paid the same “base” amount on all 1,000 transactions – even the 949 that were on time. *Id.*

The Commission also made a fundamental change to the nature of the plan. While Ameritech Wisconsin’s proposed plan was contractual, the plan ordered by the Commission was not. The Commission acknowledged Ameritech Wisconsin’s contention that the remedy plan should be made available “through amendments to interconnection agreements” as required by the 1996 Act, but refused to follow it. PSCW-R.1 p.29 (App. p.67). Instead, the Commission directed that its plan, as modified, “shall be made immediately available through the issuance of this order.” *Id.*

Ameritech Wisconsin filed a petition for rehearing and sought leave to present evidence of the punitive effects of the Commission-imposed plan. The Commission denied rehearing by order issued November 14, 2001. PSCW-R.2 (App. pp.155-163).

F. The Circuit Court’s Decision.

Ameritech Wisconsin timely filed a petition for judicial review on November 30, 2001, along with a motion

to stay payments under the plan pending review on the merits. The parties filed briefs on that motion, and the Circuit Court held a hearing on December 13, 2001, at which the parties presented evidence and argument as to the nature and operation of the Commission's plan. Judge Dugan then granted Ameritech Wisconsin's motion and stayed payments under the plan. At the court's instruction, Ameritech Wisconsin posted a bond to secure payments.

After a second round of briefing, the Circuit Court issued its 24-page written Decision on the merits on July 25, 2002. The court first held that the Commission-imposed plan was a penalty, because "[t]here is no evidence in the record that reflects that the Commission attempted to estimate the damages caused by Ameritech not complying with the plan." R.65 p.17 (App. p.17). Rather, the Commission's "entire focus was upon a monetary inducement to comply with the plan, not damages arising from noncompliance." *Id.*

Next, the court analyzed Wisconsin statutes governing the Commission's authority, along with this Court's construction of those statutes. "Pursuant to the statutes cited and Wisconsin cases," the court reasoned, "the Commission is authorized to pursue remedial relief but cannot impose a

penalty.” *Id.* p.21 (App. p.21). Therefore, the court concluded, “the Commission exceeded its authority ... when it approved a plan that imposed a penalty.” *Id.*

Finally, Appellants argued that Ameritech Wisconsin waived, or was estopped from presenting, its objections to the Commission’s plan simply by virtue of participating in the Commission proceedings and offering a different remedy plan of its own. The Circuit Court rejected their contentions, finding that although Ameritech Wisconsin had “offered a plan that provided for payments for nonperformance it did not agree to the specific plan adopted by the Commission.” *Id.* p.22 (App. p.22).

As a result of its holdings, the Circuit Court reversed, vacated, and remanded the Commission’s decision with respect to the “remedy” plan. The Commission and four CLECs (the “Carriers”) filed separate notices of appeal; Ameritech Wisconsin filed its cross-appeal.

ARGUMENT

I. The proper standard of review is *de novo*, as the Commission is owed no deference as to the purely legal question of its statutory authority.

II. In *Wisconsin Bell*, this Court held that the Commission does not have statutory authority to seek or impose penalties. The Circuit Court followed that holding here, and its decision is uncontested. Appellants do not respond to the Circuit Court’s analysis; they do not contend that the Commission has power to assess penalties; and they do not cite any authority that supports the imposition of penalties.

III. As a result, if the Commission plan at issue here is a penalty, it is invalid. The Circuit Court held that the plan is a penalty, not a “remedy,” because it bears no relation to damage. This holding, too, is not really contested. Neither Appellant disputes that the Commission’s plan would assess payments without regard to damage or lack of it. Neither Appellant contends (or points to evidence) that there is any damage when Ameritech Wisconsin fills an order on time. Instead, the Appellants advance the view that the Commission’s plan is a remedy so long as they call it one, and that the plan is not a penalty but an incentive to compliance. The cases cited by Appellants do not support their attempt to distinguish deterrence from punishment, nor could they. After all, the hallmark of a penalty is its deterrent

purpose. Thus, the Circuit Court correctly held that Appellants' arguments were nothing more than "a tortured twisting of words to avoid calling [the Commission's plan] a penalty." R.65 p.17 (App. p.17).

IV. The Commission's plan is also invalid because there is no record evidence of damage to support it.

V. The Commission's plan calls for arbitrary and excessive penalties and thus violates Eighth Amendment and due process principles.

VI. Appellants last resort is to sidestep the merits with the procedural theories of waiver and estoppel. They contend that Ameritech Wisconsin lost its right to challenge the Commission's plan – even though Ameritech Wisconsin objected to that plan from its inception – simply by participating in the Commission proceedings and offering a different plan. The Circuit Court correctly rejected these theories: As a matter of law, the doctrines of waiver and estoppel are not available to create agency authority where the legislature did not, and as a matter of fact Ameritech Wisconsin consistently opposed the Commission's plan.

VII. Finally, the Commission challenges the Circuit Court's decision to grant a stay pending review. Because the

Circuit Court reversed the Commission’s plan, the Commission’s challenge to the stay is moot.

I. Standard Of Review

The Commission is a creature of statute, and its enforcement powers are fixed by statute. *Wisconsin Bell*, 211 Wis. 2d at 754; *Wisconsin Power & Light Co. v. PSC*, 181 Wis. 2d 385, 392, 511 N.W.2d 291 (1994) (“*Wisconsin Power & Light*”). Thus, the question presented by this appeal is *not* whether some form of remedy plan would be effective in encouraging nondiscrimination, or whether the particular plan established by the Commission would be more effective than some other plan in achieving that end. Rather, the central question is whether the Commission had the statutory authority to impose the plan it created.

As the Circuit Court properly recognized, that issue is a pure question of law, which this Court reviews *de novo*. “The extent of an agency’s statutory authority is a question of law.” *Wisconsin Power & Light*, 181 Wis. 2d at 392. An agency’s powers are determined by the legislature, not by the agency itself. As a result, this court “owe[s] no deference to an agency’s determination concerning its own statutory authority.” *Id.* To the contrary, “[a]ny reasonable doubt as to

the existence of an implied power in an agency should be resolved *against* the exercise of such authority.” *Wisconsin Bell*, 211 Wis. 2d at 756 (emphasis added).

Appellants contend that the Commission’s decision deserves deference, but they simply assume that the Commission’s order falls within its jurisdiction, bypassing the very issues that this Court has been called upon to address. Appellants make no attempt to distinguish the authorities cited by the Circuit Court for *de novo* review, and the cases that Appellants do cite do not involve issues of agency authority or subject matter jurisdiction. Rather, those cases dealt with whether the agencies had properly interpreted or applied substantive (rather than jurisdictional) statutes. *See, e.g., Barron Elec. Coop. v. PSC*, 212 Wis. 2d 752, 755, 569 N.W.2d 726 (Ct. App. 1997) (applying substantive anti-duplication statute).

Likewise, the question of whether the Commission-imposed plan is penal – and therefore unlawful – on the basis of established facts is a conclusion of law subject to *de novo* review. *See Fields Found., Ltd. v. Christensen*, 103 Wis. 2d 465, 475, 309 N.W.2d 125 (Ct. App. 1981) (reviewing *de novo* trial court’s conclusion that contractual liquidated

damages provision was penal and thus unenforceable). That principle applies with particular force here, as the Court is not being asked to calculate the damages for any particular performance shortfall (say, a missed installation date), or to weigh evidence as to whether any particular number is the “right” one. Rather, the problem is that the Commission’s *methodology* would assess payments without regard to the amount of damage – indeed, in cases where there has been no damage at all. There is nothing to which the Court could defer on this question, as the Commission never decided that its plan was compensatory.

In any event, no deference is due to an agency where the court is as competent to decide the legal question involved. *Byers v. LIRC*, 208 Wis. 2d 388, 394, 561 N.W.2d 678 (1997). Courts have frequently enforced the divide between penalty and remedy and have developed substantial case law on the subject. By contrast, Appellants cannot cite any case in Commission history addressing this legal boundary. *De novo* review applies where the issue is one of first impression before the agency. *Coutts v. Wisconsin Retirement Bd.*, 209 Wis. 2d 655, 664, 562 N.W.2d 917 (1997).

II. The Commission Has No Power To Impose Penalties.

The Circuit Court Decision enforces a fundamental distinction between the imposition of punishment, on the one hand, and remedial action on the other. As this Court recognized in *Wisconsin Bell*, “the law distinguishes between penalties, which exist to punish a wrongdoer without regard to the damages caused, and remedies, which seek to provide relief or redress for a wrong,” or equitable remedies like injunctive relief that seek to prevent further injury. 211 Wis. 2d at 758. The power to seek or assess penalties is carefully circumscribed by statutes that are comprehensive in scope, unambiguous in language, and mandatory in operation.

The general rule is that penalties (other than imprisonment) are sought only by the attorney general and assessed only by a court. *Id.* Wis. Stat. § 778.01 states that forfeitures – which “include[] any penalty, in money or goods” – are to be “recovered in a civil action” and Wis. Stat. §778.02 adds that “[e]very such forfeiture action *shall* be in the name of the state of Wisconsin.” For actions “in the name of the state of Wisconsin,” it is the attorney general who shall

represent the State. 211 Wis.2d at 757 (citing Wis. Stat. § 165.25(1)).

Wherever the legislature has intended an exception to this rule – for example, to give an administrative agency authority either to seek or impose penalties – it has done so expressly and unambiguously. *Id.* at 757 (collecting statutes). Such statutory exceptions use the word “penalty” or “forfeiture,” specify precisely the agency with authority to pursue such sanctions, and limit the situations covered. *See* Wis. Stat. § 11.60(4) (statute titled “Civil penalties” for campaign finance violations); *id.* § 50.04(5)(c) (provision titled “Assessment of forfeitures” for nursing home violations); *id.* § 100.30(4) (provision titled “Penalties” for violations of unfair sales act). Further, the statutory exceptions define whether the agency’s power is limited to bringing an action to pursue a forfeiture (*see, e.g.,* Wis. Stat. § 100.30(4)) or whether the agency may assess a forfeiture directly (*see id.* § 50.04(5)(c)).

Given the care and clarity with which the legislature has expressly delegated the power to punish, Wisconsin courts will not imply that an agency has such power where the legislature has not expressly bestowed it. *Wisconsin Bell,*

211 Wis. 2d at 757. Otherwise, if any agency given authority to regulate in an area automatically received an implicit power to impose penalties, the general rule – that civil punishment is to be pursued by the attorney general and awarded by a court – would be nullified, and the carefully limited exceptions to that rule would be superfluous.

The Circuit Court correctly found that there is no express exception to the general rule that penalties are not to be imposed by an agency. Quite the contrary: The public utilities statutes reaffirm the legislature’s general limitation on the forfeiture power. Wis. Stat. § 196.44(2) mandates that “the attorney general or the district attorney of the proper county ... *shall* institute and prosecute *all* necessary actions or proceedings for the enforcement of *all* laws relating to public utilities or telecommunications providers, and for the punishment of *all* violations.” (emphasis added) Wis. Stat. § 196.44(3) reiterates that “[a]ny forfeiture, fine or other penalty under this chapter may be recovered as a forfeiture in a civil action brought in the name of the state” – a command that leads inexorably to Wis. Stat. § 165.25(1)’s rule that actions brought in the name of the state must be brought by the attorney general.

Appellants do not challenge the Circuit Court’s reasoning or its conclusion. They make no attempt to distinguish – or even cite – *Wisconsin Bell*. They do not even contend (much less show) that the Commission has power to impose penalties. Indeed, they ignore the question of penalties altogether, and simply say that the Commission has power to regulate, or to require a “remedy plan,” or to use “new techniques” to achieve its ends. None of the authorities they cite rebuts – or is even pertinent – to the Circuit Court’s dispositive holding that the Commission has no power to impose penalties.

A. None Of The Statutes Cited By Appellants Mention Penalties, Much Less Give The Commission Power To Impose Them.

The Commission Decision (PSCW-R.1 p.30 (App. p.68)) relied on two different statutory provisions, Wis. Stat. §§ 196.219 and 196.37(2). Appellants now try to tack on a new provision (Wis. Stat. § 196.02) on which the Commission Decision did *not* rely. Further, the Carriers try to shift the scene from state law to federal law. None of these arguments, however, overcome the legislature’s plain intent or supply the express exception required by *Wisconsin Bell*. To the contrary, the Circuit Court correctly held that

Appellants' arguments all suffer from a common defect. They are not founded on any express statutory authority at all, but on an attempt to infer the power to impose penalties – the very approach this Court rejected in *Wisconsin Bell*.

Wisconsin Bell itself rejected Appellants' view of Wis. Stat. § 196.219, holding that “the enforcement provisions of § 196.219, Stats., are properly considered remedial, rather than punitive.” 211 Wis.2d at 758. As the Court explained, “forfeiture actions are neither covered by nor mentioned in §196.219,” in sharp contrast to statutes expressly authorizing an agency to pursue forfeitures. *Id.* at 755-56. Instead, § 196.219 merely authorizes the Commission to pursue “relief,” such as an injunction to compel compliance, which the appellate court recognized as “plainly remedial, rather than penal, in nature.” *Id.* at 758. The Court thus refused the Commission's attempt to equate such “relief” with “the punitive sanctions of a forfeiture action, which is left to the attorney general” and concluded that § 196.219 did not give the Commission authority even to *seek* punitive sanctions in court, much less to impose them on its own. *Id.*

Wisconsin Bell's reasoning compels the same conclusion with respect to the second statute on which

Appellants rely, Wis. Stat. § 196.37(2). Like § 196.219, § 196.37(2) does not address or even mention forfeitures; it merely allows the Commission to make “any just and reasonable order” regarding future actions. As in *Wisconsin Bell*, this language is a far cry from the specificity with which the legislature addressed forfeitures in other statutes. Just as this Court rejected the Commission’s attempt in *Wisconsin Bell* to equate the “relief” mentioned in § 196.219 with punishment, it should reject the Commission’s attempt to equate the “just and reasonable order” described in § 196.37(2) with “the punitive sanctions of a forfeiture action, which is left to the attorney general.” 211 Wis. 2d at 758.

Appellants’ reliance on Wis. Stat. § 196.02 is equally unfounded. Like §§ 196.37 and 196.219 (the only statutes specifically cited as bases for the plan in the Commission Decision, PSCW-R.1 p.30 (App. p.68)), this general statute does not provide the express authority required by *Wisconsin Bell* to support the imposition of forfeitures. Section 196.02 merely gives the Commission general jurisdiction to regulate, order hearings, and sue or be sued. As this Court held in *Wisconsin Bell*, “the commission has not persuaded us that its limited statutory power under § 196.02(12), Stats., to ‘sue and

be sued in its own name” would even “authorize it to bring an action in the state's name” to *seek* penalties, much less to impose them. 211 Wis. 2d at 257.

