STATE OF MICHIGAN

COURT OF APPEALS

CEO TELECOMMUNICATIONS, INC., f/k/a LD SERVICES, INC.,	UNPUBLISHED May 10, 2002
Appellant,	
V	No. 228230 MPSC
MICHIGAN PUBLIC SERVICE COMMISSION and ATUL C. AGRAWAL, M.D.,	LC No. 00-011994
Appellees.	

Before: Gage, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Appellant CEO Telecommunications, Inc. (CEO) appeals as of right the order of appellee Michigan Public Service Commission (PSC) finding that CEO illegally switched the long distance service of appellee Atul C. Agrawal, M.D., imposing sanctions for that act, and denying CEO's motion for rehearing. We affirm.

I. Introduction

The expansion of competition in the telecommunications industry has given rise to new services and the entry of new providers. A small number of these providers have engaged in unscrupulous activities. One such activity, commonly known as "slamming," refers to the switching of one or more of an end-user's telecommunications services from one provider to another provider without the permission of the user. 1998 PA 259 and 1998 PA 260, effective October 1, 1998, amended the Michigan Telecommunications Act (MTA), MCL 484.2101 *et seq.*,[1] and were intended to give the PSC greater authority to deal with unscrupulous providers. MCL 484.2502(a) and (b) prohibit a telecommunications provider from making false, misleading or deceptive statements regarding rates, terms or conditions of its service, and from charging an end-user for a service for which the user did not make the initial affirmative offer. MCL 484.2505(1) specifically prohibits slamming. MCL 484.2506(2) authorizes the PSC to impose fines and issue cease and desist orders on finding that a provider has engaged in slamming. MCL 484.2506(3) provides that a fine shall not be imposed for a violation of MCL 484.2505(1)

[1] The MTA was repealed effective January 1, 2001.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

if the violation was an unintentional, bona fide error that occurred notwithstanding the provider's maintenance of procedures reasonably designed to avoid such errors.

II. Underlying Facts and Proceedings

In February 1999, Dr. Agrawal received a statement from his local exchange carrier notifying him that his long distance carrier had been switched from AT & T Communications to Frontier Telemanagement, Inc. Some investigation by Dr. Agrawal revealed that his long distance carrier was in fact CEO, a reseller of Frontier's service. Dr. Agrawal's next telephone bill, dated March 28, 1999, contained charges from CEO dating back to December 3, 1998. Dr. Agrawal refused to pay those charges, and succeeded in having his long distance service returned to AT & T.

Dr. Agrawal filed an amended complaint against CEO alleging that his long distance service had been switched without his permission in violation of MCL 484.2505(1). He also alleged that CEO's actions violated MCL 484.2502(a) and requested that the PSC issue a cease and desist order pursuant to MCL 484.2506(2), but did not request money damages. A hearing referee conducted a hearing in which Dr. Agrawal, CEO and the PSC staff participated. Dr. Agrawal testified that he never had a conversation with a CEO representative in Hindi, a language he denied knowing how to speak, that he did not receive an information package from CEO, and that he never authorized a change in his long distance service provider. Dr. Agrawal estimated that he and his wife spent at least twenty hours resolving the matter, and stated that when he performed his work as a surgeon he earned $1,000 per hour. Laura Quintero, CEO's Director of Corporate Affairs, acknowledged that CEO switched Dr. Agrawal's long distance service. She maintained that Dr. Agrawal authorized the switch, and produced the transcript of a portion of a telephone conversation purportedly between Dr. Agrawal and a sales representative. Quintero also produced a printout of a computer database purportedly showing that an information package was mailed to Dr. Agrawal two days after he spoke with the sales representative, but did not produce the information package itself. Ronald Choura, Supervisor of Service Quality in the PSC's Communications Division, testified that based on his review of the complaint and the evidence, he concluded that Dr. Agrawal's long distance service was switched without his permission, and that CEO violated MCL 484.2502(a) and (b) by giving Dr. Agrawal false information and by assessing improper charges.

The PSC read the record and issued a decision based on it rather than awaiting a proposal for decision from the hearing referee. The PSC concluded that CEO violated MCL 484.2505(1) by switching Dr. Agrawal's long distance service without his permission. The PSC rejected the staff's assertion that CEO violated MCL 484.2502(a) by giving Dr. Agrawal false information, but found that CEO violated MCL 484.2502(b) by billing Dr. Agrawal for a service that he did not request. The PSC imposed two fines: (1) $20,000, the maximum amount allowed under MCL 484.2506(2)(a) for slamming Dr. Agrawal in violation of MCL 484.2505(1), and (2) $200 per day from December 3, 1998, the date on which CEO recorded its switch of Dr. Agrawal's long distance service, to March 9, 1999, the date the service returned to AT & T, for a total of $19,400, under MCL 484.2601(b). The PSC additionally required CEO to reimburse Dr. Agrawal lost earnings amounting to $10,000. Finally, the PSC rejected CEO's assertion that the PSC's decision to read the record in lieu of receiving a proposal for decision deprived it of due process.

