STATE OF MICHIGAN

COURT OF APPEALS

QUICK COMMUNICATIONS, INC.,

Petitioner-Appellant,

v

MICHIGAN BELL TELEPHONE COMPANY, d/b/a AT&T MICHIGAN,

Respondent-Appellee

and

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.

UNPUBLISHED
October 7, 2010

No. 286679
Michigan Public Service Commission
LC No. 00-015381; 00-015391

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

MURRAY, J. (*concurring*).

I concur with my colleague's conclusion that the order of the Michigan Public Service Commission should be reversed. However, as discussed below, I do so not because of contract law, but on the basis that the Public Service Commission's first order adopting the mediator's proposed resolution was in significant part unlawful. Because the order was unlawful, and the unlawful provision gutted what would have been a significant benefit to Quick Communications, Inc., the Public Service Commission should have vacated the order rather than send it to the mediator for clarification, and the parties should have been returned to the statutory mediation process.

The lead opinion acknowledges that both MCL 462.25(8), and our cases enforcing that statute, indicate that an order of the Public Service Commission cannot be overturned unless it is shown by clear and satisfactory evidence that the order is either unlawful or unreasonable. MCL 462.25(8); *Attorney General v Public Service Comm*, 206 Mich App 290, 294; 520 NW2d 636 (1994). Citing to *Associated Trucklines, Inc v Public Service Comm*, 377 Mich 259; 140 NW2d

515 (1966), the *Attorney General* Court held that "[t]he term 'unlawful' has been defined as an erroneous interpretation or application of the law, and the term 'unreasonable' has been defined as unsupported by the evidence." *Id*. Although the lead opinion acknowledges this standard of review[1], the opinion immediately leaps into an essentially de novo review under contract law as to whether the order—which the majority considers essentially to be a consent judgment—should be enforced. In my view, however, a reversal can only occur if it is demonstrated by clear and satisfactory evidence that the order is either unlawful or unreasonable.

The order first adopted by the Public Service Commission constitutes an erroneous application of the law as it required AT&T to provide a service that is not permitted under federal law. The provision at issue provides that AT&T should "allow Quick to obtain wholesale UNE-based Centrex service by purchasing 2-wire analog loop service and Centrex ports pursuant to AT&T's Tariff 20R, Part 5, section 2." However, as all parties seem to concede, several years before the entry of the orders at issue, the FCC issued a set of unbundling rules in the 2005 Triennial Review Remand Order (TRRO). In that TRRO, the FCC implemented a nationwide ban on unbundled local circuit switching. TRRO, ¶ 226; *Covad Communications Co v Federal Communications Comm*, 450 F3d 528, 536 (CA DC, 2006).[2] That is, however, exactly what the contested provision within the order required AT&T to provide to Quick.[3] But because the law is clear that a state commission cannot impose unbundling requirements that are inconsistent with the FCC's orders and rules, *Illinois Bell Telephone Co v Box*, 548 F3d 607, 611-612 (CA 7, 2008); *Verizon North Inc v Strand*, 367 F3d 577, 584-586 (CA 6, 2004), the PSC's order requiring as much was contrary to law. Accordingly, once it was presented with Quick's motion to enforce that part of the order, the PSC should have vacated the order and remanded the parties back to the statutory mediation process.

For several reasons I would not employ the contract analysis utilized by the lead opinion. First, the law set forth regarding mutual mistake is found nowhere in Quick's briefs, so it has failed to prime the appellate pump in that regard. Second, and more importantly, any rights

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[1] Neither party has cited a case to our Court indicating that this typical standard of reviewing a Public Service Commission order should not apply in this case even though the final order resulted from the parties' acceptance of a mediator's recommended settlement. However, in *Attorney General*, 206 Mich App at 294-296, our Court applied the stringent statutory standard of review when addressing a challenge to a Public Service Commission order that was entered as a result of a settlement between a utility and the Commission.

[2] Counsel for Quick admitted at oral argument that these unbundled services were not available at the time the order was entered by the Public Service Commission, nor have they been at any time since.

[3] I am not as convinced as the dissent that Quick should have realized that this provision was not intended to be included in the order. After all, that is exactly what the order provided for after these highly competent parties engaged in the mediation process. Typically we require parties to adhere to what they have agreed to, and though this telecommunications area is anything but typical, the principle remains the same, and I remain convinced that the elimination of what would have been a very beneficial provision for one party (albeit illegal) required the Public Service Commission to remand for further mediation.

Quick had from the PSC's adoption into an order of the recommended settlement were not based on contract law, but on the provisions of the order itself. See MCL 484.2203a(3) and *Attorney General v Michigan Public Service Comm*, 249 Mich App 424, 434-435; 642 NW2d 691 (2002). This is especially true since the PSC reserved the right to modify the terms of the order, similar to the way it had done in *Attorney General*, 249 Mich App at 435. See, also, MCL 462.24. Accordingly, I would vacate and remand for these reasons, rather than for those offered by the lead opinion.

/s/ Christopher M. Murray