STATE OF MICHIGAN

COURT OF APPEALS

SBC MICHIGAN,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, COMPETITIVE LOCAL EXCHANGE CARRIERS ASSOCIATION OF MICHIGAN, MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., MCIMETRO ACCESS TRANSMISSION SERVICES, INC., MCI WORLDCOM COMMUNICATIONS, INC., BROOKS FIBER COMMUNICATIONS OF MICHIGAN, INC., AT&T COMMUNICATIONS OF MICHIGAN, INC., TCG DETROIT, XO MICHIGAN, INC., and ATTORNEY GENERAL,

Appellees.

UNPUBLISHED
May 10, 2005

No. 251117
PSC
LC No. 00-011830

Before: Cooper, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Appellant appeals as of right from orders of the Michigan Public Service Commission (PSC) modifying a remedy plan designed to ensure appellant's provision of nondiscriminatory access and services to its competitors, and denying rehearing. We reverse.

I. Facts

This case stems from recent changes in state and federal law such that local telephone companies that once enjoyed monopoly status are now obliged to provide certain facilities and services, on a nondiscriminatory basis, to other providers in order to ensure a competitive environment.

Historically, local telephone networks consisted of facilities constructed and operated by an incumbent local exchange carrier (LEC), such as Ameritech Michigan, now appellant SBC Michigan. The Michigan Telecommunications Act (MTA), MCL 484.2101 *et seq.*, was designed to encourage competing providers to enter that market. MCL 484.2101(2)(b)-(d). Shortly after the enactment of the local-competition provisions of the MTA, Congress enacted

the local-competition provisions of the Federal Telecommunications Act of 1996 (FTA), 47 USC 151 *et seq*. These acts require incumbent LECs to allow competing local exchange carriers (CLECs) to purchase network elements on a nondiscriminatory basis. 47 USC 251; MCL 484.2305 and 484.2355.

Appellant, as a local provider wishing to offer long-distance service, was obliged to satisfy the FCC that "they have opened their local markets in that state to competition . . . ." *AT&T Corp v FCC*, 343 US App DC 23, 28; 220 F3d 607 (CA DC, 2000), citing 47 USC 271. In 1999, the PSC issued an order adopting performance measures and benchmarks to be used in reviewing appellant's compliance with those obligations. The PSC modified those measures and benchmarks over time, and then, in an order dated April 17, 2001, adopted an enforcement mechanism or remedy plan.

Among competing proposed plans, the PSC chose to adopt and modify appellant's, a system for filing monthly reports regarding its state of compliance, and making payments to the CLECs for instances of noncompliance affecting the CLECs' customers, and to the state for violations affecting competition. The plan initially retained the "K table," a statistical adjustment appellant insisted would avoid penalizing as discriminatory violations what were really ordinary and random variations in performance. However, the order did require that liquidated damages and assessments for discriminatory performance failures be increased by a multiplier of two.

In its order of July 25, 2001, the PSC suspended the multiplier, while declaring a continuing intention to monitor appellant's performance to determine if an escalation of remedies would be appropriate to ensure nondiscrimination. The K table was retained, rebuffing petitions from CLECs to eliminate it.

In February, 2002, the PSC commenced review of the suspended multiplier. Several CLECs continued to urge elimination of the K table. On March 26, 2003, the PSC deleted the K table from the remedy plan, concluding that it was "necessary and appropriate to increase the incentives for SBC to provide nondiscriminatory access to its facilities and services," and that the "most effective modification to the remedy plan for that purpose is elimination of the K table, which excuses a number of instances of noncomplying performance each month." With that action, the PSC declined to reinstate the multiplier. In denying rehearing, the PSC elaborated on its reasoning as follows:

> . . . [T]he Commission cautioned the parties against overreliance on intricate statistical approaches if the effect on the methodology would interfere with "the practical need to design a remedy plan that will assist in implementing the nondiscrimination provisions of state and federal law." By the time that it issued the March 26, 2003 order, the Commission had become convinced that the K table was doing just that . . . .
>
> It is also not clear that the K table is appropriate as a means of correcting any asymmetry. The purpose of the remedy plan is to induce SBC not to discriminate against CLECs relative to the service it provides itself. It is not clear why SBC's success in some performance measures should excuse its deficiencies. The nondiscrimination standard does not suggest that SBC should be rewarded for

providing some instances of better treatment of its competitors or allowed to justify instances of discrimination on the basis of its performance as a whole.

This appeal followed. Appellant argues that the PSC erred in failing to resort to contested-case proceedings, and that the remedy plan conflicts with federal law.[1]

II. Evidentiary Foundations

All regulations, practices, and services prescribed by the PSC are initially presumed lawful and reasonable. MCL 462.25. See also *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 satisfactory evidence" that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecommunications Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999).

A. Liquidated Damages and Assessments

Appellant suggests that the remedy plan is flawed because it imposes penalties on an ongoing basis without recourse to formal contested-case proceedings in each instance. Appellees respond that this issue was litigated, decided, and not appealed below, and thus, not properly before this Court. We agree with appellees.

In reply comments dating from 1998, appellant objected to methodology under which routine penalties were assessed for routine failures to provide nondiscriminatory access or service, as opposed to resorting to individualized contested-case proceedings. But appellant admits to having both lost that argument below, and declined to appeal the decisions involved. Appellant in fact included such a system of liquidated damages for failures to provide nondiscriminatory access in its own proposed such plan, which the PSC adopted with modifications as reflected in the April 17, 2001, order, which itself was not appealed. Indeed, the self-executing aspect of that plan is one of the factors that won the FCC's approval of appellant's request to enter the long-distance service market in Michigan. *In re Application by SBC Communications*, 18 FCCR 19,024, ¶ 174.

Appellant should thus not be heard to complain that not every sundry penalty-inducing incident will not trigger a formal evidentiary proceeding. Because appellant waived timely appellate objections in the matter, and acquiesced in such methodology by including it within its own proposal, that aspect of the remedy plan now stands as the law of the case. As the PSC stated in denying rehearing, appellant

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[1] Of the ten appellees of record in this case, only four have offered arguments for this appeal—the PSC in one brief, and MCImetro, MCI WorldCom, and Brooks Fiber, who refer to themselves collectively simply as "MCI," in another. For convenience, in this opinion, the MCI appellees will similarly be referred to collectively as "MCI."

> actively participated in designing the current remedy plan, which calls for it to make periodic payments as an incentive against noncompliance, and its original proposal formed the basis for the plan that is currently in effect. It cannot, at this late stage, disavow the plan because of some aspect of it that it does not like.

For these reasons, we deem that appellant's objections to a self-executing system of remedies in place of separate contest-case adjudications have been waived.

B. Elimination of the K Table

Appellant also argues that the decision to eliminate the K table without resort to the full adversarial contested-case process was error. We agree.

Appellees do not dispute appellant's assertion that the elimination of the K table stands to cost appellant approximately $5 million per year. In fact, the PSC specifically stated that increased payments from appellant was a desired result of that modification. The elimination of the K table, then, creates a substantially new scheme that places a good deal of appellant's money in jeopardy.

The PSC possesses only that authority granted to it by the Legislature. *Consumers Power Co v Public Service Comm*, 460 Mich 148, 155; 596 NW2d 126 (1999). Authority must be granted by clear and unmistakable language. *Id.* at 155-156. Section 601 of the MTA authorizes the PSC to order remedies or penalties. Section 203(1) directs that, upon receipt of an application or complaint, or on its own motion, the PSC may conduct an investigation, hold hearings, and issue findings and orders "under the contested hearings provisions" of the Administrative Procedures Act (APA), MCL 24.201 *et seq*. Appellant argues that the PSC eliminated the K table in violation of both procedural requirements.

1. MCL 484.2601

Section 601 of the MTA governs remedies and penalties "[i]f after notice and hearing the commission finds person has violated this act . . . ." As appellant points out, this statutory language envisions the imposition of a penalty only after a violation has been proved upon notice and hearing. For that reason, however, it is inapplicable in this instance.

Setting forth the adverse consequences of certain acts or omissions is not the same as administering a penalty. See *In re MCI Telecommunications Complaint, supra* at 427-428 (quoting this Court's unpublished opinion below), 431 (adopting this Court's reasoning). "The PSC can indeed use its ratemaking authority to compel or punish the conduct of regulated utilities by outlining the rate-making consequences of certain acts or omissions." *Id.* at 428. In the instant case, although the PSC does not maintain that the modification of the remedy plan is an exercise in rate-making authority, what the two cases have in common is that neither involved punishment for a past violation. For the same reason that § 601 did not apply in *In re MCI*, it does not apply here.

2. APA Procedures

Appellant argues that the PSC violated the requirements of the APA by issuing the 2003 orders without allowing it to present evidence or cross-examine witnesses. We agree.

A administrative "rule" is an "[a]gency regulation, . . . standard, policy, . . . or instruction of general applicability that implements or applies law enforced or administered by the agency . . . ." MCL 24.207. Exemptions from that definition include "[a] determination, decision, or order in a contested case." MCL 24.207(f). Accordingly, "an agency has the option of setting [legislatively mandated] standards either pursuant to the rule-making provisions of the APA or case by case through adjudication." *Northern Michigan Exploration Co v PSC*, 153 Mich App 635, 649; 396 NW2d 487 (1986).

In this case, the PSC, through contested-case proceedings, modified and adopted appellant's remedy plan on April 17, 2001, which included both a multiplier and the K table. No party chose to appeal, leaving the evidentiary or procedural underpinnings behind that decision unchallenged. However, the order made clear that the PSC would closely monitor appellant's compliance with its duty to offer access and services to its competitors in a nondiscriminatory manner, and stood prepared to adjust appellant's incentives as needed.

A subsequent adjustment was suspension of the multiplier, putting appellant in apparently its best position to date. The initial decision to include both a multiplier and the K table, then the subsequent one to suspend the multiplier, are not at issue in this appeal. At issue is whether the PSC was entitled to eliminate the K table, as an alternative to reintroducing a multiplier, without allowing the full adversarial presentation and testing of evidence bearing on the question.

Among the constraints on administrative action is that decisions may not be capricious or arbitrary. MCL 24.306(1). The PSC's statements in denying rehearing indicate that general reflections, more than evidentiary development, led to the conclusion that retaining the K table was poor policy. Its elimination had the effect of imposing on appellant a substantially greater regulatory burden. Such a major revision of the existing regulatory scheme should have followed only from full adversarial development of an evidentiary record. The PSC itself, when suspending the modifier, acknowledged that future adjustments to appellant's cooperation incentives may be in order, "after a hearing if necessary," and MCI and certain other CLECs similarly called for formal evidentiary proceedings to adjudicate a request for elimination of the K table or reinstatement of the modifier.

For these reasons, we conclude that the PSC overstepped its authority in eliminating the K table without affording appellant an opportunity to present evidence, or rebut adverse evidence, concerning appellant's compliance with its duty to provide nondiscriminatory access and service to its competitors, and whether such additional coercive pressure in that regard was warranted. See *In re Public Service Comm Guidelines*, 252 Mich App 254, 267; 652 NW2d 1 (2002) (the PSC may not "eschew[] the procedural mandates of the APA in favor of its own course of action" in setting policy to response to "a changing industry").

C. Substantial Evidence

The lack of proper procedure in this instance has left the PSC without a proper evidentiary basis for its decision. Reversal is appropriate where agency action is not supported by competent, material, and substantial evidence on the whole record. See MCL 24.306(1). "A

PSC order is unreasonable if the evidence does not support it." *Detroit Edison Co v Public Service Comm*, 264 Mich App 462, 465; 691 NW2d 61 (2004). The evidentiary inquiry concerns "admissible and admitted evidence." See *Associated Truck Lines, Inc v Public Service Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966) (O'Hara, J., dissenting). The APA recognizes that proper evidentiary process includes the opportunity for cross-examination. MCL 24.272(4).

In this case, the PSC offers but brief argument in defense of the assertion that it lacked an evidentiary basis for its decision to eliminate the K table. This consists of quoting from the order denying rehearing, which refers to nothing more specific than "several months of data," then adding, "The Commission decision to eliminate the K table from the performance remedy plan is supported by the record . . . ," while reminding this Court that the PSC is entitled to some deference.

MCI similarly points to general statements from the PSC that it had reviewed appellant's performance, including several months' data, and, thus, concluded that elimination of the K table was appropriate. MCI then cites some record evidence, first relying on an affidavit setting forth credentials of one Dr. Michael Kalb, and opining that that the K table operated to excuse several violations on appellant's part each month. However this affidavit dates from May 2001, and the PSC squarely rejected admonishments to drop the K table in its July 25, 2001, order. Accordingly, this affidavit did not provide evidence of appellant's performance while operating with the K table in the months following the July 2001 decision to retain it, and, thus, could not have contributed to the amorphous "several months of data" to which the PSC referred in explaining its March 2003 decision to eliminate it.

MCI also refers to its Exhibit 10 without elaboration. This is a reproduction of a document prepared by a consulting concern, labeled as an exhibit dated April 1, 2002. The gist of that document is to question appellant's reporting habits as a reliable basis for CLECs to evaluate appellant's performance. Each page includes the disclaimer, "*This exception report is for discussion purposes only and is subject to change without notice*" (italics in original). This document questions appellant's reporting methodology, but does not challenge appellant's actual performance.

MCI otherwise points to only comments of the parties and conclusions of the PSC, not to evidence actually admitted and subjected to cross-examination. While there is no dispute that the K table had operated to shield appellant from much financial liability, the questions whether appellant thus invited more coercive pressure to abide by its nondiscrimination obligations, and whether elimination of the K table was reasonably suited to that goal, remain fact-sensitive ones militating in favor of full evidentiary development. The PSC's decision to change its position without recourse to new record evidence in the matter constitutes capricious, arbitrary, and unreasonable action.

Because the PSC imposed a substantially greater regulatory burden on appellant without citing or developing a firm evidentiary basis for concluding that appellant invited such change by some degree of failure to fulfill its obligation to provide the CLECs with nondiscriminatory access and services, we conclude that the PSC exceeded its authority in taking that step.

III. Federal Law

Appellant argues that the PSC's orders eliminating the K table and denying rehearing violate a federal duty not to impose on an incumbent LEC a duty to provide access and service to CLECs that is superior to what it provides itself or its own customers, and also run afoul of federal legislation setting forth provisions for the negotiation and arbitration of interconnection agreements between LECs and CLECs. Neither argument warrants appellate relief.

A. 47 USC 251(c)(2)(C)

Section 251(c)(2)(C) of the FTA lists, as among the duties that an LEC has to CLECs, that "to provide . . . interconnection with the local exchange carrier's network . . . that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection . . . ." 47 USC 25(c)(2)(C). Appellant interprets this statute as prohibiting the PSC from requiring that it provide better access and service to its CLECs than what it provides to itself or its own customers.

However, for the reasons discussed in part II above, this issue is not ripe until a proper factual basis exists for establishing that an actual controversy exists.[2] Without a proper evidentiary record of appellant's performance since the PSC last chose to retain the K table, it is impossible to ascertain whether appellant can be charged with having been forced, in effect, to choose between paying penalties and subsidizing its competitors by providing them access and service superior to what appellant provides itself and its own customers.

Appellant implies that K table methodology is required to avoid forcing it to overperform in serving its competitors. However, in petitioning for rehearing of the decision to eliminate the K table, appellant itself had proposed a plan that did not include the K table, thus indicating that such methodology is not a necessity, but instead a negotiable tool. The question then remains whether the PSC has provided as a regulatory scheme that coerces appellant, in effect, to give its competitors an unfair advantage. This inquiry is a fact-sensitive one requiring full evidentiary development of the sort that has not taken place here. We therefore decline to address this issue at this time.[3]

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[2] Courts adhering to the ripeness doctrine "will not act when the issue is only hypothetical or the existence of a controversy merely speculative. . . . The question in each case is whether there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Black's Law Dictionary (6th ed, 1990), p 1328. See also *Paragon Props Co v Novi*, 452 Mich 568; 550 NW2d 772 (1996).

