STATE OF MICHIGAN

COURT OF APPEALS

LUCRE, INC., Petitioner/Appellant/Cross-Appellee, v VERIZON NORTH, INC. and CONTEL OF THE SOUTH, INC., doing business as VERIZON NORTH SYSTEMS, Respondents/Appellees/Cross-Appellants, and MICHIGAN PUBLIC SERVICE COMMISSION, Appellee/Cross-Appellee.	UNPUBLISHED October 20, 2011 No. 298296 Michigan Public Service Commission LC No. 00-016082

Before: M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Lucre, Inc. appeals as of right from the Michigan Public Service Commission's (PSC) opinion and order dismissing Lucre's complaint against Verizon North, Inc. and Contel of the South, Inc., doing business as Verizon North Systems (Verizon). Verizon cross appeals as of right. We affirm.

I. FACTS

A. SUBSTANTIVE FACTS

Lucre and Verizon are local exchange carriers that provide local exchange and other telecommunications services. Lucre is a "competitive local exchange carrier," whereas Verizon is an "incumbent local exchange carrier." An incumbent local exchange carrier is a local exchange carrier that provided telephone exchange service to a locality at the time the

Telecommunications Act of 1996 (the Act)[1] was enacted and was a member of the exchange carrier association.[2] As explained in *Bell Atlantic Corp v Twombly*[3]:

> Congress withdrew approval of the [incumbent local exchange carriers'] monopolies by enacting the Telecommunications Act of 1996 (1996 Act), 110 Stat 56, which "fundamentally restructure[d] local telephone markets" and "subject[ed] incumbent local exchange carriers to a host of duties intended to facilitate market entry." In recompense, the 1996 Act set conditions for authorizing [incumbent local exchange carriers] to enter the long-distance market.
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> "Central to the [new] scheme [was each (incumbent local exchange carrier's)] obligation . . . to share its network with competitors," which came to be known as "competitive local exchange carriers" A [competitive local exchange carrier] could make use of an [incumbent local exchange carrier's] network in any of three ways: by (1) "purchas[ing] local telephone services at wholesale rates for resale to end users," (2) "leas[ing] elements of the incumbent local exchange carrier's network 'on an unbundled basis,'" or (3) "interconnect[ing] its own facilities with the incumbent local exchange carrier's network."

The PSC approved an interconnection agreement between Verizon and BRE Communications, L.L.C. (BRE) on February 17, 1999. BRE and Verizon had negotiated some of the agreement's terms and conditions, but they were unable to agree on other terms and conditions. They submitted the issues upon which they could not agree to arbitration before the PSC. They did not submit any issue pertaining to Verizon's obligation to pay for its proportionate use of BRE transport facilities (a "facilities charge" provision). In fact, Verizon had template agreements that it used in negotiating interconnection agreements with competitive local exchange carriers. Verizon maintained that it intentionally left out a facilities charge provision.

On December 12, 2000, Lucre chose to interconnect with Verizon by opting into the existing Verizon/BRE interconnection agreement. Lucre and Verizon submitted a joint application for adoption of the BRE/Verizon interconnection agreement; no changes were made to the interconnection agreement. Lucre was to be "substituted in place of BRE in the Terms wherever appropriate." In MPSC Case No. U-12902, the PSC approved Lucre's election to opt in by an opinion and order dated June 5, 2001.

Lucre's and Verizon's two systems or networks were not contiguous. Moreover, at the time of the opt in, their systems or networks were not directly interconnected. Rather, "the traffic between Lucre and Verizon was transited by AT&T Michigan . . . through AT&T's

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[1] 104 PL 104.

[2] See 47 USC 251(h).

[3] *Bell Atlantic Corp v Twombly*, 550 US 544, 549; 127 S Ct 1955; 167 L Ed 2d 929 (2007) (internal citations omitted).

tandem in Grand Rapids, Michigan." Lucre subsequently contracted for the installation of transport facilities, including certain dedicated transport circuits, in order to achieve direct interconnectivity.

Direct interconnectivity was first achieved in February 2002. The Verizon-originated traffic over the AT&T switching equipment, including the Grand Rapids tandem, was correspondingly diverted, making it unnecessary for AT&T to transit Verizon's traffic. Verizon's use of the subject transport facilities, in proportion to Lucre's use, was 99.92 percent. In essence, Lucre maintains that Verizon should be required to pay its proportionate share for the use of the transport facilities, and Verizon maintains that it should not be required to do so because the Verizon/BRE interconnection agreement did not include a facilities charge provision.