The Carriers ultimately shift gears entirely and contend that the Commission’s plan is supported by *federal* law, namely, § 271 of the 1996 Act. This approach is unavailing, because nothing in § 271 or any FCC order purports to give state commissions authority to impose penalties where (as here) the legislature has withheld such authority, nor does any citation endorse the “all-transactions” model presented here. Indeed, § 271 does not give state commissions affirmative power to impose any new rules on any subject. Rather, it simply provides that state commissions are to *advise* the FCC as to the applicant’s compliance with existing rules for long-distance entry. Moreover, as Ameritech Wisconsin demonstrates in its cross-appeal, the Commission’s order was not *founded* on the 1996 Act, but instead is *contrary to* the Act, because the Commission disavowed the Act’s de-regulatory process of negotiation and arbitration.

B. The Commission’s Request For “New Regulatory Techniques” Belongs In The Legislature, Not This Court.

Confirmation that existing law does not authorize the Commission’s plan is in the Commission’s own brief, where the Commission complains that it should not be “stranded with its old regulatory techniques” in its efforts to promote competition. That argument fails for two reasons.

First, the legislature did *not* “strand” the Commission with old techniques. It created a new technique in Wis. Stat. § 196.199, an expedited proceeding to enforce interconnection agreements between competitors. Section 196.199 deals with disputes as to a party’s compliance with a specific interconnection agreement. *See id.* § 196.199(3). The Commission here did not address any specific interconnection agreements; indeed, it chose against a contractual approach entirely. At any rate, § 196.199 does not expressly authorize the Commission to impose forfeitures (except as a sanction for frivolous pleadings, *id.* § 196.199(3)(c)-(d), a scenario not presented here). Rather, the statute provides that forfeitures for breach are to be recovered in “an action” (*id.* §196.199(4)(c)) and determined by “[a] court” (*id.* §196.199(4)(b)). The Commission,

meanwhile, is limited to its traditional remedial role: to issue a “finding” as to whether the party has complied with its agreement and “an order ... that requires compliance with the agreement.” *Id.* § 196.199(3)(a)2.a.

Second, the imposition of penalties is not a “new technique” at all; it is an old one, which the legislature expressly assigned to the attorney general and the courts, and which the legislature denied to the Commission. If the Commission thinks it should now have authority to impose penalties, it can ask the legislature. It is not for this Court to change the legislature’s choice.

III. The Plan Established By The Commission Is An Unlawful Penalty, Because It Assesses Payments Without Regard To The Extent (Or Even The Existence) Of Actual Damage.

Given the plain language of the governing statutes, this Court’s ruling in *Wisconsin Bell*, and the Appellants’ utter failure to address that ruling or the Circuit Court Decision, it is clear that the Commission has no authority to impose penalties. Thus, the next question is whether the plan established by the Commission Decision constitutes a penalty. As demonstrated below, it does; therefore, the

Circuit Court correctly found that the Commission did not have the power to order it.

The divide between penalty and remedy is one of substance, not form. A payment is punitive and thus unlawful when it is designed “to punish a wrongdoer without regard to the damages caused.” *Wisconsin Bell*, 211 Wis. 2d at 758. Courts have applied a similar test in assessing whether contractual provisions for liquidated damages cross the line from enforceable remedy to unenforceable penalty. “A liquidated damages clause is penal, and therefore unenforceable, if the stipulated damages are grossly in excess of the actual damages.” *Fields Found.*, 103 Wis. 2d at 475. “Stipulated damages substantially in excess of injury justify ... an inference of an objectionable *in terrorem* agreement designed to deter a party from breaching the contract, to secure performance, and to punish the breaching party if the deterrent is ineffective.” *Equity Enterprises, Inc. v. Milosch*, 2001 WI App 186, ¶19, 247 Wis. 2d 172, 189, 633 N.W.2d 662 (footnote omitted), *review denied*, 247 Wis. 2d 1035, 635 N.W.2d 784 (2001).

The Circuit Court correctly held that payments under the Commission’s plan would be assessed “without regard to

the damages caused” and would thus constitute penalties. Appellants make no real effort to rebut that holding, nor could they. There is no evidence that the Commission even considered damages in developing its plan, and that plan assesses payments *on transactions that Ameritech Wisconsin performs perfectly, where by definition there could be no damage.*

A. The Circuit Court Correctly Found There Was No Evidence That The Commission-Imposed Plan Bore Any Relation To Actual Damage.

As the Circuit Court recognized, “[t]here is no evidence in the record that reflects that the Commission attempted to estimate the damages caused by Ameritech not complying with the plan.” R.65 p.17 (App. p.17). To the contrary, the Commission’s “entire focus was upon a monetary inducement to comply with the plan, not damages arising from noncompliance.” *Id.*

The Appellants’ briefs confirm that the Circuit Court was right. Even now, despite touting the record before the Commission as extensive, Appellants cannot cite a single scintilla of evidence of damage, or a single piece of Commission analysis that made any attempt to connect its

plan to actual damages. And despite their conclusory characterization of the Commission's plan as a remedy, their entire focus remains on the plan as a monetary inducement – a deterrent – to compel compliance.

Appellants' inability to address the controlling question of damage is not surprising, as no party even *advocated* the all-transactions model before the Commission adopted it, much less presented record evidence to support it. Moreover, given the design of the Commission's plan, a showing of damage would have been, and remains, impossible. Once there has been some shortfall in a performance measure for a given CLEC – for instance, where the percentage of due dates missed for a particular service exceeds that allowed by the applicable standard – the Commission's plan would have assessed equal payments on *all* transactions measured, even those for which the due date was *not* missed and where no damage could possibly have occurred.

1. The Commission’s Plan Was Designed To Assess Payments Even On Transactions That Were Processed On Time And Without Any Damage To The Requesting Carrier.

The payment of sanctions in those instances where a party has complied with its obligations – and where its counterpart could not possibly have been damaged – is an unenforceable penalty in the purest sense. Thus, as this Court has ruled, “[e]ven if the parties honestly but mistakenly believe that a breach will cause harm, a liquidated damages clause is unenforceable when no harm results.” *Fields Found.*, 103 Wis. 2d at 476. The *Restatement (Second) of Contracts* § 356 goes so far as to describe the assessment of liquidated damages in the absence of real damages as “an extreme case” and categorically states that “if ... it is clear that no loss at all has occurred, a provision fixing a substantial sum as damages is unenforceable.” *Id.* § 356 cmt.

b.

The Commission Decision presents precisely the “extreme case” addressed by the Second Restatement and by *Fields Foundation*. Returning to the illustration in the Statement of Facts, in which a “passing” score for missed due dates is 5 percent: Assume that for Carrier “A” Ameritech

Wisconsin misses 51 due dates out of 1,000 orders (5.1 percent), while for Carrier B, Ameritech Wisconsin misses 51 due dates out of 51 orders. Payments would be required for both carriers. One would expect the damages for B to be at least the same as those for A – the service is the same, and each carrier experienced the same number of late installations. If anything, B’s damages would be greater, because it did not receive a single timely installation. Yet the Commission’s plan would award “remedies” to Carrier A of \$150,000 (\$150 multiplied by 1,000 total transactions), nearly 20 times *more* than those awarded to Carrier B (\$150 times 51 transactions or \$7,650).