[3] However, we note that 47 USC 251(c)(2)(C) explicitly prohibits an incumbent LEC's inferior performance in connection with CLECs while tacitly allowing a requirement of superior performance, at least to the extent that such superiority is the incidental result of taking pains to avoid the prohibited inferiority. Persuasive caselaw suggests that state, if not federal, regulatory agencies are free to impose some measure of superior performance on LECs. *Indiana Bell Telephone Co v McCarty*, 362 F3d 378, 393 (CA 7, 2004) ("The 'at least' indicates that something more than equal is allowable"); *Iowa Utilities Bd v Federal Communications Comm*, 120 F3d 753, 812-813 (CA 8, 1997), reversed in part on other grounds sub nom *AT&T Corp v*
(continued…)

B. 47 USC 252

The FTA obligates an incumbent LEC to negotiate in good faith with a CLEC over the terms and conditions of interconnection agreements. *Verizon North Inc v Strand*, 367 F3d 577, 582 (CA 6, 2004).

> Section 252 describes the procedures for the negotiation, arbitration, and approval of interconnection agreements. It establishes an intricate regulatory scheme with various burdens and responsibilities placed upon incumbents, competitors, and state regulatory commissions. After a competitor requests interconnection from an incumbent, "an [incumbent] may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in [§ 251(b)-(c)]." [*Verizon North Inc, supra* at 582, quoting 47 USC § 252(a)(1) (bracketed interpolations in original).]

The states are bound to respect the supremacy of federal law. US Const, art VI, § 2. Federal legislation preempts state law to the extent that the latter interferes with the methodology through which the federal statute is intended to achieve its goal. *Gade v Nat'l Solid Wastes Mgmt Ass'n*, 505 US 88, 103; 112 S Ct 2374; 120 L Ed 2d 73 (1992). Accordingly, to the extent that an order of the PSC is inconsistent with the FTA, the order is preempted. *Verizon North Inc, supra* at 583.

Appellant argues that the remedy plan constitutes a fixed tariff standing in conflict with the negotiation and arbitration provisions of 47 USC 252. MCI responds that appellant's earlier inaction in this regard precludes consideration of this issue. Again, the preclusion argument is well taken.

Despite appellant's emphasis on elimination of the K table, that aspect of the remedy plan does not bear on the question of the plan's status as a stand-alone tariff existing apart from the negotiation and arbitration provisions of the FTA. Instead, the PSC's dropping of the K table has led appellant to dispute the propriety of a standing remedy plan in general.

Under the doctrine of judicial estoppel, "'a party who has *successfully* and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.'" *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994), adding emphasis and quoting *Lichon v American Universal Ins Co*, 435 Mich 408, 416; 459 NW2d 288 (1990). Having proposed and accepted a standing remedy plan in connection with the April 17, 2001, order, appellant should not be heard to complain now, only because it no longer approves of the precise form that the plan has taken. If 47 USC 252 afforded appellant some rights to assert against such a standing remedy plan, those were appellant's to waive, which appellant did in this instance.[4]

(…continued)

Iowa Utilities Bd, 525 US 366; 119 S Ct 721; 142 L Ed 2d 835 (1999).

[4] Also militating against resolution of this issue is appellant's failure to set forth differentiated facts and argument reflecting the distinction between CLECs participating in the disputed

(continued…)

IV. Conclusion

For the reasons discussed in part II, above, we reverse the PSC's 2003 orders and remand this case for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra

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remedy plan as amendments to existing interconnection agreements and those participating in it as a tariff. See MCR 7.212(C)(7); *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). Although we choose not to address this issue, we note that persuasive caselaw suggests that state tariffs can be reconciled with the federal negotiation and arbitration process, "as long as the regulations do not interfere with the ability of new entrants to obtain services." *Michigan Bell Telephone Co v MCImetro Access Transmission Services, Inc*, 323 F3d 348, 359 (CA 6, 2003). See also *id.* at 360 ("Under the system of cooperative federalism established by the Act, it is permissible for Michigan to maintain a tariff system alongside the agreements negotiated under the Act.").