

STATE OF MICHIGAN
COURT OF APPEALS

AMERITECH MICHIGAN,

Plaintiff-Appellant,

v

MPSC, AT&T, MCI and MICHIGAN PAY
TELEPHONE ASSOCIATION,

Defendants-Appellees.

UNPUBLISHED

December 17, 1999

No. 210542

Public Service Commission

LC No. U-11410

Before: Holbrook, Jr., P.J., and Zahra and J.W. Fitzgerald,* JJ.

PER CURIAM.

Plaintiff Ameritech appeals from the November 7, 1997 opinion and order of the Michigan Public Service Commission (MPSC) in which the MPSC permitted defendant Michigan Pay Telephone Association (MPTA) to review Ameritech's confidential data relating to pay telephone service under a protective order. We affirm.

On May 20, 1997, defendant MPTA, an industry organization representing independent pay telephone service providers, filed a petition with the MPSC to initiate an investigation to determine whether Ameritech's tariffs for pay telephone service complied with applicable state and federal laws. Between September 1996 and April 1997, the Federal Communications Commission (FCC) issued four orders which set forth certain reporting requirements in order to ensure that local exchange carriers did not subsidize their pay telephone services with revenues from rates for noncompetitive services provided to independent pay telephone providers, and to ensure that the tariffs were cost-based and nondiscriminatory. The MPTA wanted the MPSC to conduct an analysis of cost studies submitted by Ameritech pursuant to these requirements to determine whether Ameritech was discriminating in favor of its own pay telephone services.

With regard to the proper procedure for determining compliance with applicable state and federal laws, the MPSC acknowledged in its November 7, 1997 opinion and order

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

. . . that it has a responsibility to review [local exchange companies'] tariffs for compliance with applicable law. That responsibility is accomplished in the daily

course of business by the Staff. Should the Staff determine that a contested case is warranted to challenge any compliance, it will file a complaint or request the Commission to initiate a case. Once a tariff has been accepted for filing, a person who believes the tariff is inconsistent with the requirements of the law may file a complaint, and would bear the burden of proof.

After determining that a contested case proceeding could be initiated by either the MPSC Staff or another person, the MPSC found that disclosure of the cost studies subject to a protective order was necessary in order to provide the MPTA with sufficient information to determine whether a complaint was warranted. The MPSC noted that in the absence of such review, the parties would have no adequate opportunity to ensure that the pay telephone tariffs charged by local exchange carriers such as Ameritech comply with the law.

Ultimately, the MPSC denied the MPTA's request to initiate a contested case proceeding, but ordered that the MPTA "shall have access to the confidential cost studies filed in Cases Nos. U-11280 and Case No. U-11281, pursuant to the protective orders issued in those cases, with the added provision that the [MPTA] . . . not disclose protected information to its operating members."

On December 5, 1997, Ameritech filed a petition for rehearing, which was followed by motions for clarification by the MPTA and MCI on December 8, 1997. Ameritech argued that the MPSC's order granted defendants access to documents that the petition did not address, and that the only cost study at issue was the one filed on May 19, 1997. It also argued that there is no justification for allowing "pre-complaint discovery." Conversely, MPTA and MCI asserted that the order was intended to require disclosure of not only three separate cost studies, but also additional background information relating to the pay telephone service tariffs.

On February 25, 1998, the MPSC issued its Order Amending Prior Order, which stated that the MPSC "intended the [November 7, 1997] order to grant the requesting parties access to cost studies that would provide them with sufficient information to determine whether to file a complaint." However, the MPSC also stated that it "did not intend to grant unlimited discovery to the parties prior to filing such a complaint." The MPSC then amended its prior order to include that the parties be allowed access to the cost studies submitted in Cases Nos. U-11280 and U-11281 and the cost study filed on May 19, 1997, "and any different information filed with the Federal Communications Commission related to payphone service costs or tariffs, pursuant to an appropriate protective order." The MPSC denied Ameritech's motions for stay and for reconsideration or rehearing.

Ameritech then filed this claim of appeal, arguing that the MPSC's authority to order the production of documents is limited to the context of a contested case proceeding and that the ordered disclosure is contrary to common law, the Michigan Court Rules, the MPSC Rules of Practice and Procedure, and legislative policy. It also contends that because the MPSC Staff is fully capable of reviewing the cost studies to determine their compliance with applicable law, there is no need to disclose the information to third parties. We are unpersuaded by any of Ameritech's arguments.

A party challenging an order of the MPSC must show by clear and convincing evidence that the orders complained of are unlawful or unreasonable. *In re Procedure & Format for Filing Tariffs Under the Michigan Telecommunications Act*, 210 Mich App 533, 538; 534 NW2d 194 (1995). Because the MPSC is a creature of the Legislature, its authority must be plainly granted by statute. *Id.* at 539. A statute that grants power to an administrative agency must be strictly construed “because doubtful power does not exist.” *Id.* However, because an agency’s interpretation of the statute it is charged with administering is entitled to deference in recognition of the agency’s expertise, this Court will not substitute its judgment for that of the agency where the construction given to the provision at issue is a reasonable one. *In re Quality of Service Standards for Regulated Telecommunication Services*, 204 Mich App 607, 611-612; 516 NW2d 142 (1994).

We conclude that the MPSC’s resolution of this dispute is a reasonable one that protects Ameritech’s interest in the confidentiality of its information and defendants’ interest in ensuring that Ameritech does not discriminate in favor of its own pay telephone services. Disclosure of the information is authorized by § 210 of the Michigan Telecommunications Act, MCL 484.2101 *et seq.*; MSA 22.1469(101) *et seq.*, which provides in pertinent part:

(1) Except under the terms of a mandatory protective order, trade secrets and commercial or financial information submitted under this act are exempt from the freedom of information act

(2) If information is disclosed pursuant to a mandatory protective order, then the information may be included in the commission’s evidentiary record if admissible and remains confidential.

(3) There is a rebuttable presumption that cost studies, customer usage data, marketing studies, and contracts between providers are trade secrets or commercial or financial information protected under subsection (1). The burden of removing the presumption under this subsection is with the party seeking to have the information disclosed. [MCL 484.2210; MSA 22.1469(210).]

When the Legislature rewrote this provision in 1995, it deleted all previous references to contested case proceedings. The elimination of this reference compels the conclusion that the Legislature did not intend that § 210 apply only in the context of contested case proceedings. See *Williams v Auto Club Ins Co (On Remand)*, 224 Mich App 313, 319; 569 NW2d 403 (1997); *Eaton Farm Bureau v Eaton Twp*, 221 Mich App 663, 668; 561 NW2d 884 (1997). Ameritech argues that the deletion of the “contested case” language in § 210 is meaningless when the other changes to the act are considered, and that the contested case requirement was not eliminated. However, had the Legislature intended to clarify a contested case requirement, it is reasonable to assume that it would have left the language referring to a contested case proceeding intact. Furthermore, because the MPSC’s interpretation of the statute is reasonable and consistent with the statutory language, it is entitled to deference. *In re Quality of Service Standards, supra*, 204 Mich App at 612.

Ameritech further argues that the MPSC's order violates the common law regarding trade secrets, which have normally been protected on equitable grounds. Even though trade secrets are typically protected under the common law, § 210 permits the MPSC to order their disclosure where the disclosure is subject to a mandatory protective order. The Legislature is presumed to be aware of the effects of legislation on the common law, and a statute must be interpreted in conformance with its express terms even if in conflict with the common law. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996); *Bennett v Weitz*, 220 Mich App 295, 299; 559 NW2d 354 (1996).

We also disagree with Ameritech's contention that under MCL 484.2203(4); MSA 22.1469(203)(4), the only context in which the MPSC is authorized to compel the production of documents or papers is a contested case proceeding. While § 203(4) provides that in a contested case, the MPSC can, among other things, "compel the attendance of witnesses and the production of papers, books, accounts, documents, and testimony," in this case, the MPSC did not have to compel production of the cost studies since they had already been filed with and were in its possession. Furthermore, we believe that when read in conjunction with the Legislature's rewriting of § 210, as discussed above, § 203(4) cannot be construed as a limitation on the MPSC's authority in this regard. *Weems v Chrysler Corp*, 448 Mich 679, 699-700; 533 NW2d 287 (1995) (observing that individual provisions must be read in the context of the entire statute).

As for Ameritech's argument that the order is contrary to the MPSC's rules of procedure and the Michigan Court Rules, we note that the rules regarding discovery are applicable only in the context of a contested case proceeding. In this case, no contested case was initiated. Rather, the MPSC treated MPTA's petition as a request for disclosure of the information, similar to a request for information pursuant to the Freedom of Information Act (FOIA), to which § 210 specifically refers. There is no requirement that FOIA requests be made only in the context of litigation. Although Ameritech relies on *Ortiz v Textron, Inc*, 140 Mich App 242; 363 NW2d 464 (1985), for the proposition that a potential plaintiff has no right in equity to obtain information regarding potential lawsuits, that case is distinguishable in that it did not occur in the context of a highly regulated industry. Furthermore, no statute regarding the disclosure of confidential information subject to a protective order was at issue in *Ortiz*.

In addition, Ameritech argues that the MPSC's order violates the legislative policy of encouraging competition with regard to pay telephone services. We disagree. The safeguards set forth in the FCC orders were designed to ensure that fair competition is possible in a situation in which one party has control over access to the local telecommunications lines and the opportunity to take unfair advantage of its position. The MPSC's order allows the parties who may be damaged by such practices to protect their interests while preserving Ameritech's interest in the confidentiality of its information. Because the order preserves the conditions necessary for a genuinely competitive environment, it does not violate the legislative policy.

Finally, we reject Ameritech's argument that the MPSC action was improper given that the MPSC is capable of reviewing the cost studies to determine their compliance with applicable laws and that there is no authority for third party review. Ameritech has failed to cite any authority in support of

this argument, and thus review is precluded. *Davenport v Grosse Pointe Farms Bd of Zoning Appeals*, 210 Mich App 400, 405; 534 NW2d 143 (1995). Moreover, while it is true that the MPSC is charged with the responsibility of ensuring Ameritech's compliance with applicable laws, it would be improper for the MPSC to advocate the interests of the independent pay telephone service providers if a dispute arises. Consequently, we find this issue to be without merit.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Brian K. Zahra

/s/ John W. Fitzgerald