CEO sought rehearing, arguing that the PSC erred by imposing fines and awarding compensatory damages to Dr. Agrawal, and by failing to obtain a proposal for decision from the hearing referee. The PSC denied the petition for rehearing in its entirety.

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). To establish that a PSC order is unlawful, an appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. *In re MCI Telecommunications Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). An order is unreasonable if it is totally unsupported 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 cannot 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 ascertain 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 placed on a statute by the government agency charged with interpreting it, unless the agency interpretation is clearly erroneous. *In re Canales Complaint*, 247 Mich App 487, 496; 637 NW2d 236 (2001).

CEO first contends that the PSC's orders are unlawful and unreasonable because Dr. Agrawal did not meet his burden of proving that CEO switched his long distance service without his permission. CEO argues that Dr. Agrawal's testimony was at best uncertain, and contrasted sharply with the testimony given by Quintero, who maintained that CEO records demonstrated both that Dr. Agrawal authorized a change in his service and that he received an information package regarding the change.

As the complainant, Dr. Agrawal had the burden of proving that CEO switched his long distance service without his permission. MCL 484.2203(3). Dr. Agrawal testified that he did not have a conversation with a CEO in Hindi, a language he does not speak, and denied that he ever authorized CEO to switch his long distance service or that he ever received an information package from CEO. While Quintero offered a transcript of a conversation purported to be between Dr. Agrawal and a CEO representative, no words in the conversation identified one of the participants as Dr. Agrawal. Quintero had no personal knowledge regarding whether the sales representative actually spoke to Dr. Agrawal or whether Dr. Agrawal actually received an information package. Quintero's testimony and CEO's documentary evidence did not undermine the strength of the testimony presented by Dr. Agrawal. The PSC was entitled to find the testimony given by Dr. Agrawal more persuasive than that given by Quintero. *Great Lakes Steel Div of National Steel Corp v Michigan Public Service Comm*, 130 Mich App 470, 481; 344 NW2d 321 (1983). Because Dr. Agrawal's testimony supported the PSC's finding that CEO

engaged in illegal slamming, the PSC's order was not unlawful or unreasonable. MCL 462.26(8).

CEO next asserts that even assuming arguendo that the evidence established that Dr. Agrawal's long distance service was switched without his permission, the PSC's imposition of a fine constituted legal error because no evidence established that any unauthorized switch was intentional. CEO suggests that any number of unintentional errors could have occurred and resulted in the unauthorized switching of Dr. Agrawal's service.

MCL 484.2506(2) expressly authorizes the PSC to impose a fine on a provider found to have engaged in slamming. MCL 484.2506(3) provides that a fine shall not be imposed if the slamming occurred as a result of a bona fide error that the provider took reasonable steps to avoid. Bona fide errors include clerical mistakes, computer malfunctions, and programming or printing errors. *Id*. The burden of proving that a violation of MCL 484.2505(1) was an unintentional and bona fide error is on the provider. MCL 484.2506(3); *Canales*, *supra* at 502-503.

CEO's evidence did not establish that any bona fide, unintentional error occurred notwithstanding its efforts to prevent slamming. The transcript of the conversation purported to have occurred between Dr. Agrawal and a sales representative did not even establish that Dr. Agrawal participated in the conversation. CEO's assertion that an error might have occurred for any number of reasons, i.e., that the sales representative might have misunderstood Dr. Agrawal or that the information package might have gotten lost in the mail, lacks any support in the evidence presented at the hearing. The PSC's conclusion that CEO did not carry its burden of showing that it made a bona fide error is a reasonable interpretation of MCL 484.2506(3), and is entitled to deference. *Canales*, *supra* at 496. Accordingly, the PSC's order was not unlawful or unreasonable. MCL 462.26(8).

CEO further argues that the PSC's issuance of a decision without first receiving a proposal for decision deprived CEO of due process. In support of that argument, CEO makes the following claims: (1) the hearing referee, and not the PSC, was in the best position to determine the credibility of the witnesses, (2) CEO declined to submit rebuttal evidence because it assumed that the hearing referee would issue a proposal for decision, and (3) the PSC staff played a prosecutorial as well as an advisory role in the evidentiary hearing.

