

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN BELL TELEPHONE COMPANY,
d/b/a AMERITECH MICHIGAN,

UNPUBLISHED
January 22, 2002

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
and WORLDCOM TECHNOLOGIES, INC.,

No. 226242
MPSC
LC No. 00-012072

Appellees.

MICHIGAN BELL TELEPHONE COMPANY,
d/b/a AMERITECH MICHIGAN,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
and WORLDCOM TECHNOLOGIES, INC.,

No. 229912
MPSC
LC No. 00-012072

Appellees.

Before: Bandstra, C.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

In these consolidated cases, appellant Michigan Bell Telephone Company, doing business as Ameritech Michigan (Ameritech), appeals as of right the orders of the Michigan Public Service Commission (PSC) requiring certain action with respect to filling orders submitted by appellee Worldcom Technologies, Inc., an MCI Worldcom (MCI) company, imposing a fine, and ordering it to pay MCI's attorney fees and costs. We affirm in both cases.

I. Introduction

Historically, local telephone networks consisted of facilities constructed, installed, and operated by an incumbent local exchange carrier (LEC), such as Ameritech. The Michigan Telecommunications Act (MTA), MCL 484.2101 *et seq.*, was designed to foster competition and

to encourage new providers to enter the telecommunications market. MCL 484.2101(2). Shortly after the enactment of the local competition provisions of the MTA, the United States Congress enacted the local competition provisions of the Federal Telecommunications Act of 1996 (FTA), 47 USC 151 *et seq.* Both the MTA and the FTA provide that a competing LEC, such as MCI, may enter the existing service market of an incumbent LEC by: (1) constructing a telephone network using only its own facilities; (2) leasing elements owned by the incumbent LEC and combining those elements with its own facilities to create a network; or (3) leasing and reselling the incumbent LEC's retail services. Incumbent LECs are required to unbundle and separately price each local exchange service network element, and to allow competing LECs to purchase unbundled network elements on a nondiscriminatory basis. 47 USC 251; MCL 484.2305; MCL 484.2355. Unbundled local transport (ULT) is one network element that must be provided by incumbent LECs. ULT consists of incumbent LEC transmission facilities dedicated to a particular customer or carrier. The facilities consist of fiber optic cables with electronics attached to each end. The electronics, referred to as SONET equipment, are located in the offices of the incumbent LECs and consist of bays with slots into which cards are inserted when additional capacity is needed. Incumbent LECs must provide access to ULT only if facilities exist to allow it to do so.

II. Underlying Facts and Proceedings

A number of MCI's customers were Internet service providers that required dedicated high-speed data transfer services. MCI sought access to ULT at Ameritech's central offices in close proximity to its customers to avoid the higher mileage charges associated with serving customers from more distant offices. From February 1999 through April 1999 Ameritech rejected several of MCI's orders for ULT. Ameritech maintained that if all slots in its electronics bays were full, facilities did not exist to fill the orders, that installation of additional SONET equipment constituted the construction of new facilities, and that federal law did not require it to construct new facilities in order to fill MCI's orders. MCI gained access to ULT by resubmitting orders at central facilities until the orders were filled, by submitting orders at more distant offices, or by submitting special access service orders. Special access service provides the same functionalities as ULT but at a higher cost.

MCI filed a complaint against Ameritech, alleging that Ameritech violated its tariff, as well as state and federal law, by refusing to provide ULT on a nondiscriminatory basis, and by imposing unreasonable ordering and coding requirements on orders for ULT. The PSC found in favor of MCI. Initially, the PSC rejected Ameritech's assertion that it lacked jurisdiction to consider the matter. The PSC rejected as unjustifiably narrow Ameritech's asserted position that if the addition of electronics was necessary to fill orders for ULT, then the facilities did not exist, and it was entitled to reject the orders. Ameritech's refusal to reveal where capacity was available was considered evidence of its bad faith and of its intention to inhibit competition. Moreover, the PSC found that Ameritech's denial of MCI's ULT orders damaged MCI by requiring MCI to incur greater costs for additional mileage charges and special access service, and ordered Ameritech to refund any excess amounts paid. The PSC imposed a fine of \$10,000 per day from February 22, 1999, through March 3, 2000, the date of its initial order, for a total fine of \$3,750,000. The PSC rejected Ameritech's argument that, because the case was one of first impression, imposition of a fine was improper. In addition, the PSC found that an award of

attorney fees and costs to MCI was appropriate under MCL 484.2209 for the reason that Ameritech's position was frivolous.

MCI filed a statement of attorney fees and costs totaling \$98,452.07. The PSC ordered Ameritech to pay MCI's costs and fees in the amount of \$86,382.38.

III. Analysis

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 has 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 PSC's administrative expertise of the PSC, and is not to 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, a court cannot abandon 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. *In re MCI Telecommunications Complaint*, 229 Mich App 664, 681; 583 NW2d 458 (1998), modified 460 Mich 396; 596 NW2d 164 (1999). As a general rule, this Court will defer to the construction placed on a statute by the government agency charged with interpreting it, unless the agency interpretation is clearly erroneous. *Id.*

Initially, Ameritech argues that the PSC's first order is unlawful because it erroneously concluded that the rejection of certain of MCI's orders for ULT constituted a violation of either its tariff or of federal law. In support of that argument, Ameritech makes the following claims: (1) the FCC does not require an incumbent LEC to provide ULT to an incumbent LEC if the facilities needed to do so do not exist and must be built; (2) the installation of additional SONET equipment constitutes the construction of facilities; (3) the PSC compounded its error by holding that Ameritech must disclose plans to add additional capacity; and (4) such disclosure is not required by state or federal law, and the PSC exceeded its authority by ordering such disclosure. We disagree.

Both the MTA and the FTA require an incumbent LEC to provide unbundled network elements, of which ULT is one, to a competing LEC on a nondiscriminatory basis. MCL 484.2305; 47 USC 251. The evidence showed that while Ameritech refused to install additional SONET equipment to fill MCI's orders for ULT, it readily did so to serve its own customers or to fill MCI's orders for higher cost special access service. No evidence showed that less effort was needed to install SONET equipment to increase capacity to fill MCI's orders for special access service than was needed to install the equipment to increase capacity to fill MCI's orders for ULT. The PSC properly relied on *Ameritech Michigan v Public Service Comm & BRE Communications, LLC*, unpublished opinion and order of the federal district court for the eastern district of Michigan, issued 1/4/2000 (Docket No. 99-CV-71180-DT), as support for its decision. Ameritech's assertion that capacity was not available to fill MCI's orders for ULT when all that

was needed to increase capacity was to attach SONET equipment to the ends of in-place fiber optic cable was virtually identical to the position that it took in *BRE*, i.e., that loops, an unbundled network element, were not available when only minor work was needed to connect the loops to the network. In *BRE*, both the PSC and the federal court rejected Ameritech's position and held that the need to do minor connection work did not make the loops unavailable. The rationale for the holding in *BRE* applies with equal force to this case. To increase capacity to fill orders for ULT, Ameritech was required to simply attach SONET equipment to the ends of the fiber optic cables. The PSC's order does not require Ameritech to construct facilities to provide ULT. Ameritech violated its tariff, the MTA, and the FTA by failing to fill MCI's orders for ULT when it had the capacity to do so. MCL 484.2305; 47 USC 251.

Furthermore, the PSC did not err by requiring Ameritech to disclose the location of existing transport capacity and its plans to expand its transport capacity. The PSC has only those powers granted to it by the Legislature, *In re Telecommunications Tariffs*, 210 Mich App 533, 539; 534 NW2d 194 (1995), and, for purposes of administering the MTA, only those powers granted to it by the Act. MCL 484.2201(2). The PSC has the statutory authority to resolve complaints filed under the MTA. MCL 484.2203; MCL 484.2204. Ameritech illegally discriminated in favor of its own customers and against the customers of MCI by failing to disclose the location of existing capacity or to reveal plans to increase capacity. We defer to the PSC's interpretation of MCL 484.2305, which prohibits an incumbent LEC from discriminating in the provision of network elements to a competing LEC. *In re MCI Telecommunications Complaint, supra*. The PSC's order is not unlawful. MCL 462.26(8).

Second, Ameritech argues that the PSC's first order is unlawful because it erroneously concluded that Ameritech engaged in discrimination against MCI. It notes that MCI was subject to the same ordering process as were all other competing LECs. Moreover, while MCL 484.2305 prohibits an incumbent LEC from discriminating against a competing LEC by delaying or refusing access to the local exchange network, Ameritech contends that the transport facilities ordered by MCI were not used to gain access to the local exchange network. Finally, Ameritech emphasizes that ULT and special access service are distinct network elements; therefore, the provision of those services under different terms and conditions cannot constitute discrimination. We disagree.

An incumbent LEC such as Ameritech is required to provide its services on an unbundled and nondiscriminatory basis. MCL 484.2355. ULT is an unbundled network element and is a part of the local exchange service. The evidence showed that while no significant difference existed between the effort required to add capacity to provide special access service and that required to add capacity to provide ULT, Ameritech routinely rejected MCI's orders for ULT on the ground that needed capacity did not exist, while routinely filling orders for special access service, even when it was required to add capacity to do so. The PSC's finding that Ameritech engaged in discrimination by unreasonably distinguishing between orders for ULT and orders for special access service, and by unreasonably distinguishing between its own need for additional capacity to serve its own customers and the needs of MCI, was supported by the evidence and is entitled to deference. *Attorney General, supra*; *In re MCI Telecommunications Complaint, supra*. The PSC's order is not unlawful. MCL 462.26(8).

Third, Ameritech argues that the PSC's first order is unlawful in that it erroneously determined that the PSC had jurisdiction over the subject matter of MCI's complaint. MCI

sought ULT and special access service for the purpose of providing customers with high-speed Internet data access. Ameritech claims that a dedicated connection provided for access to the Internet only constitutes an interstate communication, and that therefore the matter lies within the exclusive jurisdiction of the FCC. Again, we disagree.

The PSC has jurisdiction to hear and resolve issues raised in complaint proceedings. MCL 484.2203; MCL 484.2204. This authority, coupled with the PSC's finding that the traffic for which MCI sought ULT was not destined solely for the Internet, supported the PSC's conclusion that at a minimum, it had concurrent jurisdiction with the FCC over the issues raised in MCI's complaint against Ameritech. Accordingly, the PSC's order is not unlawful. MCL 462.26(8).

Fourth, Ameritech argues that the PSC's first order imposing a fine of \$3,750,000 is unlawful and unreasonable in that it is excessive and serves no compensatory purpose. Ameritech claims that MCI's ability to compete was not harmed because it received all transport requested and was able to provide service to its customers. Furthermore, Ameritech asserts that imposition of a fine is inappropriate in a case of first impression, and that, even assuming *arguendo* that a fine was justified, imposition of a fine of \$10,000 per day for each day from February 22, 1999, the date on which Ameritech first rejected a ULT order from MCI, to March 3, 2000, the date of the PSC's decision, was not warranted because any violation was not ongoing. We disagree.

The imposition of a fine is specifically authorized by MCL 484.2601(a). MCI was harmed by Ameritech's tactics. While MCI was ultimately able to gain access to transport, it was forced to place some orders multiple times, and on other occasions was required to order more expensive special access service. Ameritech's assertion that a fine was not appropriate because this was a case of first impression and it believed that its position was supported by federal law is without merit. Ameritech's similar argument regarding the meaning of availability of capacity had been rejected by the PSC, on both state and federal grounds, in *BRE, supra*. Throughout these proceedings, Ameritech continued to adhere to its position regarding the availability of capacity, and continued to reject MCI's ULT orders on that basis. The imposition of a fine in the amount of \$10,000 for each day from February 22, 1999 to March 3, 2000 was at the mid-range of the penalties authorized by MCL 484.2601(a) and warranted by the evidence. Accordingly, the PSC's order is neither unlawful nor unreasonable in this regard. MCL 462.26(8).

Fifth, Ameritech argues that the PSC's first order granting MCI attorney fees and costs is unlawful for the following reasons: (1) the PSC erred by finding that Ameritech's asserted position was devoid of arguable legal merit; (2) its finding that Ameritech took the position that it did in order to harass and injure MCI by imposing unlawful delays and costs was not supported by the evidence, and (3) Ameritech asserted a well-supported position in what was a case of first impression. We disagree.

MCL 484.2209(1) authorizes the PSC to award attorney fees and costs to the prevailing party if it determines that the position asserted by the nonprevailing party was frivolous. MCL 484.2209(2) provides that a position is frivolous if: (1) it was asserted for the purpose of harassing, embarrassing, or injuring the prevailing party; (2) the nonprevailing party had no reasonable basis for believing that the facts underlying its position were true; or (3) it was devoid

of arguable legal merit. The substance of Ameritech's position regarding the availability of facilities with which to fill MCI's orders for ULT had been declared to be in violation of both federal and state law. *BRE, supra*. The PSC's interpretation and application of MCL 484.2209 is entitled to deference. *Attorney General, supra; In re MCI Telecommunications Complaint, supra*. Accordingly, we conclude that the PSC's order is not unlawful or unreasonable. MCL 462.26(8).

Finally, Ameritech argues that the PSC's second order awarding MCI attorney fees and costs in the amount of \$86,382.38 is unlawful. Again, we disagree. Ameritech does not challenge the method by which the PSC calculated the fees and costs due MCI under MCL 484.2209, or the amount awarded, but simply repeats the arguments it made in its consolidated appeal. As discussed above, those arguments are without merit.

We affirm.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage