

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN PAY TELEPHONE ASSOCIATION,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
AMERITECH MICHIGAN, GTE NORTH, INC.,
and AT & T COMMUNICATIONS OF
MICHIGAN,

Appellees.

UNPUBLISHED
October 23, 2001

No. 219950
MPSC
LC No. 011756

Before: K. F. Kelly, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Appellant Michigan Pay Telephone Association (MPTA) appeals as of right the orders of the Michigan Public Service Commission (PSC) granting in part and dismissing in part its complaint and denying rehearing. We affirm.

Payphone service in Michigan is provided by local exchange carriers (LECs), such as Ameritech Michigan (Ameritech) and GTE North, Inc. (GTE), as well as independent payphone providers (IPPs). IPPs are organizations that operate payphones. In 1984 the Federal Communications Commission (FCC) ordered LECs to offer payphone access service to IPPs. In 1996 Congress enacted the Federal Telecommunications Act (FTA) of 1996, 47 USC 151 *et seq.*, which included provisions designed to enhance local competition. Section 276, 47 USC 276, prohibited LECs from subsidizing their own payphone services and from discriminating in favor of their services and against services offered by IPPs. The FCC ordered LECs to file tariffs with state utilities commissions setting forth the rates, terms, and conditions for services made available to IPPs. The FCC required that the tariffs be cost-based, nondiscriminatory, consistent with 47 USC 276 and other guidelines, and in compliance with the New Services Test. This test is cost-based and designates the direct cost of providing a service as a price floor. LECs may then add a reasonable amount of overhead to establish the total price of a service. The cost cannot embody direct or indirect subsidies.

The MPTA, a trade organization of IPPs, requested that the PSC determine whether the tariffs filed by Ameritech and GTE complied with the FTA and the Michigan

Telecommunications Act (MTA), MCL 484.2101 *et seq.*¹ The PSC concluded that the MPTA had not provided sufficient reason for it to initiate a contested case. Subsequently, the MPTA filed a complaint against Ameritech and GTE alleging: (1) that the prices for network services charged by Ameritech and GTE were inconsistent with the New Services Test pricing standard; (2) that the services provided by Ameritech and GTE were discriminatory; and (3) that Ameritech and GTE subsidized their payphone operations.

The PSC granted in part and dismissed in part the MPTA's complaint. The PSC relied on MCL 484.2203(3), which places the burden of proof on the party filing the complaint, to conclude that the MPTA had the burden of proof on all issues. The PSC found that the MPTA failed to carry its burden of establishing that Ameritech and GTE's tariffs did not comply with the New Services Test. The PSC noted that the FCC has not specified a particular method for determining costs and reasonable overhead, and rejected the MPTA's argument that the costs of the retail services sold to IPPs should be compared to the costs of the unbundled network elements sold by LECs to competing providers on a wholesale basis. The PSC observed that the services sold to IPPs by Ameritech and GTE were not wholesale services, and concluded that the MPTA failed to establish that Ameritech and GTE's payphone services for IPPs were priced at more than cost plus a reasonable overhead.² Finally, the PSC concluded that the MPTA did not carry its burden of showing that Ameritech and GTE engaged in discriminatory practices in violation of MCL 484.2318(1) and 47 USC 276. The record showed that the IPPs had access to the same services that were available to Ameritech and GTE's payphone operations, and that the IPPs could obtain those services for the same rates. The fact that Ameritech and GTE did not offer some services that would be useful to the IPPs did not constitute discrimination because such services were not available to their own payphone operations.

The MPTA sought rehearing, and submitted an affidavit produced in another case. The PSC denied the petition, stating that the arguments raised therein had been raised and rejected, and noting that the MPTA failed to explain why it did not introduce the affidavit earlier in the proceedings.

This Court's review of PSC orders is narrow and well defined. MCL 462.25 provides that all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, *prima facie*, to be lawful and reasonable. *Michigan Consolidated Gas Co v Public Service Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC bears the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). An order is unlawful if it is based on an erroneous interpretation or application of the law, and is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc v Public Service Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966). A reviewing court must give due deference to the administrative expertise of the PSC, and may not substitute its judgment for that of the agency. *Attorney General v Public Service Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). However,

¹ The MTA was repealed effective January 1, 2001. MCL 484.2604(1).

² The PSC concluded that while the MPTA carried its burden of establishing that GTE's payphone operations were subsidized, it failed to do so with respect to Ameritech. The MPTA does not challenge this portion of the PSC's decision on appeal.

this does not mean that a court may abandon or delegate its responsibility to interpret statutory language and legislative intent. *Miller Bros v Public Service Comm*, 180 Mich App 227, 232; 446 NW2d 640 (1989). Statutory interpretation is a question of law subject to de novo review. As a general rule, this Court will defer to the construction of a statute by the government agency charged with interpreting it, unless the agency interpretation is clearly erroneous. *In re MCI Telecommunications Complaint*, 229 Mich App 664, 681-682; 583 NW2d 458 (1998), modified 460 Mich 396; 596 NW2d 164 (1999).