In civil matters, due process generally requires notice of the nature of the proceedings, the opportunity to be heard timely and in a meaningful manner, and an impartial decision maker. *Traxler v Ford Motor Co*, 227 Mich App 276, 288; 576 NW2d 398 (1998). MCL 24.281 provides that if a majority of the agency officials "who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served on the parties." In this case, the members of the PSC read the record and issued a decision. Consequently, the procedure utilized by the PSC in deciding this matter was specifically authorized by statute. Moreover, CEO was not precluded from presenting any evidence that it wished to have considered. CEO had the opportunity at the hearing to present witnesses, to cross examine witnesses, and to introduce documentary evidence, but chose to forego presenting any rebuttal evidence. We therefore conclude that CEO was not denied due process. *Traxler, supra*.

CEO next contends that the PSC's order was unlawful and unreasonable to the extent that it erroneously awarded Dr. Agrawal compensatory damages in the amount of $10,000 when Dr. Agrawal did not request compensatory damages and the record did not support the award of such damages.

A complaint filed with the PSC must contain all the information on which the complainant intends to rely. MCL 484.2203(2). However, MCL 484.2203(2) was not intended to preclude the enforcement of the MTA's penalty provisions. CEO correctly notes that Dr. Agrawal's complaint did not specifically request compensatory damages, and that he testified that he was not pursuing the matter for the purpose of collecting money damages. Nevertheless, because CEO was aware of the factual allegations underlying the PSC's finding that Dr. Agrawal was entitled to compensatory damages, CEO did not suffer prejudice arising from any lack of notice. *Canales*, *supra* at 500-501. Furthermore, the PSC's award of compensatory damages in the amount of $10,000 was supported by the evidence at the hearing. Dr. Agrawal testified that his time as a surgeon was worth $1,000 per hour. CEO failed to explore the issue of the extent of Dr. Agrawal's damages, and offered no rebuttal evidence on the issue. We note that proof of damages need not be mathematically precise. *Severn v Sperry Corp*, 212 Mich App 406, 415; 538 NW2d 50 (1995). In light of the applicable law and evidence, we cannot conclude that the PSC's order was unlawful or unreasonable. MCL 462.26(8).

CEO also argues that the PSC's order is unlawful in that it erroneously imposed a fine of $19,400 for charging Dr. Agrawal for a service he did not order, a violation of MCL 484.2502(b), when no such violation appeared in the complaint or found support in the evidence. CEO suggests that the PSC compounded its error by imposing a fine for each day of the ninety-seven day period from December 3, 1998, the first day on which charges were posted to Dr. Agrawal's account, through March 9, 1999, the day on which Dr. Agrawal's service was returned to AT & T, when CEO charged Dr. Agrawal for services he did not order at most over a period of nine days.

While Dr. Agrawal's complaint did not allege a violation of MCL 484.2502(b), we again observe that CEO had awareness of the factual allegations underlying this violation, and was not prejudiced by any lack of notice. *Canales*, *supra*. The fine imposed by the PSC, in the amount of $200 per day for each day on which a violation of the MTA occurred, was specifically authorized by MCL 484.2601(b). The undisputed evidence showed that although Dr. Agrawal did not receive an invoice from CEO until February 28, 1999, CEO had posted charges to his account beginning on December 3, 1998. Because the PSC's interpretation and application of the penalty provision in MCL 484.2601(b) was reasonable, and entitled to this Court's deference, *Canales*, *supra* at 496, we conclude that the PSC's order was not unlawful. MCL 462.26(8).

CEO lastly avers that the PSC's order is unlawful because it imposed separate fines for the same conduct when it assessed both the maximum fine of $20,000 for a first violation of the statute prohibiting slamming, MCL 484.2505(1), and a separate fine in the amount of $19,400 based on its finding that Dr. Agrawal was billed for services that he did not order, a violation of MCL 484.2502(b).

The PSC's findings that CEO engaged in slamming, conduct prohibited by MCL 484.2505(1), and that CEO billed Dr. Agrawal for a service that he did not affirmatively order, conduct prohibited by MCL 484.2502(b), both were supported by the requisite evidence.

Canales, *supra*. MCL 484.2506(2) plainly provides for the PSC's imposition of a fine for a violation of MCL 484.2505(1), while MCL 484.2601(b) provides for the PSC's imposition of a fine for a violation of MCL 484.2502(b). Because the statutory scheme clearly supports the imposition of separate fines, and because we defer to the PSC's interpretation and application of the penalty provisions of the MTA, we conclude that the PSC's order was not unlawful. MCL 462.26(8).

Affirmed.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra