

STATE OF MICHIGAN
COURT OF APPEALS

GTE NORTH, INC.,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
MICHIGAN CABLE TELECOMMUNICATION
ASSOCIATION, MCI
TELECOMMUNICATIONS, ATTORNEY
GENERAL, AT & T COMMUNICATIONS, TCG
DETROIT, INC, AND AMERITECH MICHIGAN,

Appellees.

UNPUBLISHED
December 30, 1997

No. 198324
Public Service Commission
LC No. U-00010860

Before: Jansen, P.J., and Doctoroff and Gage, JJ.

PER CURIAM.

Plaintiff GTE North (GTE) appeals from a June 5, 1996, order of the Michigan Public Service Commission (PSC) and the PSC's September 12, 1996, order on rehearing. As described by the PSC, this PSC case concerns "interconnection issues generic to basic local exchange service competition" under the Michigan Telecommunications Act (MTA). MCL 484.2101 *et seq.*; MSA 22.1469(101) *et seq.* We reject GTE's arguments that the PSC decision resulted in an unconstitutional taking of GTE's property and we affirm.

GTE is in the business of providing "basic local exchange service" in parts of Michigan. See MCL 484.2102(B); MSA 22.1469(102)(a). GTE has been a regulated, monopoly provider of such service for many years and has a considerable investment in facilities and information.

Our Legislature has made a policy decision to deregulate telephone services and to introduce competition into telephone services. This policy is reflected in the MTA. 1991 PA 179, effective January 1, 1992, and 1995 PA 216, effective November 30, 1995. Providers of basic local exchange service such as GTE are required to "unbundle" and to price separately each basic local exchange service they provide and other providers must be allowed to purchase the services. MCL 484.2355;

MSA 22.1469(355), MCL 484.2357(1); MSA 22.1469(357)(1). The rate a provider of basic local exchange service can charge for interconnecting with its service is the provider's "total service long run incremental cost" (TSLRIC) of providing the service, at least until January 1, 1997. MCL 484.2352(1); MSA 22.1469(352)(1). Until studies regarding TSLRIC costs are approved by the PSC, the rates for "unbundled loops" and certain other services are to be those established pursuant to PSC case U-10647. MCL 484.2352(2); MSA 22.1469(352)(2). After January 1, 1997, the rate for interconnection shall be "just and reasonable" as determined by the PSC. Providers of local exchange service are to file tariffs with the PSC which set forth their wholesale rates, and such rates must be at levels no greater than the provider's current retail rate less the provider's avoided costs. MCL 484.2357(4); MSA 22.1469(357)(4). Thus, our Legislature has addressed some of the specifics of pricing during and after deregulation. Doing so was well within the Legislature's authority. *Duquesne Light Co v Barasch*, 488 US 299, 313; 109 S Ct 609; 102 L Ed 2d 646 (1989).

PSC Case U-10647 established interconnection arrangements between City Signal, Inc., and Ameritech Michigan, a provider of basic local exchange service. GTE participated in U-10647, but it was not GTE's rates that were specifically being established in that case. U-10647 gave rise to the instant proceeding, however. In U-10647 the PSC determined that a "generic" proceeding should be undertaken to consider interconnection issues relating to basic local exchange service competition. The instant case was therefore initiated by an order of the PSC entered in U-10647. Numerous parties participated by providing prepared testimony, exhibits and briefs.

Three paragraphs of the order portion of the PSC's June 5, 1996, decision in the instant case are relevant to this appeal.

A. Ameritech Michigan and GTE North Incorporated shall, within 60 days of the date of this order, file new total service long run incremental cost studies as provided in this order. Until those cost studies are approved by the Commission, the rates established by the Commission in Case No. U-10647 shall remain in effect.

B. Ameritech Michigan and GTE North Incorporated shall, within 30 days of the date of this order, file a tariff for unbundled ports, at a rate equal to the total service long run incremental cost for that service, and a total service long run incremental cost study to support that rate.

* * *

D. Within 30 days of the date of this order, Ameritech Michigan and GTE North Incorporated shall file tariffs for resale of all basic local exchange services that, as of January 1, 1996, these companies provided to retail customers. The required tariffs shall reflect wholesale rates as defined by law.

On rehearing, the PSC rejected GTE's contention that rates based upon GTE's TSLRIC for unbundled loops (and other services) would be at a confiscatory rate because, according to GTE, TSLRIC did not include overhead or a profit factor. The PSC found that interconnection rates set at

TSLRIC were not confiscatory and that such rates allowed GTE to recover its costs of providing the network. The PSC also found that the methodology for determining TSLRIC included a profit.