B. PROCEDURAL FACTS

After failed attempts at resolving this issue based on other theories, Lucre filed the complaint in this case. Lucre sought a PSC ruling on whether the omission of a facilities charge was lawful under state and federal statutes, regulations, and orders. The PSC concluded that omission of a facilities charge provision did not violate any law or regulation. It stated that 47 USC 251(b) and (c) outlined requirements for interconnection agreements, including a facilities charge provision, but concluded that these requirements applied to *arbitrated* interconnection agreements or any portion thereof, not *negotiated* interconnection agreements or any portion thereof. It concluded that the BRE/Verizon interconnection agreement was and could be both arbitrated and negotiated, and that the facilities charge, or rather, its absence, was a negotiated term. Accordingly, it determined that §§ 251(b) and (c) did not require the provision. The PSC further concluded that 47 CFR 51 implemented these sections, and that, although it required a facilities charge provision, it provided that the requirement could be ignored if an agreement was negotiated.

II. STANDARD OF REVIEW

In *Attorney General v Public Serv Comm*,[4] this Court stated:

> 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. To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. And of course, an order is unreasonable if it is not supported by the evidence. In sum, a final order of the PSC must be authorized by law and supported by competent, material and substantial evidence on the whole record.

Regarding findings of fact by the PSC, in *In re Complaint of Rovas*,[5] the Court stated:

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[4] *Attorney General v Public Serv Comm*, 279 Mich App 180, 188-189; 756 NW2d 253 (2008) (internal citations omitted).

> The constitution requires that . . . agency findings be "supported by competent, material and substantial evidence on the whole record." Review of an administrative agency's fact finding is akin to an appellate court's review of a trial court's findings of fact in that an agency's findings of fact are entitled to deference by a reviewing court. In its fact finding capacity, the agency has reviewed evidence, such as witness testimony, and it is in the best position to evaluate the credibility and weight of that evidence. Similar to the clear error standard of review for circuit courts, under the constitutional and statutory standards of review, a reviewing court must ensure that the finding is supported by record evidence; however, the reviewing court does not conduct a new evidentiary hearing and reach its own factual conclusions, nor does the reviewing court subject the evidence to review de novo.

Noting that the present case was resolved based on a stipulated record and citing *Vergote v K Mart Corp*,[6] Lucre argues that there should be no deference to the PSC's findings of fact. However, this Court has held that PSC findings are conclusive when competent evidence supports them.[7]

With regard to the interpretation of a statute, this Court stated the following in *In re Complaint of Rovas*[8]:

> This standard requires "respectful consideration" and "cogent reasons" for overruling an agency's interpretation. Furthermore, when the law is "doubtful or obscure," the agency's interpretation is an aid for discerning the Legislature's intent. However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue.

III. REQUIREMENT OF A FACILITIES CHARGE PROVISION IN AN INTERCONNECTION AGREEMENT

A. OVERVIEW

Lucre argues that the Verizon/BRE interconnection agreement was an arbitrated agreement and that a facilities charge provision therefore could not be excluded. Alternatively, Lucre argues that Verizon was statutorily and by rule required to pay for dedicated transmission facilities in proportion to its use and, coextensively, that the facilities charge provision could not be omitted from the Verizon/BRE interconnection agreement pursuant to negotiation. We disagree.

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[5] *In re Complaint of Rovas*, 482 Mich 90, 101; 754 NW2d 259 (2008).

[6] *Vergote v K Mart Corp*, 158 Mich App 96, 106; 404 NW2d 711 (1987).

[7] *Consumers Power Co v Public Serv Comm*, 196 Mich App 687, 691; 493 NW2d 424 (1992), citing *Short Freight Lines, Inc v Public Service Comm*, 25 Mich App 408; 181 NW2d 560 (1970).

[8] *In re Complaint of Rovas*, 482 Mich at 103.

B. ARBITRATED VERSUS NEGOTIATED AGREEMENT

Preliminarily, Lucre suggests that an interconnection agreement must be regarded as either negotiated or arbitrated, and that if any part is arbitrated, the agreement must be deemed arbitrated. However, this would be inconsistent with the statutory language. Under 47 USC 251(c)(1), Verizon had the duty to negotiate an interconnection agreement in good faith with BRE in accordance with 47 USC 252. Section 252 provides in pertinent part:

> (a) Agreements arrived at through negotiation.
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> (1) Voluntary negotiations. Upon receiving a request for interconnection, services, or network elements pursuant to section 251,[9] an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251.[10]
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> * * *
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> (b) Agreements arrived at through compulsory arbitration.
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> (1) Arbitration. During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.
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> (e) Approval by State commission.
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> (1) Approval required. Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.
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> (2) Grounds for rejection. The State commission may only reject—
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> (A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that—
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> (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

[9] 47 USCS § 251.

[10] 47 USCS § 251(b), (c).

> (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or
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> (B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251,[11] including the regulations prescribed by the Commission pursuant to section 251,[12] or the standards set forth in subsection (d) of this section.

Because § 252 provides for negotiation of interconnection agreements and then arbitration of unresolved issues, interconnection agreements can be hybrid agreements that are partially negotiated and partially arbitrated. Section § 252(e) refers to rejection of "an agreement (or any portion thereof) adopted by negotiation" and rejection of "an agreement (or any portion thereof) adopted by arbitration." Given that a portion of an interconnection agreement not adopted by negotiation would be arbitrated and a portion not adopted by arbitration would be negotiated, most if not all interconnection agreements likely would be both negotiated and arbitrated. There is no cogent reason for overturning the PSC's interpretation of these statutes to mean that an agreement that results in arbitration of some issues is not an arbitrated agreement with respect to all issues. Thus, an agreement can be both negotiated in part and arbitrated in part.

Lucre maintains that, regardless, the agreement in this case was arbitrated. Lucre points to the fact that the BRE/Verizon interconnection agreement's cover page refers to the agreement as "this arbitrated Agreement." Moreover, in Verizon's letter to Lucre regarding Lucre's election to opt in to the BRE/Verizon interconnection agreement, Verizon states that Lucre is adopting "the arbitrated Interconnection Agreement" between BRE and Verizon. Similarly, Lucre referred to the interconnection agreement as an "arbitrated Interconnection Agreement" and the "BRE arbitrated agreement." Lucre maintains that it justifiably relied on the representation that this was an arbitrated agreement when it opted in to the BRE/Verizon interconnection agreement.

However, Lucre stipulated that

> [i]n 1997, Verizon and BRE [] entered into negotiations concerning an interconnection agreement . . . and, when not able to reach agreement on all terms and conditions of such agreement, arbitrated before the [PSC] the terms and conditions upon which they could not agree.

Since it is undisputed that the BRE/Verizon interconnection agreement was negotiated in part and arbitrated in part, we cannot regard it as an arbitrated agreement in its entirety.

Lucre next maintains that the facilities charge provision, or the absence thereof, was not negotiated. It acknowledges testimony that the term was removed from Verizon's template

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[11] 47 USCS § 251.

[12] 47 USCS § 251.

agreements. However, it points to the absence of evidence that BRE was aware of the provision, or its removal, or that the matter was discussed. Further, it maintains that negotiation cannot be inferred from the fact that the issue was not identified for arbitration.

However, Verizon maintained that it intentionally left out a facility charge provision. That a facility charge provision was not reinserted arguably gives rise to an inference that, as part of the negotiations, BRE agreed to the omission of this term. Consistent with the administrative law judge's finding, the failure to submit the issue for arbitration is some evidence that it was the subject of negotiation. Moreover, as the administrative law judge pointed out, the BRE/Verizon interconnection agreement, reduced to writing, recited that it was "an integrated package that reflects a balancing of interests critical to the Parties." This implies that BRE did not view the term as critical to its interests. Competent evidence and reasonable inferences drawn from the evidence supported the administrative law judge's finding, which the PSC adopted, that "the parties exercised their right to negotiate and exclude a facilities charge." It is entitled to deference.

Lucre's next argument is premised on the agreement being viewed as an arbitrated agreement. Since this premise fails, so does the argument. Specifically, Lucre notes that under § 252(a)(1), an agreement can be negotiated "without regard to the standards set forth in subsections (b) and (c) of section 251." Subsections (b) and (c) of § 251 set forth various obligations of local exchange carriers. Pertinent here was § 251(b)(5), which imposes a "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Thus, if an agreement were negotiated, the negotiated agreement would not have to include a provision for reciprocal compensation. There is no corresponding provision in subsection (b) that would allow for an arbitrated agreement to exclude a provision for reciprocal compensation. Allowing that a § 251(b)(5) provision for reciprocal compensation might be read to include a facilities charge provision, Lucre contends that the agreement was arbitrated and that the provision requiring reciprocal compensation/a facilities charge could therefore not be omitted. However, as discussed above, the fact that some portions of the agreement were arbitrated does not mean that the entire agreement was arbitrated. Moreover, based on the determination that this specific term was subject to negotiation, § 252(a)(1) indicates that it could be omitted.

C. OMISSION OF THE NEGOTIATED FACILITY CHARGE PROVISION

Lucre next argues that, regardless of the actual agreement, 47 CFR 51.709(b) and precursors to that regulation require that Verizon pay for its proportionate share of the transmission facilities. Part 51.709(b) provides:

> The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods.

Lucre argues that subsections (b) and (c) of § 251 do not cover this facilities charge provision, and that it therefore cannot be omitted pursuant to negotiation under § 252(a)(1).

The PSC concluded that Part 709(b) was promulgated pursuant to §§ 251 and 252. This was based on 47 CFR 51.1(b), which expressly states that "[t]he purpose of these rules is to implement sections 251 and 252 . . ." The PSC noted that, similar to § 252(a)(1)'s treatment of the obligations in subsections (b) and (c), 47 CFR 51.3 provides:

> To the extent provided in section 252(e)(2)(A) of the Act [dealing with the grounds for rejection of a negotiated agreement as set forth above], a state commission shall have authority to approve an interconnection agreement adopted by negotiation even if the terms of the agreement do not comply with the requirements of this part.

Thus, the PSC concluded that, consistent with § 252(a)(1) and Part 51.3, BRE and Verizon could disregard the facilities charge provision as part of their negotiated agreement.

Lucre challenges this reasoning. First, it points out that a regulation cannot trump a statute. And it argues that the statute did not allow for negotiation to omit the facilities charge term for which regulation provides. It also argues that the statute allowed for negotiating out reciprocal compensation arrangements, and that the concept of reciprocal compensation does not encompass a facilities charge. In support of this argument, it cites the *TelNet* case,[13] which *Verizon North, Inc v TelNet Worldwide Inc*[14] affirmed. In the *TelNet* case, one issue was whether TelNet could require Verizon to pay "a charge for using TelNet's dedicated transmission connection to transport Verizon's calls to the TelNet system or whether TelNet was limited to the reciprocal compensation fee for transport and termination of calls."[15] In affirming the PSC's determination that it could charge more for the dedicated connection, the District Court held:

> Here, Verizon is arguing that reciprocal compensation should be the exclusive compensation to TelNet for services that are not the same as those for which Verizon receives reciprocal compensation. Until the dedicated connection link was built, Verizon and TelNet each paid reciprocal compensation for their respective traffic from the point it reached the other's network to the termination point. Both previously paid a third party for carrying their respective traffic from their own network to the other's network. Now, Verizon suggests that the cost of the dedicated transmission should be built and maintained for both parties' use but that only TelNet should pay. Reciprocal compensation to TelNet does not include the dedicated transmission link because that portion of the transmission does not cover the "same services" covered by the reciprocal compensation paid to Verizon. It is apparent from the regulations that reciprocal compensation does not

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[13] *In the matter of the application of TelNet Worldwide, Inc, for arbitration of interconnection rates, terms and conditions and related arrangements with Verizon North, Inc and Contel of the South, Inc, d/b/a Verizon North Systems*, Case No. U-13931 (February 24, 2005).

[14] *Verizon North, Inc v TelNet Worldwide Inc*, 440 F Supp 2d 700 (WD Mich, 2006).

[15] *Id.* at 702.

include and was not contemplated to cover the transmission links between the networks.[16]

Verizon's argument on this point is unavailing for two reasons. First, although § 252(a)(1) only allowed for disregard of the obligations set forth in § 251(b) and (c), including reciprocal compensation, the CFRs expressly created the facilities charge requirement, and the CFRs provided that it could be excluded in a negotiated agreement. Second, as previously noted, Part 709(b) (the facilities charge requirement) was promulgated pursuant to §§ 251 and 252. The PSC argues that it was promulgated pursuant to § 251(b)(5), the reciprocal compensation provision. While *TelNet* drew a distinction between reciprocal compensation and a dedicated facilities charge, there is some similarity between the two concepts and, as the PSC points out, there is no other provision under which Part 709(b) could have logically been promulgated. Lucre has not identified an alternative statutory provision. If § 251(b)(5) is viewed as encompassing the facility charge provision, the § 252(a)(1) allowance for disregard of the obligations set forth in § 251(b) and (c) was available to BRE and Verizon.

Finally, Lucre argues that, regardless of whether the agreement was negotiated or arbitrated, the duty to pay for the dedicated transport facilities was required by law. Again, it points to *TelNet* and Part 709(b), as well as what is referred to as the "Local Competition Order."[17] All three of these authorities provide for a dedicated facilities charge. However, none of these authorities undermines the premise that when an agreement is negotiated, such a term may be omitted. In fact, as the PSC pointed out, in *TelNet* the facilities charge was a disputed issue in arbitration. Moreover, the Local Competition Order indicates that the steps taken in it are "initial measures that will enable the states and the [PSC] to begin to implement sections 251 and 252."[18] As previously noted, § 252 implements the negotiation/arbitration procedure.

For these reasons, we conclude that the PSC did not err in dismissing Lucre's complaint against Verizon. Given our resolution of this issue, it is unnecessary to consider Verizon's issue on cross appeal.

We affirm.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck

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[16] *Id.* at 709.

[17] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, 16027, ¶ 1062 (1996) ("The amount an interconnecting carrier pays for dedicated transport is to be proportional to its relative use of the dedicated facility.").

[18] 11 FCC Rcd 15507, ¶ 6.