The reason for this quantum leap would not be the number of missed due dates, nor would it be the rate of misses; in fact, Carrier A would receive the same \$150,000 payment for its miss rate of 5.1 percent as for a miss rate of 100 percent. Rather, the sole reason for Carrier A’s windfall would be the fact that it received more *timely* installations than Carrier B – a factor that could not possibly relate to actual damage.

2. The Commission's Plan Would Have Assessed Payments At The Same Maximum Amount Without Regard To The Degree Of Compliance.

Payments under the Commission's plan would also be punitive in that they would not vary with the degree of compliance or non-compliance. Upon any shortfall, Ameritech Wisconsin would have paid on all transactions in the performance category, regardless of the rate of misses. As with the payment of penalties where there has been no damage, an assessment of payments at the same maximum rate, regardless of the degree of the "breach" to be remedied, presents another textbook example of penalties that are levied without regard to the damages caused.

"When a contract specifies a single sum in damages for any and all breaches even though it is apparent that all are not of the same gravity, the specification is not a reasonable effort to estimate damages; and when in addition the fixed sum greatly exceeds the actual damages likely to be inflicted by a minor breach, its character as a penalty becomes unmistakable." *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1290 (7th Cir. 1985) (finding that a formula for assessing "damages" based on full contract price for any

shortfall in quantity shipped, is an unenforceable penalty because it is “invariant to the gravity of the breach”). Wisconsin’s highest court likewise follows “the rule that, when an amount is specified to be paid for one or more breaches of a contract, some of which are of but minor and others of greater consequence, and the damages resulting therefrom, are uncertain and cannot be measured by any fixed rule, then the amount specified will be held to be a penalty and not liquidated damages.” *State v. Hackbarth*, 228 Wis. 108, 124-25, 279 N.W. 687, 695 (1938).

Following the same rule, *Checkers Eight Ltd. Partnership v. Hawkins*, 241 F.3d 558, 562 (7th Cir. 2001), invalidated a settlement agreement that imposed the same \$150,000 fee for any late installment payment “[r]egardless of whether the defendants were a day late in making the last payment or had refused to perform at all.” The court found the stipulated amount to be an unenforceable penalty because it is “insensitive to the magnitude of the defendants’ breach” and thus “appears to have no purpose other than ensuring that the defendants made the installment payments on time.” *Id.*

The Commission’s plan here is cut from the same cloth. Returning to the example above, the payment for

CLEC “A” would be \$150,000, and it would remain \$150,000 whether Ameritech Wisconsin’s rate of missed due dates for that carrier was 5.1 percent (as it actually was), 0.00051 percent, 51 percent, or 100 percent. In *Hackbarth*’s words, the same amount is “specified to be paid for one or more breaches of a contract, some of which are of but minor and others of greater consequence.” 228 Wis. at 124-25. These outcomes epitomize a plan that is “insensitive to the magnitude of the defendants’ breach,” *Checkers Eight*, 241 F.3d at 562, or to any conception of damage; an “*in terrorem* agreement designed to deter a party from breaching the contract, to secure performance, and to punish the breaching party if the deterrent is ineffective,” *Equity Enterprises*, 247 Wis. 2d at 189, 633 N.W.2d at 671. And that is exactly what the Commission intended – as confirmed by the Decision itself, the stated purpose of which was to “encourage Ameritech to provide nondiscriminatory wholesale service ... and impose a monetary disincentive upon Ameritech if it fails to deliver that quality of service” (PSCW-R.1, p.10 (App. p.48)) using language that echoes, in euphemistic terms, the definition of an *in terrorem* provision articulated in *Equity Enterprises*.

B. Calling A Penalty An “Inducement” Does Not Change Its Punitive Character, Because All Penalties Serve As Inducements.

Appellants rely heavily on semantics. They repeatedly refer the Commission’s plan as a “remedy,” apparently thinking that the plan is not a penalty unless they call it one. In the same vein, the Commission claims (at 43) that its plan is not a penalty because it is an inducement to compliance.

If labeling were the test, Appellants would still fail, because they repeatedly referred to plan payments as “penalties” before the Commission and the Circuit Court. PSCW-R.64 pp.397-400 (App. pp.34-37); R.51 (Carrier Circuit Court Brief) p.38; R.83 (Hearing Tr.) pp.42, 66. But labeling is not the test; in fact, it is not a meaningful test at all. *Wisconsin Bell* made that clear, when it rejected the Commission’s previous attempt to use new labels (in that case, one the Commission called a “punitive remedy”) to avoid established legal standards. 211 Wis. 2d at 757-58. All that has changed here is that Appellants are trying a different label – but with the same lack of legal support.

The central problem with Appellants’ wordplay is that it assumes a bright-line distinction between punishment and incentive, such that anything that is intended to “induce” or

“compel” compliance is not a penalty. There is no such line. Punishment and incentive are not divided but closely related: After all, a principal purpose of punishment is to induce compliance and deter non-compliance. Thus, the court in *Wisconsin Veterans Home v. Division of Nursing Home Forfeiture Appeals*, 104 Wis. 2d 106, 111, 310 N.W.2d 646 (Ct. App. 1981) recognized that the purpose of forfeitures is to “provid[e] an incentive to abide by the law” and thus “assur[e] that private nursing homes will comply with the law.” Indeed, the very reason that penalty clauses are not permissible is that they represent an “*in terrorem* agreement designed to deter a party from breaching the contract, to secure performance, and to punish the breaching party if the deterrent is ineffective.” *Equity Enterprises*, 247 Wis. 2d at 189 (footnote omitted) .

Given that all penalties are intended to induce compliance, the exception for “inducements” that Appellants seek to create would swallow the rule that penalties are not authorized. Nothing designed to induce compliance would be considered punitive. Thus, it is not surprising that the cases cited by Appellants – which do not even concern the

imposition of monetary sanctions or the question of Commission authority – do not support their argument.

In *Northern States Power Co. v. Public Service Comm'n*, 246 Wis. 215, 16 N.W.2d 790 (1944), the Commission simply ordered a utility to extend service to a home. It did not order the utility to pay penalties in the event the service provided did not meet some performance standard. By contrast, this case does not concern Ameritech Wisconsin's obligation to provide service to CLECs – an obligation defined by federally mandated interconnection agreements – but rather, the Commission's attempt to use monetary sanctions to punish allegedly discriminatory service.

Although *GTE North, Inc. v. Public Service Comm'n*, 176 Wis. 2d 559, 500 N.W.2d 284 (1993) at least involved the payment of money, it has no bearing here. *GTE North* did not involve a payment imposed as a sanction for allegedly inadequate service, but instead involved the refund of money that should not have been collected in the first place because there was no tariff for the service. The question in *GTE North* was not whether such relief was remedial or punitive,

but whether the statute authorized retroactive remedies for past conduct.

The Commission's citation to *Waukesha State Bank v. Village of Wales*, 188 Wis. 2d 374, 525 N.W.2d 110 (Ct. App. 1994) is equally inapposite. *Waukesha State Bank* did not concern the authority of the government entity (in that case a village) to assess monetary penalties, because the statute at issue there expressly authorized such penalties (in contrast to the public utilities statutes here). Instead, *Waukesha State Bank* concerned the Village's authority to impose a lien to secure payment of the penalties. This appeal, meanwhile, concerns the Commission's authority to require penalty payments in the first place.