The PSC rejected GTE's argument that GTE would be forced to sell its basic local exchange services below its costs. GTE argued that certain of its retail services were already priced at a subsidized rate which was less than GTE's actual costs, and that a wholesale rate would be even farther below GTE's actual costs. The PSC recognized that GTE was permitted to restructure its rates for basic local exchange service in order to ensure that they were not less than TSLRIC. MCL 484.2304a; MSA 24.1469(304a).

Subsequent to the instant proceeding PSC case U-11281 was initiated. The purpose of U-11281 is to consider GTE's TSLRIC and to determine prices for unbundled network elements as well as for basic local exchange services. That is, the actual rates GTE is permitted to charge are the subject of U-11281.

In this appeal GTE claims that there has been an unconstitutional taking of its property under either a "regulatory takings" analysis or a "physical occupation" analysis. GTE contends that the PSC's orders establish pricing methods that will require GTE to accommodate competitors at unfairly low prices which will not ensure GTE an opportunity to earn a fair return on its investment. GTE also argues that there has been a "taking" because actual physical interference and occupation of GTE's property has been ordered by the PSC.

The PSC's orders are subject to review as provided in MCL 462.26; MSA 22.45. MCL 484.2203(7); MSA 22.1469(203)(7) [previously MCL 484.2203(5); MSA 22.1469(203)(5)]. It is GTE's burden as appellant to show by clear and satisfactory evidence that the challenged order of the PSC is unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8); *Michigan Intra-State Motor Tariff Bureau, Inc v PSC*, 200 Mich App 381, 387; 504 NW2d 677 (1993). All rates, fares, charges, classifications, regulations, practices and services prescribed by the PSC are presumed prima facie to be lawful and reasonable. MCL 462.25; MSA 22.44; *Michigan Consolidated Gas Company v PSC*, 389 Mich 624; 209 NW2d 210 (1973). "Unlawful" has been defined as an erroneous interpretation of applicable law, while "unreasonable" has been defined as unsupported by the evidence. *Associated Truck Lines, Inc v PSC*, 377 Mich 259, 279; 140 NW2d 515 (1966) (J. O'Hara dissenting on other grounds). Const 1963, art 6, §28 requires that a final agency order be authorized by law and supported by competent, material and substantial evidence on the whole record. *Attorney General v PSC*, 189 Mich App 138, 142; 472 NW2d 53 (1991). This Court gives due deference to the PSC's administrative expertise and will not substitute its judgment for that of the PSC, particularly in legislative matters such as setting rates. *Michigan Intra-State Motor Tariff Bureau, Inc, supra* at 388.

Private property may not be taken for public use without just compensation. US Const Am V and XIV; Const 1963, art 10, §2. GTE's claims of an unconstitutional taking are either premature or are not ripe. A claim of unconstitutional regulatory taking does not ripen until there has been a final decision regarding application of the law to the property involved. *Electro-Tech, Inc v H.F. Campbell Co*, 433 Mich 57, 79; 445 NW2d 61 (1989); *Lake Angelo Assoc v Twp of White Lake*, 198 Mich

App 65, 70-71; 498 NW2d 1 (1993). Although these cases dealt with building and zoning restrictions, the underlying principle – that there is no adjudicable damage until the regulatory process is complete – conceptually applies equally in the instant context.

GTE's rates for basic local exchange service and for interconnections are being established in U-11281. In the instant case the PSC basically established a framework for a future determination of GTE's rates to be charged under §§352 and 357, as well as for other rates. The two orders which the PSC issued follow the basic mandate prescribed by our Legislature in the MTA. Although rates for "unbundled loops" might actually be fixed pursuant to the determination in U-10647 (pursuant to §352(2)), there is no indication that such interim rates have yet been the basis for any resale of services, and, due to their interim nature, there might never be a resale under those rates. Moreover, our understanding (based particularly on the opinions of the PSC and the PSC's brief filed on appeal) is that U-10647 established a framework for interim rates, which rates would then be based upon GTE's own costs. Under these circumstances we abstain from ruling on the constitutionality of the PSC's application of MCL 484.2352; MSA 22.1469(352) and MCL 484.2357; MSA 22.1469(357) to GTE. Courts should not "grapple with a constitutional issue except as a last resort." *Taylor v Auditor General*, 360 Mich 146, 152; 103 NW2d 769 (1960). See also *Regents of the University of Michigan v Michigan*, 395 Mich 52, 59; 235 NW2d 1 (1975).

We recognize that there is a wide range of permissible rates which do not constitute a taking. A rate order is unconstitutional when it establishes a rate so low as to be confiscatory. *Michigan Bell Telephone Co v Public Service Comm*, 332 Mich 7, 26; 50 NW2d 826 (1952). No particular method or formula must be followed by the PSC when it determines rates. *Id.* at 36. A fundamental difficulty with GTE's position on appeal is that GTE has not shown that the rates it will be permitted to charge are confiscatory in the sense that they will not provide GTE with a return on its investment or will be less than its costs. These possibilities would be matters for consideration in the subsequent proceeding initiated to determine GTE's actual rates. But in the instant case what is known is that GTE's rates are to be based upon TSLRIC and the PSC has indicated that the methodology for determining TSLRIC includes an element of profit.

GTE has not shown that its rates are necessarily limited to something less than its costs. Although included in GTE's submitted evidence were answers to two questions which indicated GTE would not recover its full costs, the issue was not developed and no findings regarding specific costs were made by the PSC. This was consistent with the PSC's approach in this "generic" proceeding which merely ordered GTE to provide studies and propose tariffs which would then be the subject of a further proceeding. In addition, GTE is not necessarily locked into rates below its actual costs, since GTE may seek to restructure its rates pursuant to MCL 484.2304a; MSA 22.1469(304a).

In support of its "regulatory taking" argument, GTE relies on *Brooks-Scanlon Co v RR Comm of Louisiana*, 251 US 369; 40 S Ct 183; 64 L Ed 323 (1920). *Brooks-Scanlon* is inapplicable. *Brooks-Scanlon* involved a lumber company which operated a railroad line as part of its business. The railroad line became unprofitable. The Supreme Court reversed the state supreme court's ruling that *Brooks-Scanlon* could be required to continue operating the railroad line even though it was operating at a loss. The Supreme Court ruled that the nonpublic lumber business could not be forced to subsidize

the public railroad line. The instant case is materially different because GTE is largely or entirely a regulated business in which the public has a significant interest, as evidenced by our Legislature's passage of the MTA. *Brooks-Scanlon* might be applicable if GTE were seeking to terminate its telecommunication business in Michigan.

Bohn Lumber Products v Michigan Public Service Comm, 317 Mich 174; 26 NW2d 875 (1947), which GTE also relies upon, is similarly distinguishable. *Bohn* involved another private lumber company which leased property from a railroad for use in the lumber company's private business. *Bohn* could not prevent the railroad company from subsequently leasing the property to another private company. While the *Bohn* Court recognized that a regulated entity could not be deprived of its property without due process and that the right to regulate does not include the right to take property for the private use of another, *Bohn* further recognized that where a duty to the public is not involved the police power of the state is not to be exercised. *Id.* at 181-183. The lease decision in *Bohn* was not a regulated matter since the property involved was not "public service property" devoted to common carrier service. *Id.* at 184. In contrast, the instant case involves public access to telephone service and to GTE's property which is devoted to a public service.

GTE's reliance upon *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419; 102 S Ct 3164; 73 L Ed 2d 868 (1982), is also misplaced. GTE relies upon this case to support its argument that an unconstitutional taking has occurred by way of "physical occupation." *Loretto* dealt with a requirement that private landlords allow cable television companies to attach their facilities to the property of the landlords. GTE is not situated similarly to the landlord in *Loretto* because GTE's property is used for the public and regulated purpose of providing telephone communications. Under the MTA, GTE is required to permit – for a price – other providers to interconnect with GTE's equipment and facilities. For example, under MCL 484.2356; MSA 22.1469(356), GTE is required to provide for "virtual collocation" with other providers at or near the location of GTE's transmission equipment. These requirements for interconnection do not constitute an unconstitutional taking.

Michigan regulatory acts have long required regulated companies to connect their equipment and services with those of other providers. See 1883 PA 72 and 1913 PA 206; MCL 484.51; 22.1431 and MCL 484.106. This interference with a utility's private property is not unconstitutional, since the utility is a regulated entity, the property is used for a public purpose, the interference is reasonable, and just compensation is provided in the utility's rates. Such was the reasoning in *Michigan State Telephone Co v Michigan RR Comm*, 193 Mich 515; 161 NW 204 (1916). Also pertinent to the instant case is that the Court in *Michigan State Telephone Co* recognized that insufficient information was available to it on the question of whether the utility's rates were sufficient to avoid a loss. The Court left the matter for the ratemaking authority, noting that it was the utility's obligation to affirmatively show that the interconnection ordered would cause an undue loss. This is similar to the case before us in that GTE has an opportunity to establish in a subsequent proceeding that it will be forced to operate at a loss.

GTE has not shown an unconstitutional taking or a confiscatory rate, and therefore GTE has not shown that the PSC's orders were unlawful or unreasonable.

Affirmed.

/s/ Kathleen Jansen

/s/ Martin M. Doctoroff

/s/ Hilda R. Gage