STATE OF MICHIGAN

COURT OF APPEALS

QUICK COMMUNICATIONS, INC., Petitioner-Appellant,	UNPUBLISHED October 7, 2010
V	No. 286679 Michigan Public Service Commission
MICHIGAN BELL TELEPHONE COMPANY, d/b/a AT&T MICHIGAN, Respondent-Appellee	LC No. 00-015381; 00-015391
and MICHIGAN PUBLIC SERVICE COMMISSION, Appellee.	

Before: SAAD, P.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

Quick Communications, Inc. ("Quick") appeals as of right from an order of the Michigan Public Service Commission ("the PSC" or "the Commission") by which the PSC (1) adopted a mediator's clarification of a recommended settlement that had previously been adopted by the PSC as a final order, and (2) dismissed Quick's motion to enforce the final order. We reverse and remand for further proceedings.

Quick provides telecommunications services as a competitive local exchange carrier ("CLEC"). It has an interconnection agreement ("ICA") with Michigan Bell Telephone Company, doing business as AT&T ("AT&T"), an incumbent local exchange carrier ("ILEC"). In November 2001, Quick began offering Centrex service to its customers and purchased the service from AT&T. Quick represented that AT&T had two products for providing wholesale unbundled network element ("UNE") Centrex service. The first product was a 2 wire analogue loop with a port combination where the port came with all Centrex features available in the serving switch. In its complaint, Quick indicated that this was available to CLECs under AT&T's Tariff 20R, part 5, section 2. It referred to this product as the "tariffed Centrex product." The second product was also a 2 wire analogue loop with a port combination, but was provided in conjunction with "Centrex system features, per common block." This second product was available under the ICA and was referred to as the "Coast ICA Centrex product." It

was significantly more expensive. Quick filed a complaint and maintained that for four years commencing in June 2003, AT&T had improperly charged it for the Coast ICA Centrex product instead of the tariffed Centrex product.

MCL 484.2203(14), a provision of the Michigan Telecommunications Act, MCL 484.2101 *et seq.*, ("MTA"), requires that complaints based on ICAs be sent for alternative dispute process. The PSC therefore sent the dispute to mediation. The mediator issued a recommended settlement on October 29, 2007. Pertinent to this appeal, the mediator's recommendation was based on the conclusion that (1) AT&T had improperly imposed Coast ICA Centrex product charges upon Quick, (2) the parties' ICA gave Quick the choice of purchasing either from the tariff or from a price schedule attached to the ICA, and (3) Quick had expressed its desire to purchase the tariffed Centrex product. As part of the recommended settlement, the mediator included the following provision:

> The Mediator further recommends that, immediately upon Quick's payment of the . . . $54,999.83 balance, AT&T should withdraw its June 19, June 28, and August 31 demand letters and, *from this date forward*, allow Quick to obtain *wholesale UNE-based Centrex service by purchasing 2-wire analog loop service and Centex ports pursuant to AT&T's Tariff 20R, Part 5, Section 2.* [Emphasis added].

Quick and AT&T agreed to the recommended settlement. Pursuant to MCL 484.2203a(3), which provides that a recommendation will become a final order if the parties accept the recommendation, the PSC issued an order on December 18, 2007, adopting the recommendation and closing the case.

On January 14, 2008, Quick filed a motion with the PSC to enforce the December 18th order. Quick maintained that it had the right to purchase and AT&T had the duty to sell "wholesale UNE-based Centrex service by purchasing 2-wire analog loop service and Centrex ports" at tariff rates. AT&T, which had stopped providing wholesale UNE-based Centrex service, responded in pertinent part by asserting that the recommended settlement, read as a whole, simply entitled Quick to purchase Centrex services based on tariff pricing as opposed to pricing under the parties' ICA. It is undisputed that wholesale UNE-based Centrex service is not available under Tariff 20R, Part 5, Section 2. Quick was taking the position that under the recommended settlement AT&T would have to reinstitute the wholesale UNE-based Centrex service. AT&T maintained that the Federal Communications Commission ("FCC") had eliminated this unbundled service in *In the Matter of Unbundled Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 20 FCC Rcd 2533, ¶ 226 (2005), also referred to as the 2005 Triennial Review Remand Order and the "TRRO." Further, AT&T asserted that with "extensive efforts by the Commission," through orders in PSC Case No. U-14447, all parties had converted to the bundled service consistent with the TRRO. Additionally, AT&T asserted that, consistent with an order in U-14447 to ensure conformance with the TRRO, AT&T and Quick had amended their ICA accordingly.

The PSC referred this matter to the mediator. On April 23, 2008, the mediator issued a clarification of the recommended settlement. The mediator stated that the wrong alleged in Quick's complaints for which a remedy was fashioned was "simply AT&T's earlier attempt to deny Quick the option of purchasing Centrex service from either the parties' ICA or AT&T's tariffs." Further, the mediator stated that "neither of Quick's complaints even suggested that

AT&T should be required to add some new UNE-based Centrex service to its panoply of offerings." The mediator also reasoned that

> Quick's proposed interpretation of the recommended settlement would—by requiring AT&T to effectively re-institute a UNE-P[1] Centrex offering—directly conflict with (1) the TRRO . . . , (2) the Commission's orders in Case No. U-14447, and (3) the parties' current ICA.
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> For example, in its TRRO, the FCC decided that incumbent local exchange carriers like AT&T would no longer be required to provide CLECs with access to unbundled local switching (including Centrex switching), either as a stand-alone element or in a combination, such as the UNE-P. Toward that end, the FCC eliminated any ongoing requirement to provide unbundled local switching and, instead, directed CLECs like Quick to "submit orders within twelve months to convert their embedded UNE-P customer base to UNE-L or another arrangement." TRRO, p 120. As mentioned earlier, the FCC went on to require that, during the 12-month transition period, the rates for unbundled local switching would be increased by one dollar.
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> Moreover, on February 28, 2005, the [PSC] commenced a collaborative proceeding in Case No. U-14447 to monitor and facilitate implementation of Accessible Letters issued by AT&T (and others) in response to the TRRO. That proceeding not only clarified issues like the appropriate application of the FCC's 12-month transition rate, but also gave rise to a uniform interconnection agreement amendment for AT&T and the CLECs to use in making their existing ICAs conform to the requirements of the TRRO. On November 8 and 30, 2005, respectively, Quick executed the amendment to its ICA with AT&T and the Commission approved that amendment.
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> Pursuant to its amended ICA with AT&T, Quick (like all other CLECs) was then required to--and apparently did--transition its UNE-P customers to alternative service arrangements. These new arrangements generally consisted of either (1) building and using its own facilities, or (2) taking service from AT&T pursuant to its resale tariffs.

The mediator concluded:

> [I]t seems clear that the October 29, 2007 recommended settlement did not intend (despite its technically inaccurate statement regarding Quick's future access to UNE-based Centrex service) to require AT&T to resume providing Quick with UNE-P-based service. Rather, from a reading of the recommendation as a whole, it is apparent that all that was intended with regard to future Centrex service was

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[1] A UNE-P is an unbundled network element-platform by which some unbundled network elements are put together and then offered for sale.

> that AT&T provide Quick the choice of whether to take such service under AT&T's tariff or from the pricing schedule attached to the parties' ICA. Such a conclusion is consistent with (1) the relief requested through the complaints filed in Cases Nos. U-15381 and U-15391, (2) the FCC's directives in the TRRO regarding the elimination of UNE-based access to local switching, (3) the Commission's multiple orders in Case No. U-14447, and (4) the amended ICA entered into by AT&T and Quick.

In adopting this recommendation by an order dated July 1, 2008, the PSC stated:

> The Commission finds that the settlement recommendation by the mediator is not a contract between the parties. Pursuant to MCL 484.2203a(3), after the parties accepted the recommendation of the mediator, the recommendation was adopted as the final order in the contested case. The interpretation of the settlement agreement by the mediator requested by the March 11 order is reasonable and the Commission adopts the mediator's clarification of the settlement agreement and dismisses the January 14 motion by Quick to receive UNE-based pricing of Centrex service based on the December 18, 2007 order in this docket.

Before we address the recommended settlement, the resulting order, and the mediator's clarification, we must discern the character of the Commission's December 18th order. In part, this involves a question of statutory interpretation. In *In re Complaint of Rovas*, 482 Mich 90, 108; 754 NW2d 259 (2008), the Court held:

> When considering an agency's statutory construction, the primary question presented is whether the interpretation is consistent with or contrary to the plain language of the statute. While a court must consider an agency's interpretation, the court's ultimate concern is a proper construction of the plain language of the statute.
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> MCL 484.2203a(3) provides:
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> Within 7 days after the date of the recommended settlement, each party shall file with the commission a written acceptance or rejection of the recommended settlement. *If the parties accept the recommendation, then the recommendation shall become the final order in the contested case* under section 203. [Emphasis added.]

This characterizes the recommended settlement as an order, as opposed to a settlement agreement or contract. If this ended our inquiry, the PSC's interpretation of its order would be entitled to substantial deference. In *In re MCI Telecommunications Corp*, 240 Mich App 292, 303; 612 NW2d 826 (2000), the Court stated:

> With regard to issues of interpretation of MPSC orders in particular, this Court accords substantial deference to the MPSC's interpretations of its own orders, and this Court ordinarily will uphold the MPSC's interpretations as long as they are supported by the record or otherwise reasonable. *ABATE v Public Service Comm*, 219 Mich App 653, 661-662; 557 NW2d 918 (1996).

However, in *Klawiter v Reurink*, 196 Mich App 263, 266; 492 NW2d 801 (1992) (citations omitted), the Court observed that the acceptance of a mediation award was like a consent judgment.

> [T]he acceptance of a mediation award is not analogous to a judgment entered after a trial and verdict by a judge or jury. . . . "In truth, a mediation proceeding that ends with the parties' acceptance of the mediators' award is like a consent judgment reached after negotiation and settlement." [*Espinoza v Thomas*, 189 Mich App 110, 117; 472 NW2d 16 (1991)]. . . . A consent judgment differs substantially from the usual litigated judgment because it is primarily the act of the parties rather than the considered judgment of the court. . . . Factors similar to those relevant in settlement negotiations would be considered by the mediators . . . .

Moreover, in *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994), the Court stated: "Judgments entered pursuant to the agreement of parties are of the nature of a contract." Similarly, in *Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 379; 521 NW2d 847 (1994), the Court stated:

> [A]n agreement to settle a pending lawsuit, which is what the stipulation at issue was, is a contract, and is to be governed by the legal principles applicable to the construction and interpretation of contracts. [See also *Kloian v Dominos Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006); *MacInnes v MacInnes*, 260 Mich App 280, 289; 677 NW2d 889 (2004).]

The December 18th order did not reflect the considered judgment of the PSC after a contested case hearing; it simply reflected the agreement of the parties to the recommended settlement. We therefore conclude that the PSC's order is a consent judgment and that the law of contracts applies.

In the present case, both parties insist that the contract can be enforced as written. However, the recommended settlement cannot be enforced as written because it provided for something that does not exist. There is no wholesale UNE-based Centrex service available under AT&T's Tariff 20R, Part 5, Section 2. Thus, the parties' understandings of the subject provision were mistaken.[2]

Preliminarily, we note that there was no classic mutual mistake of fact in this case. A "mutual mistake of fact" has been described as "an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction." *Ford*

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[2] Quick asserts that its understanding of the provision was not mistaken and, as evidence, points to the fact that the mediator apparently took the language for this provision from Quick's complaint. Quick suggests that it understood the language it initially used in its own complaint. However, even if the mediator did take the language from the complaint, the language purports to provide a service under a tariff that does not provide for the service.

Motor Co v City of Woodhaven, 475 Mich 425, 442; 716 NW2d 247 (2006) (construing the term as used in MCL 211.53a). A contract entered into based on a mutual mistake of fact may be held unenforceable. *Solo v Chrysler Corp (On Rehearing)*, 408 Mich 345, 352-353; 292 NW2d 438 (1980). It is undisputed that the recommended settlement erroneously indicated that wholesale UNE-based Centrex service was available under Tariff 20R, Part 5, Section 2. Discordant with this fact, both parties believed that it provided something wholly different. However, they did not share the same belief. Quick believed that wholesale UNE-based Centrex service was available under the specific tariff whereas AT&T believed that Centrex service, but not wholesale UNE-based Centrex service, was available. Thus, there was no classic mutual mistake of fact that would support dissolution of the contract.

Nonetheless, in 4 Williston on Contracts, § 70:107, p 538, it states:

> In a slightly changed scenario, rescission may be allowed where both parties are mistaken as to the same contractual subject matter, but their mistakes are different. Because of the common subject matter of the mistakes, they are not unilateral mistakes. To illustrate mutual mistake: if A says the thing was painted red, and B says it was painted blue, there may be a mutual mistake if both agree that the thing should not have been painted at all. Thus, if the mistakes relate to the same subject matter, avoiding a contract is still permissible. [Footnote omitted].

In Restatement Contracts, 2d, § 20, pp 58-59, it states:

> (1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and
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> (a) neither party knows or has reason to know the meaning attached by the other; or
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> (b) each party knows or each party has reason to know the meaning attached by the other.
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> (2) The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if
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> (a) that party does not know of any different meaning attached by the other, and the other knows the meaning attached by the first party; or
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> (b) that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party.

See also Restatement Contracts, 2d, § 201(1), p 83.

Here, the negligence in expression cannot be attributed to either party alone and, likewise, neither party can be deemed blameless with regard to the confusion. Since Tariff 20R, Part 5, Section 2 is in the public domain, see http://cpr.bellsouth.com//pdf/mi/0005-0002.pdf, Quick should have been aware that it did not provide for wholesale UNE-based Centrex service.

This is especially true given the progression of events at both the federal and state levels that led to the termination of UNE-based service, as well as the amendment of the ICA. Conversely, given the express reference to wholesale UNE-based Centrex service in the recommended settlement, there is no sound explanation for AT&T's understanding that it meant the Centrex service provided for in Tariff 20R, Part 5, Section 2. Moreover, we are not blind to the sophistication of the parties before us. Each presumably knew of the potential for confusion by the other.

"'In order to form a valid contract, there must be a meeting of the minds on all the material facts.'" *Stanton v Dachille*, 186 Mich App 247, 256; 463 NW2d 479 (1990), quoting *Heritage Broadcasting Co v Wilson Communications, Inc*, 170 Mich App 812, 818; 428 NW2d 784 (1988) (citations omitted). There was no meeting of the minds with respect to the subject provision. Given this failure, we conclude that the only adequate remedy is to hold that the recommended settlement is unenforceable.

Quick argues that AT&T should be estopped from denying that wholesale UNE-based Centrex service was provided for in Tariff 20R, Part 5, section 2. In *Hughes v Almena Twp*, 284 Mich App 50, 78; 771 NW2d 453 (2009), this Court set forth the elements of equitable estoppel:

> An equitable estoppel arises where (1) a party by representation, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on this belief, and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts.

As previously noted, Quick was in a position to review the tariff before accepting the recommended settlement. Accordingly, assuming for purposes of discussion that AT&T should have clarified Quick's mistake, Quick did not justifiably rely on AT&T's failure to do so. Accordingly, equitable estoppel does not apply.

Quick also argues that the PSC acted in excess of its statutory authority when it referred the motion to enforce the December 18th order to the mediator, and when it adopted the mediator's clarification as its order. Since we hold that the recommended settlement is unenforceable, we need not address these issues.

Finally, Quick argues that a contested case hearing was required to address AT&T's failure to honor the recommended settlement, and that its request for discovery should have been granted. Whether a contested case hearing was statutorily required necessitates a construction of the MTA. As previously noted, issues of statutory interpretation are reviewed de novo but an agency's interpretation of a statute regarding matters it is charged with regulating is entitled to respectful consideration and, if persuasive, should not be overruled without cogent reasons. *In re Complaint of Rovas*, 482 Mich at 102, 108.

MCL 484.2203 provides that upon receipt of an application or complaint filed under the MTA, the PSC may conduct an investigation, hold hearings, and issue its findings and order under the contested hearings provisions of the Administrative Procedures Act of 1969, MCL 24.201 *et seq.* ("APA"). However, as previously noted, absent an emergency, a dispute involving an ICA must be referred for alternative dispute process under MCL 484.2203a. Subsection (7) of this statute provides that an attempt to resolve a contested case under this

provision is exempt from the requirements of § 484. 203 and the APA. Given that this case proceeded under § 203a, neither the APA nor contested case hearing protocols applied.

We reverse the PSC's July 1, 2008 and December 18, 2007 orders, and nullify the acceptance of the recommended settlement. We remand this case to the PSC for a new alternative dispute process, which shall be conducted before a different mediator. We do not retain jurisdiction.

/s/ Joel P. Hoekstra