STATE OF MICHIGAN

COURT OF APPEALS

AMERITECH MICHIGAN,

Plaintiff-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Defendant-Appellee.

UNPUBLISHED
November 26, 1996

No. 181394
LC No. 00010620

Before: Smolenski, P.J., and Holbrook, Jr., and F. D. Brouillette,* JJ.

PER CURIAM.

Plaintiff Ameritech Michigan appeals from orders entered on September 8, 1994, and November 10, 1994, by the Michigan Public Service Commission (PSC) adopting a methodology for determining long run incremental cost (LRIC) pricing for application under the Michigan Telecommunications Act (MTA), 1991 PA 179, MCL 484.2101 *et seq*.; MSA 22.1469(101) *et seq*., and granting in part and denying in part rehearing. We affirm.

The MTA, which by its terms took effect January 1, 1992, and is repealed effective January 1, 2001, MCL 484.2604(1); MSA 22.1469(604)(1), significantly changed the regulatory framework for telecommunications services in Michigan. Pursuant to the version of MCL 484.2202(f); MSA 22.1469(202)(f) relevant to this litigation, the PSC was required to issue a report to the Legislature on or before January 1, 1994, recommending legislation, providing information on data collected, and advising the legislative and executive branches regarding various aspects of the industry. The PSC issued its report on December 21, 1993. At all times relevant to this litigation, § 2202(f)(viii) required the PSC to develop a method to determine LRIC pricing "for each component of the local exchange network and access service." The MTA did not include a definition of LRIC pricing. To fulfill the statutory mandate, the PSC Staff envisioned a two-step process for developing an LRIC basis for pricing network components of local exchange and access rates, and identified nine costing principles related to defining LRIC pricing. On June 16, 1994, the PSC issued an order and notice of opportunity to comment. Ameritech and other companies filed comments.

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* Circuit judge, sitting on the Court of Appeals by assignment.

On September 8, 1994, the PSC issued an order adopting the Staff report with certain modifications. The PSC rejected the argument that the MTA did not give it the authority to require companies to conduct LRIC pricing studies. Noting that MCL 484.2308(1); MSA 22.1469(308)(1) prohibited the use of basic local exchange or access rates to subsidize or offset the cost of other products or services by providing those products at less that LRIC pricing, the PSC stated that to interpret the MTA as allowing it to use an LRIC pricing methodology but not to allow it to require companies to perform LRIC pricing studies would be an unreasonable reading of the MTA because it would prevent enforcement of the prohibition against subsidization. In addition, the PSC rejected the argument that § 308(1) applied only to regulated services, and that it did not have the authority to require companies to conduct LRIC pricing studies for unregulated services. The focus on other products and services in § 308(1) included unregulated services. Furthermore, the PSC found that it had the authority to require the unbundling of services. MCL 484.2305(1)(m); MSA 22.1469(305)(1)(m) prohibited a provider of basic local exchange service from bundling unwanted products or services for sale or lease to another provider. The PSC stated that to conclude that it did not have the authority to enforce this section was an unreasonable reading of the MTA. The PSC emphasized that the Staff did not recommend that local exchange carriers be required to change any prices or unbundle any services; rather, the Staff recommended that unbundling should be considered in other proceedings.

Ameritech filed a petition for rehearing challenging the PSC's conclusions that it had the authority both to order LRIC pricing studies for regulated and unregulated services, and to order the unbundling of services. The Michigan Exchange Carriers Association (MECA), an organization of small telephone companies, also filed a petition for rehearing.

In an order entered on November 10, 1994, the PSC granted in part and denied in part the petitions for rehearing. The PSC rejected the argument that it did not have the authority to require the unbundling of services. Again relying on § 305(1)(m), the PSC concluded that it would be unreasonable to read the MTA as precluding it from enforcing the prohibition against bundling of unwanted products or services. The PSC emphasized that it did not rule on the extent of its authority to require unbundling, that it did not determine what constitutes unbundling, and that it was not requiring local exchange carriers to unbundle services or change prices. Moreover, the PSC rejected the argument that it did not have the authority to require the filing of LRIC pricing studies for both regulated and unregulated services. It reasoned that because § 308(1) provided that basic local exchange or access rates should not subsidize other services, including unregulated services, compilation of cost information for both types of services was necessary to determine if subsidization was occurring.

The standard of review for PSC orders is narrow and well established. Pursuant to MCL 462.25; MSA 22.44, 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; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC bears the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8). The term "unlawful" has been defined as an erroneous interpretation of application of the law, and the term "unreasonable" has been

defined as unsupported by the evidence. *Associated Truck Lines, Inc v Public Service Comm*, 377 Mich 259; 140 NW2d 515 (1966). Moreover, Const 1963, art 6, § 28 also applies, and provides that a final agency order must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. *Attorney General v Public Service Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987). A reviewing court gives due deference to the PSC's administrative expertise, and is not to substitute its judgment for that of the PSC. *Yankoviak v Public Service Comm*, 349 Mich 641, 648; 85 NW2d 75 (1975); *Building Owners and Managers Ass'n of Metropolitan Detroit v Public Service Comm*, 131 Mich App 504, 517; 346 NW2d 581 (1984), aff'd 424 Mich 494 (1986).

Initially, Ameritech argues that the MTA did not authorize the PSC to impose requirements that providers prepare and file LRIC pricing studies for both regulated and unregulated services. We disagree. In *Telephone Ass'n of Michigan v Public Service Comm*, 210 Mich App 662; 534 NW2d 223 (1995), this Court addressed a similar issue. In that case, the PSC issued an order of notice and opportunity to comment, inviting interested parties to comment on a proposal requiring telecommunication service providers to file some 151 items of data for each NNX group, which includes all local telephone numbers carrying the same first three digits. The data was to be filed for the purpose of monitoring the level of telecommunication subscriber connection within each exchange, as required by § 202. The Telephone Association of Michigan (TAM), an association of 37 companies providing basic local exchange service, objected to the proposal on the grounds that the information sought was not relevant to the PSC's duty to monitor and that it was unduly burdensome. The PSC rejected the TAM's arguments and issued an order establishing the monitoring program. On appeal, this Court affirmed the PSC's order. Acknowledging that while the judicial deference accorded the construction of a statute by the agency chosen to enforce it is generally given only to long-standing interpretations, due regard must always be given to legislative intent. Therefore, due deference must be given to an administrative agency when it exercises the powers necessary to effectuate authority granted by the Legislature. This Court held that the establishment of the monitoring program was within the PSC's authority under § 202(a). 210 Mich App at 670-673.

In this case, as in *Telephone Ass'n*, *supra*, it is clear that MCL 484.2201(1); MSA 22.1469(201)(1) gave the PSC the authority to enforce the MTA. The PSC relied on § 202(f)(viii), which required the formulation of a method for determining LRIC pricing, and § 308(1), which prohibited subsidization of unregulated products or services. In order to enforce the prohibition against subsidization, the compilation of LRIC pricing studies was necessary to enable the PSC to analyze the costs of various products and services. Only then could the PSC determine if subsidization was occurring. The PSC's requirement that LRIC pricing studies be filed for both regulated and unregulated services was a reasonable construction of § 201(1) and § 308(1), and effectuated the intent of the Legislature.

Next, Ameritech contends that the PSC acted unlawfully by adopting the LRIC pricing filing requirements pursuant to the notice and comment procedure rather than via a contested case hearing. This argument is without merit.

A "rule" is defined in part as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency." MCL 24.207; MSA 3.560(107). A rule promulgated without compliance with the rulemaking requirements is invalid. MCL 24.243(1); MSA 3.560(143)(1). Those requirements include promulgation, notice, public hearing, and approval by, inter alia, the joint legislative committee on administrative rules.

Neither order issued by the PSC addressed the question. Ameritech did not criticize the use of the notice and comment procedure until it filed its petition for rehearing. The PSC's use of the procedure was proper. The orders fell within the PSC's authority under § 202(b) to establish the form and manner of recordkeeping to ensure compliance with § 308(1). The orders did not constitute rules. They did not establish standards of general applicability because they did not apply to all providers. In addition, pursuant to § 207(j), a decision by an agency to exercise a permissive statutory power does not constitute a rule. Such "permissive statutory power" may be explicit or implicit. *Pyke v Dep't of Social Services*, 182 Mich App 619, 630; 453 NW2d 274 (1990). Under the MTA, the PSC had the implicit power to compel the filing of LRIC pricing studies in order to monitor against prohibited subsidization.

Finally, Ameritech argues that the PSC had no authority to order the unbundling of services, and that the PSC's statement in its September 8, 1994, order that it had such authority constituted an unlawful intrusion into management practices. Moreover, Ameritech argues that the order effected an unconstitutional taking by negating the right to hold private property and operate it in accordance with an original franchise. These arguments are without merit.

The PSC's conclusion that it had the authority to order unbundling of services is a reasonable interpretation of § 305(1)(m), which prohibited the bundling of unwanted services. To conclude that the PSC did not have the authority to order a practice which was prohibited by the act would negate the grant of authority to the PSC to administer the MTA. That conclusion notwithstanding, the PSC did not order Ameritech to unbundle any services in this case. Ameritech's arguments regarding unbundling and the constitutional ramifications of unbundling are premature and are not properly raised in this appeal. A separate contested case proceeding has dealt with the unbundling of certain services offered by Ameritech. Ameritech's arguments are more properly raised in the context of that case.

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Frances D. Brouillette