Finally, the Commission's citation (at 27) to its own unappealed decision in *Notification by Forestville Tel. Co.* (Jan. 5, 1994), which predates the 1996 Act and *Wisconsin Bell*, is also out of place. No court ever reviewed that decision or the Commission's authority to render it. The decision did not include any analysis of whether the refunds it discussed were remedial or punitive, and no such determination could have been made because the Commission merely reserved the right to order refunds without deciding

their amount or the circumstances under which they would be required (slip op. at 32). As a result, *Forestville* also did not address the punitive features (particularly the all-transactions model) of the plan here.

C. The Commission’s Assertion That A Single Performance Shortfall Automatically Means That The Entire Process Is Discriminatory Does Not Support The Commission’s Plan.

Given the complete absence of evidentiary support, the sole basis on which the Commission Decision rested its approach was an unsupported conclusion: namely, the Commission’s view that a shortfall in performance automatically means that “discrimination has occurred,” which in turn “means that the very process Ameritech uses for providing service to the CLEC must be discriminatory” and that payments thus should be required for “all transactions that were included in that measure of performance.” PSCW-R.1 pp.25-26 (App. pp.63-64). That rationale does not lend evidentiary support to the all-transactions model. All it does is add another conclusion made without evidentiary support – a conclusion that directly contradicts the FCC’s holding that a performance shortfall

does not, in and of itself, establish discrimination. *Kansas & Oklahoma 271 Order*, ¶31.

But the Commission's assertion of discrimination also reflects the more fundamental error of law in the Commission's entire approach: a focus on penalizing *conduct*, rather than on providing a remedy for *damages*. A remedy is assessed only where there is damage; a payment ordered without regard to damage is, pure and simple, a penalty. *Fields Found.*, 103 Wis. 2d at 476 (finding that even though physician breached non-compete agreement, his former employer was not damaged; thus, the agreement's liquidated damages provision was an unenforceable penalty). Thus, the controlling question is not whether one can find some fault with a provisioning process (the question posed by the Commission), but whether some damage has resulted. On that question it is clear that there is no damage on transactions that were processed on time, because the CLEC received the service it asked for at the time it was promised.

The Commission's failure to address damages, rather than conduct, is the same legal error that invalidated the provision for liquidated damages in *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 (1947). Just as the Commission

here sought to require payments for alleged defects in the process of providing service even where those defects do not delay the ultimate delivery, the clause in *Priebe & Sons* required contractors to pay the government for delays in the process of preparing eggs that “in no way interfered with or caused delay” in the ultimate delivery date. *Id.* at 410. The Supreme Court found the challenged provision “could not possibly be a reasonable forecast of just compensation for the damage caused by a breach of contract,” reasoning that “the only thing which could possibly injure the Government would be failure to get prompt performance when delivery was due” and that “delays of the contractors which did not interfere with prompt deliveries plainly would not occasion damage.” *Id.* at 412-13. Given that the provision, by design, required payments where there was no damage, the court found that it was not compensatory, but rather “serve[d] only as an added spur to performance”; that is, to have “an *in terrorem* effect of encouraging prompt preparation for delivery.” *Id.* at 413. “It is well-settled contract law that courts do not give their imprimatur to such arrangements,” the Court concluded, because “an exaction of punishment for a breach which could

produce no possible damage has long been deemed oppressive and unjust.” *Id.*

IV. There Is No Evidence To Support The All-Transactions Model.

Given the complete disconnect between the Commission’s all-transactions model and any concept of damage, it is not surprising that there is no evidentiary support for that model. As the Circuit Court held, the Commission did not even attempt to show that its plan was remedial, or to connect its payment methodology to any evidence of damage.

This critical evidentiary gap reflects the improper procedure by which the all-transactions model was developed. No party proposed the all-transactions model, let alone provided evidence to support it. Rather, Ameritech Wisconsin proposed a per-occurrence model based on the disparity between actual performance and compliant performance, while the CLECs proposed a flat per-measure payment that did not reflect the number of transactions in any respect. Likewise, the Commission’s staff did not propose the all-transactions model; and although its witness suggested generally that the Commission *could* choose a plan of its own,

he cautioned that the Commission would have to consider “the amount of harm” as “it is not reasonable to pay a given CLEC more than the amounts of revenue which it has lost.” PSCW-R.64 p.401 (App. p.38). However, neither Staff nor the CLECs submitted evidence of harm.

The all-transactions model did not emerge until after the record was closed and briefing was complete. At that time, a Briefing Memorandum prepared for the Commission by its Staff introduced the concept as a “decision option.” PSCW-R.48 p.138. The Commission adopted that option without performing the additional inquiry into damages suggested by its Staff, and without giving Ameritech Wisconsin the opportunity to present evidence or briefing as to what the effect of this option would be – and when Ameritech Wisconsin asked for rehearing, the Commission flatly denied its request.

As a result, the all-transactions model lacks support in the record; indeed, it is not even mentioned in the record. The Staff memorandum cannot fill this evidentiary gap, because Wis. Stat. § 227.44(9) commands that “[t]he factual basis of the decision shall be *solely* the evidence and matters officially noticed,” and Staff memoranda are, by law, not a

part of the record (Wis. Stat. § 227.44(7)). *A fortiori*, a decision that lacks support from *any* evidence cannot satisfy the requirement that Commission decisions be supported by “substantial evidence in the record” (Wis. Stat. § 227.57(6)) or the mandate that “the factual basis of the decision shall be *solely* the evidence and matters officially noticed” (Wis. Stat. §227.44(9) (emphasis added)).

V. Penalties Under The Commission Decision Would Be Excessive And Therefore Unconstitutional.

Even where an agency has statutory authority to impose some punishment (a power the Commission does not have, *see* Section II), the Eighth Amendment prohibits “excessive fines,” and “limits the government's power to extract payments ... as punishment for some offense.” *United States v. Bajakajian*, 524 U.S. 321, 328 (1998). The Due Process Clause likewise precludes “plainly arbitrary and oppressive” sanctions. *Chicago & N.W. Ry. v. Nye-Schneider-Fowler Co.*, 260 U.S. 35, 43-44 (1922).

The Eighth Amendment’s “touchstone” is the principle of proportionality: “The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.” *Bajakajian*, 524 U.S. 321, at 334. Thus,

“a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant’s offense.” *Id.*

As demonstrated in Section III *supra*, the amount of payments under the Commission’s plan bears *no* relationship to the gravity of the offense because it is driven by the total volume of transactions, even those for which there was no offense. Plainly, a penalty is “grossly disproportional” where there has been no offense and no damage. *See id.* at 337 (finding that forfeiture of entire amount of unreported cash carried by defendant “would violate the Excessive Fines Clause” as it was lawful for defendant to carry cash, and defendant’s sole offense was a reporting violation). The same result applies under the Due Process Clause, as the U.S. Supreme Court has held that “[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.” *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). Moreover, by assessing penalties for compliance, the plan leads to patently disproportionate results in the aggregate, as a carrier with a higher rate of compliance would receive vastly larger “remedies.” Therefore, payments under the plan would not

just be punitive in nature (and thus outside the Commission's statutory authority), but unconstitutionally excessive in amount.

VI. The Doctrines Of Estoppel And Waiver Are Unavailable In This Case As A Matter Of Law, And Are Not Present On The Facts.

Having failed to address the merits presented on judicial review, Appellants try asking a different, procedural one: whether the doctrines of waiver and estoppel supply authority to the Commission that the legislature did not.

No one could seriously contend that Ameritech Wisconsin failed to object to the Commission's plan. Rather, Appellants' theory is that Ameritech Wisconsin waived its objections before the plan even existed, simply by participating in the Commission proceedings and offering a different plan of its own. As the Circuit Court found, Ameritech Wisconsin did not waive its challenge to the Commission's plan.

At any rate, Appellants ignore the fact that the Commission is a creature of the legislature. Its powers and its limits are jurisdictional, and the jurisdiction of an agency (like the subject matter jurisdiction of a court) cannot be enlarged by waiver or estoppel.

A. The Doctrines Of Waiver And Estoppel Cannot Be Used To Create Agency Authority Or Uphold An Unlawful Agency Order.

The central issue in this case is whether the Commission exceeded its statutory authority – its subject matter jurisdiction – when it imposed forfeitures on Ameritech Wisconsin. With regard to jurisdiction, the legislature, not private parties, is the source of an agency’s authority to act. *Wisconsin Bell*, 211 Wis. 2d at 754. Administrative determinations made without subject-matter jurisdiction are consequently void. *Board of Regents v. Wisconsin Personnel Comm’n*, 103 Wis. 2d 545, 552, 309 N.W.2d 366 (Ct. App. 1981).

Just as a court’s subject matter jurisdiction cannot be expanded by waiver or estoppel (*Wisconsin’s Environmental Decade, Inc. v. PSC*, 84 Wis. 2d 504, 515-16, 267 N.W.2d 609 (1978)), administrative agencies cannot gain subject matter jurisdiction by waiver, consent or estoppel.

Accordingly, courts have rejected the attempts of agencies to expand their authority by waiver and estoppel. *State ex. rel. Pioli v. Higher Ed. Personnel Bd.*, 558 P.2d 1364, 1367 (Wash. App. 1976); *Ruby v. Schuett*, 360 P.2d 170, 175 (Wyo. 1961); *Nagy v. Ford Motor Co.*, 78 A.2d 709, 713

(N.J. 1951). As Wisconsin’s highest court recently held, “[t]he jurisdiction of administrative agencies is always open for judicial review,” and a party does not waive its objection to jurisdiction by participating in agency proceedings. *ABKA Ltd. Partnership v. DNR*, 2002 WI 106, ¶ 26, 255 Wis. 2d 486, 502, 648 N.W.2d 854.

B. There Are No Facts To Support The Imposition Of Estoppel Or Waiver In This Case.

Separate and apart from the legal bar to their theories, Appellants have failed to provide a factual basis for their application. A party asserting equitable estoppel must prove its elements by clear and convincing evidence, and may not rest upon conjecture or inference. *Johnson v. Johnson*, 179 Wis. 2d 574, 583, 508 N.W.2d 19 (Ct. App. 1993). Similarly, to demonstrate judicial estoppel, the opponent must have *prevailed* on a position that is *clearly* inconsistent – indeed *irreconcilable* – with its current position. *State v. Petty*, 201 Wis. 2d 337, 354, 548 N.W.2d 817 (1996). Finally, to demonstrate either waiver or equitable estoppel, a party must show that its opponent knew the particular facts upon which the waiver or estoppel depends. *Schmitz v. Schmitz*, 70 Wis. 2d 882, 888, 236 N.W.2d 657 (1975).

Normally, a waiver or estoppel argument proceeds from the fact that one party presented something objectionable at a hearing or in a brief, and the other party had an opportunity to object but did not. That is not the case here, nor could it be. The Commission-imposed plan – in particular, its all-transactions approach – was not presented by *any* party, and did not even exist until after the close of evidence and after the conclusion of briefing. When the Commission created the all-transactions approach, Ameritech Wisconsin immediately objected to that approach as unlawfully penal, and asked for the opportunity to present evidence in response. The Commission denied that petition, and that is why we are here.

What, then, do the Appellants offer in support of their theory? The Carriers' argument is that Ameritech Wisconsin waived in advance any objection to any plan the Commission formulated without even knowing what plan the Commission would formulate – simply by participating in the Commission proceedings or by knowing that the Commission might issue an order that differed in some unspecified manner from the parties' proposals. That is absurd. If the Carriers were correct, any party to any administrative proceeding

automatically waives its rights to challenge the outcome, even if that outcome departs in some fundamental way from the agency's authority under law or from the evidence of record. The right of judicial review would be meaningless. Under the Carriers' theory their own appeal should be thrown out – after all, Appellants participated in the Circuit Court proceedings even though they knew that the court might rule against them, as it did.²

Further, waiver and estoppel require knowledge of the “particular facts” on which the waiver or estoppel depends. Ameritech Wisconsin did not have, and could not have had, knowledge of the particular facts which formed the basis of its petition – the all-transactions penalty plan – because those facts were not known until the Commission issued its Decision, after the record was closed. When the Commission's plan and its defining penal attributes first appeared in the Commission Decision, Ameritech Wisconsin timely filed a petition for rehearing in which it vigorously

² In the same vein, no support for the waiver or estoppel theories can be found in the testimony of Mr. Jahn, a Commission witness. Mr. Jahn actually *agreed* with principals Ameritech Wisconsin advances here – that any modifications to the plan should be based on damage, and that “it is not reasonable [for Ameritech Wisconsin] to pay a given CLEC more than the amounts of revenue which it has lost as a result of inadequate OSS.” PSCW-R.64 p.401 (App. p.38).

raised the very objections that prevailed before the Circuit Court. Ameritech Wisconsin's positions have been consistent throughout the proceedings.

The Commission's "judicial estoppel" variant is equally outrageous. Its view is that by proposing a cap on remedies in total, Ameritech Wisconsin agreed to *any* form of penalty assessment so long as it was within the cap. Under this construct, Ameritech Wisconsin would be estopped from arguing against any penalty up to the cap, even if the Commission had imposed an arbitrary one-time assessment of the \$100 million cap for no reason whatsoever. This case is not about the propriety of the "cap" on payments, because Ameritech Wisconsin did not challenge the existence or amount of the cap; rather, this case is about the propriety of the methods by which the Commission seeks to assess payments *before* reaching the cap, and whether those payments constitute forfeitures rather than remedies. On that issue, Ameritech Wisconsin has consistently opposed the Commission's proposal from its inception. Moreover, Ameritech Wisconsin can hardly be said to have prevailed on that issue before the Commission (as judicial estoppel

requires), when the Commission fundamentally changed Ameritech Wisconsin's proposal.

VII. The Commission's Appeal From The Circuit Court's Preliminary Decision To Grant A Stay Is Moot and Unfounded.

Before rendering its decision on the merits, the Circuit Court granted a preliminary stay pursuant to Wis. Stat. § 227.54, after a round of briefs and a hearing. The Commission contends the stay was improper because the court should have considered the "public interest" criterion that applies to preliminary injunctions. The Commission's challenge is moot, because the stay is no longer in effect. The Circuit Court has made its decision on the merits, and that order is what stands now. *See Milwaukee Professional Firefighters, Local 215, IAFF, AFL-CIO v. City of Milwaukee*, 78 Wis. 2d 1, 14, 253 N.W.2d 481(1977) ("[T]he issue regarding the preliminary injunction is moot. The [stay] was issued pending the arbitrator's award, which was subsequently made The award having been made, the relief given by the circuit court pending that award has been terminated").

In any event, the Commission's challenge is unfounded. Wis. Stat. § 227.54 gives the court broad

discretion to issue a stay, and it does not mention the “public interest” criterion. Neither does § 196.43 (which is referenced by § 227.54). Subsection 196.43(1) requires only notice (which was given) and a hearing (which was held); subsection (2) requires an undertaking by two sureties, and that too was done. Subsection 196.43(3) applies only to the stay of Commission orders under § 196.199(3)(a)2, a situation the Commission does not contend is presented here.

The Commission’s reliance on *Halsey, Stuart & Co. v. Public Service Commission*, 212 Wis. 184, 248 N.W. 458 (1933) is misplaced. *Halsey* predates both the Wisconsin Administrative Procedure Act, Wis. Stat. § 227.54, and Wis. Stat. § 196.43 in its current form. *Halsey* does not interpret or even mention § 196.43, the statute under which the Circuit Court issued the stay. Further, *Halsey* does not mention the “public interest” test at all. Its holding is limited to the conclusion that the propriety of a stay “depends upon the showing of a reasonable probability of plaintiff’s ultimate success” (212 Wis. at 196), a showing Ameritech Wisconsin successfully made.

CONCLUSION

For the reasons set forth above, Ameritech Wisconsin respectfully requests that the Court affirm the judgment of the Circuit Court.

CROSS-APPELLANT PORTION OF BRIEF

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ISSUES PRESENTED FOR REVIEW

The following issues were not decided by the Circuit Court, in light of its decision to reverse and vacate the Commission-imposed plan as an unauthorized penalty:

1. Whether the Commission’s order unlawfully circumvented the process of negotiation and arbitration required by the federal Telecommunications Act of 1996, and is therefore pre-empted.

2. Whether the Commission’s plan complied with Wis. Stat. § 196.37 and § 196.199, which require a case-specific finding preceded by notice and an opportunity to be heard.

As set forth in the Respondent Portion of this brief, the Circuit Court held – and properly so – that the Commission-imposed “remedy plan” was invalid, because 1) the Commission lacks statutory authority to impose penalties, and 2) the plan was an unauthorized penalty, because it assessed payments without regard to damage. In light of that decision, the Circuit Court did not reach the above additional bases for invalidating the Commission’s plan, whose proper resolution would have formed the basis of further instructions to the Commission on remand:

Ameritech Wisconsin presents these grounds as cross-appeal issues because Ameritech Wisconsin requests that the Circuit Court's Decision be modified to include these additional bases for reversal of the Commission Decision, along with the appropriate instructions to the Commission on remand.

STATEMENT OF THE CASE

Pursuant to Wis. Stat. § 809.19(6)(b)2, the Statement of the Case is not presented here but is set forth in the "Respondent" portion of this brief.

ARGUMENT

I. The Commission Decision Unlawfully Circumvented The Interconnection Agreement Procedure Established By The 1996 Act.

In addition to its failure to comply with the Wisconsin statutes on which it premised its authority, the Commission failed to follow the procedure required by the 1996 Act. Congress consciously chose a "de-regulatory framework" for implementing the nondiscrimination requirements of the 1996 Act. The keystone of that framework is the use of interconnection agreements, rather than regulatory edicts, as the source of an incumbent LEC's obligations. Section 252 prescribes, in careful detail, the procedures and timetables for

creating such agreements. Section 252(a)(1) further states that interconnection agreements are the “binding” statements of the parties’ rights and obligations. 47 U.S.C. § 252(a)(1); *Michigan Bell Tel. Co. v. MCI Metro Access Transmission Services, Inc.*, 128 F. Supp. 2d 1043, 1054 (E.D. Mich. 2001) (“Under the Act, interconnection agreements are binding documents”), *appeal docketed*, No. 01-1312 (6th Cir. argued Sept. 18, 2002). Recognizing the contractual model that Congress established, the Wisconsin legislature enacted Wis. Stat. § 196.199 to govern actions seeking enforcement of interconnection agreements.

Ameritech Wisconsin proposed a contractual remedy plan that was designed to work within the Act’s de-regulatory framework. As the Commission Decision (PSCW-R.1 p.29 (App. p.67)) acknowledged, “Ameritech proposed that the remedy plan be made available through amendments to the interconnection agreements.” By contrast, the plan established by the Commission Decision was designed to evade the Act’s contractual framework. It purported to make payments “immediately available through the issuance of this order” rather than through amendments to interconnection

agreements. *Id.* In so doing, the Commission Decision conflicts with, and is preempted by, the 1996 Act.

As the Supreme Court repeatedly has observed, “[p]reemption may be either expressed or implied and ‘is compelled whether Congress’ command is explicitly stated in the statute’s language *or implicitly contained in its structure and purpose.*” *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88, 98 (1992) (emphasis added).

Significantly for present purposes, federal law not only preempts state law that conflicts with federal substantive standards, but also trumps state action that “interferes with the *methods* by which the federal statute was designed to reach [its] goal.” *Id.* at 103 (emphasis added). As the Supreme Court has explained, because “[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy,” the scope of federal preemption extends to “‘specially designed procedures . . . to obtain uniform application of [Congress’] substantive rules’” *Amalgamated Ass’n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971). Where “Congress plainly meant to do more than simply to alter the then-prevailing substantive law,” but “sought as well to

restructure fundamentally the processes for effectuating that policy,” state action that conflicts with or undermines Congress’ chosen “technique of administration” is preempted. *Id.* at 287-88. In short, “‘conflict is imminent’ when ‘two separate remedies are brought to bear on the same activity.’” *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 380 (2000) (citations omitted).

Applying these principles, it is clear that the use of a stand-alone order to enforce interconnection obligations “interferes with the methods by which the federal statute was designed to reach [its] goal” (*Gade*, 505 U.S. at 103) of implementing the Act’s local competition provisions. Indeed, the United States District Court for the Western District of Wisconsin, *Wisconsin Bell, Inc. v. Bie*, No. 01-C-0690-C (W.D. Wis. Sept. 26, 2002) applied these principles to strike down a different portion of the very Commission Decision that is at issue here. At the same time that it imposed the “remedy” plan, the Commission ordered Ameritech Wisconsin to combine certain elements of its network and to provide the resulting combinations to competing carriers. The Commission was not arbitrating an interconnection agreement between carriers or interpreting any existing

agreements; rather, it evaded the process of negotiation and arbitration entirely, and ordered Ameritech Wisconsin to offer combinations by a general tariff.

The district court set aside the tariffing requirement as preempted by the 1996 Act. It first noted that, in the Act, “Congress gave sweeping authority to the federal government to regulate telecommunications.” Slip op. at 11 (App. p.174). The court further observed that “Congress spoke directly to the issue of gaining access to network elements by enacting § 252, a detailed procedure for reaching agreements for the sale of network elements, services and interconnection.” *Id.* at 12 (App. p.175). And, the court acknowledged the well established principle that “[e]ven if a state-imposed tariff furthers competition, as the commission’s action seems to do, it may be preempted ‘if it interferes with the *methods* by which the federal statute was designed to reach [its] goal.’” *Id.* (emphasis in original) (citing, *inter alia*, *Gade*, 505 U.S. 88 (1992)).

Applying that principle, the district court concluded that the Commission’s tariff order interfered with Congress’s prescribed methods because it “requires [Ameritech Wisconsin] to sell certain combinations of network elements

using a procedure that allows an entrant to bypass the Telecommunications Act's provisions for negotiation by opting for the tariff, at least as to the two combinations covered by the decision." Slip op. at 12 (App. p.175). The court rejected the Commission's rationale that it could require tariffs for certain services as long as those "services together cannot create a complete regime of state-ordered tariffed interconnection offerings that bypass §§251 and 252 altogether." *Id.* As the court explained, although the Commission "did not impose a tariff requirement that covered all network elements, services or interconnections but limited the requirement to only two network combinations * * * the net effect is the same." *Id.* at 13 (App. p.176). In short, the court found that the PSCW's tariffing requirement "interferes with the incumbent's ability to invoke the interconnection agreement procedures in situations in which the entrant opts for the state-imposed tariff" and held that the "decision impos[ing] a tariff that the entrant may select unilaterally in lieu of the interconnection agreement process * * * is inconsistent with § 252 of the Telecommunications Act." Slip op. at 17 (App. p.180).

In concluding that “the commission’s tariffing requirement is inconsistent with and preempted by” the 1996 Act (*id.*), the Wisconsin district court relied on the prior holdings of other federal courts, which uniformly have refused to allow carriers or state commissions to circumvent the Congressionally-mandated procedures set forth in section 252 for entering into interconnection rights and obligations. *See, e.g., Verizon North, Inc. v. Strand*, 309 F.3d 935, 941 (6th Cir. 2002) (holding state commission order invalid because it “completely bypasses and ignores the detailed process for interconnection set out by Congress in the [1996 Act], under which competing telecommunications providers can gain access to incumbents’ services and network elements by entering into private negotiation and arbitration aimed at creating interconnection agreements that are then subject to state commission approval, FCC oversight, and federal judicial review”); *Michigan Bell*, 128 F. Supp. 2d at 1054-57; *MCI Telecomm. Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1178 (D. Or. 1999) (holding that state commission-ordered tariff “conflicts with the Act and is preempted” because, by “dispens[ing] with the interconnection agreement altogether” and “allowing CLECs to order services ‘off the

rack' without an interconnection agreement," the commission had illegally "bypasse[d] the Act entirely and ignore[d] the procedures and standards that Congress has established").

Like the tariffing requirement addressed in *Bie*, the Commission's imposition of a remedy plan bypassed the process of negotiation, arbitration, agreement, and federal judicial review set forth in the Act. Indeed, the Commission expressly repudiated that process and imposed a plan that (like a tariff) would have allowed CLECs to order remedies "off the rack" without regard to their interconnection agreement. Thus, as in *Bie*, the Commission's plan "interferes with the incumbent's ability to invoke the interconnection agreement procedures," and its decision imposing a plan "that the entrant may select unilaterally in lieu of the interconnection agreement process * * * is inconsistent with §252 of the Telecommunications Act." *Bie*, slip op. at 17 (App. p.180).

Because the Commission is required to follow the federally mandated interconnection agreement process, the Circuit Court's Decision should be modified to instruct the Commission that if it adopts a different remedy plan in the

future, it must implement that plan through the interconnection agreement process.

II. The Commission Lacks Authority To Impose “Remedies” Without Proper Findings.

As the Circuit Court held, the Commission’s governing statutes preclude it from unilaterally assessing punishment, and the scheme imposed by the Commission is clearly punitive and thus unlawful. But even assuming, for the sake of argument, that the “remedy plan” is actually “remedial,” the Commission failed to comply with the statutes on which its Commission Decision relied.

Wis. Stat. § 196.219 (4) authorizes the Commission to take remedial action, but only where it has found a violation of that section. Similarly, section 196.37 (2) expressly requires that remedial action can only be taken “*if* the commission finds” a discriminatory or otherwise unlawful practice. Such a finding, by definition, cannot be made before the alleged violation has even occurred. The requirement of a finding is no mere technicality: Once a violation has occurred, the administrative finding must be preceded by notice and an opportunity to be heard. *See Mid-Plains Tel., Inc. v. PSC*, 56 Wis. 2d 780, 785-89, 202 N.W.2d

907 (1973) (finding that a commission action taken without notice and an opportunity to be heard is void). By requiring payments *before* any of these steps has taken place – indeed, in advance of any of the transactions its plan seeks to govern – the Commission failed to follow the statutory steps.

This case shows exactly why the legislature required that a proper finding precede action. The basis for payments under the Commission Decision was not an investigation or factual finding about historical facts and damage, but the Commission’s prediction that future shortfalls in any performance measure for any CLEC would, *ipso facto*, constitute discrimination by Ameritech Wisconsin. That conclusion was improper. The FCC has cautioned that a statistically significant difference between wholesale and retail performance in a given measure is not the end of the inquiry, but merely the beginning of “an analysis of specific facts and circumstances” which is the only proper way to decide “whether this legal [nondiscrimination] standard is met.” *In re Joint Application by SBC Communications Inc. for Provision of In-Region, InterLATA Services in Kansas & Oklahoma*, 16 F.C.C. Rcd. 6237, ¶28, ¶29 (2001). A proper analysis of statistical differences would include (i) “whether

these differences provide an accurate depiction of the quality of . . . performance,” (ii) “the degree and duration of the performance disparity,” (iii) “whether the performance is part of an improving or deteriorating trend” (iv) whether “the performance differences are slight, or occur in isolated months, and thus suggest only an insignificant competitive impact,” and (v) “the performance demonstrated by all [related] measurements as a whole.” *Id.* ¶¶31-32. By acting in the absence of the “finding” required by §§ 196.37 and 196.219, the Commission short-circuited the contextual analysis required by the FCC, and denied Ameritech Wisconsin the right to present evidence on “the specific facts and circumstances” involved in each alleged instance of discrimination.

To be sure, the analysis and findings required by the Wisconsin statutes and by the FCC may take time. Due process always does, although the Wisconsin legislature has already acted to shorten the time by establishing expedited procedures for resolving disputes with respect to interconnection agreements in Wis. Stat. § 196.199.

Ameritech Wisconsin offered a further solution below, a “settlement offer” of voluntary payments shouldered by

agreement rather than imposed by government. The Commission deliberately chose to forego either route and to impose a system of non-voluntary payments instead, citing §§ 196.37 and 196.219. But citing statutory authority requires compliance with statutory mandates. By assessing payments without the required analysis and finding, the Commission failed to satisfy the very statutes on which its Commission Decision relied. The Circuit Court's reversal of the Commission Decision may be affirmed on this separate ground; further, the Circuit Court Decision should be modified to clearly instruct the Commission that it may impose remedy payments only after the required notice and finding.

CONCLUSION

For the reasons set forth above, Ameritech Wisconsin respectfully requests that the Court affirm the judgment of the Circuit Court, and modify the Circuit Court Decision to include instructions that the Commission not impose any remedy plan other than through the federally mandated interconnection agreement process, and that it may impose remedy payments only after conducting the required notice and hearing process.

Respectfully submitted this 3rd day of March, 2003.

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