Initially, the MPTA argues that the PSC's order is unlawful and unreasonable both because it improperly shifts the burden of proof, and because it erroneously concludes that the rates for network services provided by IPPs to Ameritech and GTE are cost-based and comply with the New Services Test. The MPTA contends that the tariffs filed by Ameritech and GTE were not cost-based, and sought to recover more than a reasonable amount of overhead.

We disagree. The FCC requires LECs to provide credible cost studies and justification for overhead allocation when submitting tariffs for services to be provided to IPPs. If a tariff is challenged via the filing of a complaint, the party filing the complaint bears the burden of proving that the tariff does not comply with state or federal law. MCL 484.2203(3). A challenge to an accepted tariff does not shift the burden of proving compliance to the party that filed the tariff. The PSC correctly held that the MPTA had the burden of proof on all issues.

The New Services Test establishes the direct cost of providing the service as a price floor, and then allows the addition of a reasonable amount of overhead to derive the total cost of the service. The FCC has not mandated the use of any particular methodology for determining direct costs or reasonable overheads for purposes of complying with the New Services Test. When preparing its tariff, Ameritech updated existing cost studies to establish a price floor, and used existing rates to calculate overhead. GTE prepared its tariff using a method that has been found by the FCC to comply with the New Services Test. The PSC properly rejected the MPTA's assertion that because the prices charged by Ameritech and GTE were not determined through use of figures calculated for different services previously approved in other cases, the methodology for determining the prices for services provided to IPPs could not have complied with the New Services Test. The PSC determined that the methodologies used by Ameritech and GTE were acceptable to achieve compliance with the New Services Test, a test that by design is flexible. The PSC's administrative expertise in this area is entitled to deference. *Public Service Comm No 2, supra*. Furthermore, the prices set by the tariffs submitted by Ameritech and GTE are within the zone of reasonableness within which the PSC's judgment operates without judicial interference. *Michigan Bell Telephone Co v Public Service Comm*, 332 Mich 7, 26-27; 50 NW2d 826 (1952). The PSC's order is not unlawful or unreasonable. MCL 462.26(8).

Next, the MPTA argues that the PSC's order is unlawful and unreasonable because it erroneously concludes that Ameritech and GTE do not discriminate against IPPs. The MPTA asserts that by requiring IPPs to use certain configurations of services, and by failing to furnish certain services, Ameritech and GTE prevented IPPs from engaging in effective competition.

We disagree. The essence of the MPTA's argument is that an LEC is required to provide any service that an IPP might desire, regardless of whether the service is reasonably feasible to provide and reasonably priced. The MPTA cites no authority to support its position. Moreover, the evidence showed that the IPPs had access to the same services, at the same rates, as did

Ameritech and GTE's payphone operations. The PSC's conclusion that Ameritech and GTE did not engage in discriminatory conduct under the circumstances is a reasonable interpretation of MCL 484.2318(1), *In re MCI, supra*, and is supported by the requisite evidence. Const 1963, art 6, § 28. The PSC's order is not unlawful or unreasonable. MCL 462.26(8).

Next, the MPTA argues that the PSC's order is legally deficient because it does not recount the facts on which the PSC relied to base its conclusions. The MPTA contends that at a minimum, this matter should be remanded to the PSC for further consideration.

We disagree. MCL 24.285 requires that a final decision of an agency in a contested case include both findings of fact and conclusions of law. The PSC opinion recited the evidence produced by the parties and the basis for its decision on each issue raised in the complaint. The PSC made definitive findings of fact that allow for adequate review of its decision. *Attorney General v Public Service Comm*, 63 Mich App 69, 76-77; 234 NW2d 407 (1975).

Finally, the MPTA argues that the PSC erred by denying its petition for rehearing. The MPTA asserts that the affidavit that accompanied the petition was relevant to its argument that Ameritech's method of identifying overhead expenses was flawed. The MPTA contends that the affidavit was not produced prior to the issuance of the PSC's decision because it was not until that point that the PSC rejected its arguments regarding Ameritech's calculation of its expenses.

We disagree. Rule 403, 1992 AACCS, R 460.17403, provides that a petition for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences arising from compliance with the order. The affidavit that accompanied the MPTA's petition could have been produced prior to the issuance of the PSC's decision, and was not determinative of any issue in the case. The PSC did not abuse its discretion by denying the MPTA's petition for rehearing.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald