STATE OF MICHIGAN

COURT OF APPEALS

AMERITECH MICHIGAN,

Plaintiff-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Defendant-Appellee.

UNPUBLISHED
December 3, 1996

No. 187278
LC No. U-10665

Before: Markman, P.J., and McDonald and M. J. Matuzak,* JJ.

PER CURIAM.

Appellant Ameritech Michigan claims appeals from orders entered on March 10, 1995, and June 5, 1995, by the Michigan Public Service Commission (PSC) holding that it violated the Michigan Telecommunications Act (MTA), 1991 PA 179, MCL 484.2101 *et seq*.; MSA 22.1469(101) *et seq*., and denying rehearing, respectively. We affirm.

Ameritech sells a calling card which customers can use to make local or toll calls. At all relevant times, Ameritech imposed a surcharge of $0.65 for using the calling card. Beginning on July 1, 1994, and continuing through August 31, 1994, Ameritech conducted a promotion which discounted the surcharge to $0.55 when a customer used the calling card to make a local call. The charge for the local call was based on the applicable tariff, and was not charged at the regular flat rate of $0.25 for a call placed with a coin. The discount on the surcharge applied only when a customer made a local call. The surcharge remained the same for toll calls.

The MTA, which by its terms took effect January 1, 1992, and is repealed effective January 1, 2001, MCL 484.2604(1); MSA 22.1469(604)(1), significantly changed the regulatory framework for telecommunications services in Michigan. On August 24, 1994, the PSC Staff filed a complaint alleging that Ameritech had violated §305(1)(o)of the MTA, MCL 484.2305(1)(o); MSA 22.1469(305)(1)(o), by offering the calling card promotion without seeking prior approval from the PSC. At all times relevant to the issues in this case, §305(1)(o) stated:

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

(1) A provider of basic local exchange service shall not do any of the following:

(o) Except with the approval of the commission, jointly market or offer as a package, at a discounted rate, 1 or more unregulated services with a regulated service.

The parties stipulated to the following: that the regular surcharge for all calls placed with Ameritech's calling card was $0.65; however, that surcharge was discounted to $0.55 for local calls for the period July 1, 1994, through August 31, 1994; that offering the use of a calling card was an unregulated service; that local calling was a regulated service; that customers were not required to use a calling card to make a local call; that the discount applied only to local calls; and that Ameritech did not seek approval from the PSC before conducting the promotion.

In a proposal for decision (PFD) issued on February 1, 1995, the administrative law judge (ALJ) held that the language of §305(1)(o) was clear on its face and rejected Ameritech's contention that the statute prohibited only the joint marketing of a regulated service at a discount with an unregulated service without prior permission of the PSC. Section 305(1)(o) was included in a list of activities the prohibition of which was apparently designed to protect against cross-subsidization and the abuse of a monopoly. While a local provider was free to discount an unregulated service without PSC approval, such approval was required when an unregulated service was joined with a regulated service at a discount. In such a situation, the PSC would have limited jurisdiction to control the provision of the unregulated service.

Possible penalties included a fine of not less than $1,000 per day nor more than $20,000 per day, revocation of any license, and cease and desist orders. MCL 484.2601; MSA 22.1469(601). The ALJ observed that a calling card was a convenience for which a customer would expect to pay a higher fee. The purpose of the promotion, the ALJ concluded, seemed to be to increase use of calling cards, not to induce customers into paying a higher price for local calls. The ALJ found that the PSC Staff had failed to show that any ratepayer was actually harmed by the promotion and had not shown that the maximum possible fine of $20,000 for every day of the promotion was justified. The ALJ recommended that the PSC issue a cease and desist order requiring Ameritech to obtain prior approval for all future combined promotions.

In an order dated March 10, 1995, the PSC accepted in part and rejected in part the PFD. Noting that the issue of whether Ameritech violated the MTA turned on the interpretation of §305(1)(o), the PSC found that the plain language and construction of the statute required a provider to obtain prior approval before jointly marketing an unregulated service with a regulated service at a discount. The Legislature intended the statute to protect competitors from unfair competition from those who controlled facilities that made possible the connection with a customer. The PSC acknowledged that the language of a legislative conference committee report could be construed to support Ameritech's argument, but concluded that the language of the report ultimately could not take precedence over the language actually enacted into law. Moreover, the PSC observed that other provisions of the MTA supported a conclusion that PSC approval of the promotion was required. MCL 484.2304; MSA 22.1469(304), for example, authorized control of rates for regulated services;

thus, if the Legislature intended that PSC approval be obtained only when a regulated rate was discounted, the inclusion of §305(1)(o) would have been unnecessary. Further, MCL 484.2401; MSA 22.1469(401) provided that the PSC would not have authority over listed unregulated services, except as otherwise provided in various sections, including §305. The language of §401 suggested that the Legislature intended that §305 was to take precedence over the general freedom from regulation enjoyed by unregulated services. MCL 484.2308; MSA 22.1469(308) prohibited the use of basic local exchange rates to subsidize the cost of other products or services. The promotion offered by Ameritech engaged in such cross-subsidization. The PSC found that, when an unregulated service is jointly marketed with a regulated service, prior approval is required, regardless of whether the discount applied to the unregulated or the regulated service. The total for the offering would be the same in either case. The PSC concluded that Ameritech violated §305(1)(o) when it offered the calling card promotion without obtaining prior approval.

Noting that the purpose for the imposition of penalties was to protect ratepayers, §601, the PSC also concluded that in order to serve that purpose, the provisions of the MTA had to be effectively enforced. The record established that some economic loss may have occurred as a result of the promotion. Ameritech's advertising did not state that a local call placed with a calling card would be billed at a timed rate, i.e., so many cents per minute, rather than at the flat rate of $0.25 charged for a local call placed with a coin. Thus, a person making a three-minute local call with a calling card would pay a higher rate, aside from the calling card surcharge, than would a person making the same call with a coin. The PSC therefore concluded that, in addition to a cease and desist order, a fine of $1,000 per day, for a total of $62,000, was appropriate. Ameritech filed a petition for rehearing and reconsideration. In an order dated June 5, 1995, the PSC denied the petition.

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 only 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).

On appeal, Ameritech argues that the PSC erred by holding that the calling card promotion required prior approval under §305(1)(o). As originally proposed, §305(1)(o) would have barred all

joint marketing of unregulated and regulated services. A Senate-House Joint Conference Committee report described the purpose of §305(1)(o) as prohibiting the joint marketing of a discounted regulated service with an unregulated service without prior PSC approval. Ultimately, the Legislature prohibited local exchange providers from discounting a regulated service as an inducement to purchase an unregulated service. According to Ameritech, the PSC erred by concluding that §305(1)(o) was unambiguous and that no interpretation was needed. *Belanger v Warren Consolidated School District Board of Ed*, 432 Mich 575, 589; 443 NW2d 372 (1989). The PSC's ruling was contrary to the legislative intent that prior approval be obtained only when a basic local exchange provider jointly marketed an unregulated service with a regulated service with the regulated service offered at a discount. By its nature, the use of a calling card involves a regulated service, specifically the placing of a call. The instant promotion involved a discounted unregulated service and the discount was offered only on that service.

We disagree with Ameritech. Reviewing courts give great weight to any reasonable construction of a statute by the agency charged with enforcing the statute. Section 305(1)(o) prohibits a basic local exchange provider from jointly marketing or offering "as a package, at a discounted rate, 1 or more unregulated services with a regulated service" without prior PSC approval. Ameritech offered an unregulated service with a regulated service as a package at a discounted rate. The proffered discount was not applicable to all types of calls made with a calling card. The discount could be obtained only when a specific regulated service, a local call, was purchased. Because the discount was triggered by the purchase of an unregulated service §305(1)(o) applied, and prior PSC approval was needed. The plain language of the statute did not specify that the discount must apply to the regulated service before approval was required. Although we do not address the economic wisdom of the PSC's regulatory action here, the PSC's interpretation of §305(1)(o), and its conclusion that this provision was violated by Ameritech, was consistent with the language of the statute.

Next, Ameritech argues that the fine imposed by the PSC was unlawful, unreasonable, and not supported by the requisite evidence. Although we recognize that the PSC's sanctions in this case were harsh, we disagree with Ameritech. Section 601 provides that upon finding a violation of the MTA, the PSC "shall order remedies and penalties to protect and make whole ratepayers and other persons who have suffered an economic loss as a result of the violation . . ." The "remedies and penalties" that may be imposed include, but are not limited to, a fine of not less than $1,000 per day nor more than $20,000 per day for a first offense, a license revocation, and a cease and desist order. In interpreting §601, the PSC concluded that it had the authority and discretion to impose a penalty in order to protect ratepayers and to require compliance with the MTA.

The finding that economic loss occurred was supported by adequate evidence. A three-minute call placed with a calling card would cost $0.85[1] as opposed to $0.25 for the same three-minute call placed with a coin. The calling card call would cost the customer twenty percent more in calling charges apart from the surcharge. A longer call placed with a calling card would incur greater calling charges. The insert used to advertise the promotion did not apprise customers that a local call placed with a

calling card would be charged at a timed rate instead of at the flat rate. Any customer who opted to use a calling card for convenience not only paid the surcharge but very likely incurred higher calling charges.

We cannot say that the imposition of such a fine was not supported by §601. The language of §601 does not require that documented economic harm be traceable to a specific customer. Because Ameritech violated §305(1)(o) by offering the calling card promotion without prior approval, and because the finding that some economic impact occurred was supported by evidence, we are precluded from second guessing the PSC's exercise of its discretion in imposing the fine.

Affirmed.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ Michael J. Matuzak

[1] This represents a $0.55 surcharge plus $0.30 ($0.14 for the first minute and $0.08 for the second and third minute).