STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM
GENERAL TRIAL DIVISION

AT&T COMMUNICATIONS OF MICHIGAN, INC. and TCG DETROIT,

Plaintiffs-Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Defendant-Appellee.

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OPINION AND ORDER

File No: 03-972-AA

Hon. Beverley Nettles-Nickerson

OPINION

FACTS

On December 14, 2000, two closely- related complaints were filed with the Michigan Public Service Commission ("MPSC" or "Commission"). In one complaint, MPSC case number U-12759, Covenant House Michigan ("CH") and Great Lakes Telecom, Inc. ("GLT") alleged violations, by AT&T Communications of Michigan, Inc. and TCG Detroit (collectively "AT&T"), of the Michigan Telecommunications Act ("MTA"), MCL 484.2101 *et seq;* MSA 22.1469(101) *et seq.* More specifically, CH and GLT alleged violations by AT&T with regard to local service and in the manner in which billing disputes were handled. The second complaint, MPSC case number U-12764, alleged similar claims. These claims were brought by Molly-Maid and Great Lakes ("MM & GL"), on February 5, 2001. A joint prehearing was conducted before the assigned Administrative Law Judge.

On July 11, 2001, the Commission issued a consolidated order finding that AT&T's billing for unauthorized remote call-forwarding services was a violation of § 502(1)(c) and § 507of the MTA.

On August 8, 2001, AT&T filed a Claim of Appeal with the Michigan Court of Appeals. On March 6, 2003, the Court of Appeals denied the appeal, pursuant to MCR 7.203(F)(1) and MCR 7.216(A)(10). The Commission filed an Application for Leave to Appeal with the Michigan Supreme Court, which was denied on May 15, 2003.

STATUTORY PROVISIONS UNDER REVIEW

The questions presented here involve the statutory construction of §§ 507(1), 502(1)(c), and 601(f) of the MTA. MCL 484.2507(1); MSA 22.1469(507)(1), MCL 484.2502(1)(c); MSA 22.1469(502)(1)(c), and MCL 484.2601(f); MSA 22.1469(601)(f), respectively.

Section 507(1) states in pertinent part that "[a] telecommunications provider shall not include or add optional services in an end-user's telecommunication service package without the express oral or written authorization of the end-user." MCL 484.2507(1).

Section 502(1)(c) states that "[i]f an end-user has canceled a service, [the provider of the telecommunication service shall not] charge the end-user for service provided after the effective date the service was canceled." MCL 484.2502(1)(c).

Section 601(f) provides:

> If after notice and hearing the commission finds a person has violated this act, the commission 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, including but not limited to, 1 or more of the following:

(f) . . . attorney fees and actual costs of a person or a

provider of less than 250,000 end-users.

MCL 484.2601(f)

DISCUSSION

AT&T construes § 507(1) of the MTA in connection with § 102, which defines the terms "service" and "lines." Service means "Telecommunication Services" or "services" and "includes regulated and unregulated services to customers for the transmission of 2-way interactive communications usage. . . ." MCL 484.2102(dd). Line means "line" or "access line" and is "the medium over which a telecommunication user connects into the local exchange." MCL 484.2102(n).

Based on these definitions, AT&T asserts that remote call-forwarding was authorized to be included in the package of telecommunication services provided to CH. In addition, AT&T asserts that it was an unintentional minor harmless error, which resulted in AT&T billing CH for 76 call-forwarding lines rather than a lesser number (about 9)[1] that were ordered by CH.

In connection with a planned move in 1999, CH began exploring options for phone services and contracted with GLT in June of 1999 for telecommunication consulting services. GLT made a proposal that involved abandoning CH's existing "Centrex system" for a private-branch-exchange ("PBX") based system. Accordingly, the PBX equipment would be installed, operated, and maintained by GLT. In addition, GLT would serve as CH's agent to purchase the telecommunications services from other providers, such as AT&T.

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[1] While the exact number of remote call-forwarding lines is not certain, it is certain that AT&T was notified of the billing error after the first billing showed charges on all lines.

When CH moved its headquarters to a new office building, they ordered one T-1 Trunk[2] from AT&T and 1000 DID/DOP telephone numbers to be used in conjunction with that Trunk. In addition, CH ordered remote call-forwarding on about 9 numbers, allowing those Centrex numbers to be forwarded to a new telephone number at the new office building. AT&T based its billing for call-forwarding charges on all 76 of the old Centrex numbers, instead of the 9 ordered. It is clear that AT&T was notified of the error and that AT&T attempted to correct the error. However, due to a system problem, the error was never corrected and CH continued to be billed for call-forwarding charges on all 76 lines.

In its Order, the Commission ruled that AT&T violated § 507 of the MTA by including remote call-forwarding services in CH's package of telecommunication services because the provided service included an "optional service" (remote call-forwarding) on one or more lines for which there was no expressed authorization.

Turning to the issues currently before this Court, AT&T argues that the Commission confuses the applicable standard of review and suggests that the applicable standard of review is great deference absent "an abuse of discretion." *In re MCI Telecommunications Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999) and *Michigan Bell Telephone Company v MPSC*, 332 Mich 7; 50 NW2d 826 (1952). AT&T argues that the confusion arises from the deference courts give when the Commission is involved in rate-making verses statutory construction activities. AT&T further argues that in situations, such as this, where the Court is dealing with the Commission's initial interpretation of a statute, an initial statutory interpretation will not be accorded the same measure

[2] The T-1 Trunk is the line and associated equipment which connects CH's PBX equipment with one of AT&T's switches.

of deference that the Court would give to a longstanding administrative interpretation. *In Re Telecommunications Tariffs*, 210 Mich App 533; 534 NW2d 194 (1995).

In response, the Commission asserts that the appropriate standard of review is set forth in the MTA; that standard requires a showing of clear and convincing evidence that the Commission's order is unlawful or unreasonable. In support of this assertion, the Commission relies on Section 203 (7) of the MTA which provides for review of commission orders in section 26 of the Michigan Complied Laws, MCL 464.26(8). Accordingly, MCL 464.26(8) provides "[i]n all appeals under this section the burden of proof shall be upon the appellant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable."

Continuing, the Commission relies on the Michigan Supreme Court which, after citing MCL 464.26(8) as the governing standard of review, held that "[t]o declare an order of the commission unlawful there must be a showing that the commission failed to follow some mandatory promises of the statute or was guilty of an abuse of discretion in the exercise of its judgment."

Based on the above, the Commission concludes that a finding that the Commission order was "unreasonable" as set forth in MCL 464.26(8), or "an abuse of discretion" as interpreted by the Michigan Supreme Court, creates a broad range or zone of reasonableness within which the MPSC may operate.

FINDINGS OF FACT/ CONCLUSIONS OF LAW

This Court finds that the appropriate review has been set forth by the Michigan Supreme Court in *Magreta v Ambassador Steel*, 380 Mich 513; 158 NW2d 473 (1968). "This court has repeatedly given great deference to the construction placed upon a statute by the agency legislation chosen to enforce it." *Id.* Notably, the Court of Appeals has also given deference to a commission's construction of a statute stating "[g]reat deference is due the construction of a statute by the agency legislatively chosen to enforce it which should not be over ruled without cogent reasons." *Consumers Power Co v PSC*, 196 Mich App 436, 453; 493 NW2d 424 (1992).

Based on the above, this Court concludes that great deference is given to statutory construction if the agency exercises jurisdiction in enforcing that statute. Thus, this Court recognizes the applicable standard of review as involving the Court's analysis of the whether the Commission's interpretation of statutory construction was reasonable and just. It is not the role of this Court to substitute its judgment for the Commission's judgment in situations where the Commission's statutory construction or interpretation of that construction is reasonable and just. Importantly, even in situations like the one currently before this Court, when there are two constructions of the statute which arguably meet the standard of reasonable and just, the Commission's interpretation cannot be found to be unreasonable or unjust just because an alternate interpretation of the statute could also be found to be reasonable and just.

Here, there is no dispute that CH ordered call-forwarding on a limited number of the old Centrex numbers; rather, the dispute centers on the number of lines that CH could have been billed for the call-forwarding service. This much is very clear, especially in light of the fact that CH notified AT&T of its error – 9 lines should have been call-forwarded.

Thus, this Court finds CH's initial order requesting call-forwarding included something less than 75 lines, more accurately 9 lines.

In addition, there is no dispute that AT&T included all of CH's lines in a communications package that included call-forwarding services. While that service was approved by CH on 9 lines, it was clearly without authorization on the remaining CH lines. Significantly, CH notified AT&T

of the error and AT&T prepared a service change order. Despite AT&T's actions to correct the error, CH was continuously billed for remote call-forwarding on lines without express oral or written authorization to do so. The Commission found that CH's telecommunication package included an optional service without proper authorization. The Commission viewed this action as "cramming" and considers the action to be a service violation. This Court concurs in that assessment.

Based on the above, this Court finds that the Commission's construction of § 507(1) is reasonable and just. The Commission found that AT&T actions were in violation of § 507(1) of the MTA when AT&T included an optional service to an end-user's telecommunication package without express authority of the user and, as such, AT&T's actions constituted the offense of cramming. Since AT&T presented no evidence regarding additional steps to avoid continuing violations after being notified of the billing errors, the Commission found the maximum allowable penalty should have been imposed for this offense. This Court concurs in this assessment.

ATTORNEY FEES AND COSTS

As noted above, § 601 of the MTA provides that if the commission finds a person has violated this act, the commission "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, including but not limited to . . . attorney fees and actual costs of a person or a provider of less than 250,000 end-users." MCL 484.2601(f). Accordingly, recovery under MCL 484.2601(f) must satisfy a two-prong analysis: first there must be a rate payer or other person; and second, there must have been an "economic loss."

AT&T argus that the Commission erred, in awarding attorney fees and actual costs under § 601(1) of the MTA because GL suffered no economic loss for the reason that GL was not billed by

AT&T, CH was. Thus, AT&T concludes that the second qualifying part of § 601 for the award of attorney fees was not met. In addition, AT&T argues that it was inappropriate for the Commission to assess actual costs and attorney fees against AT&T because such an award compensates CH and GL for litigating some claims that were ultimately rejected by the MPSC.

It is noteworthy that, while the ALJ recommended that reasonable attorney fees be awarded pursuant to Section 601(f) of the MTA, the ALJ found "no evidence" to establish any economic harm. *PFD,* MPSC Case No. U-12759, ALJ James Rigas, pp 23-24, May 24, 2001.

Following the ALJ's recommendation, the Commission did award costs and attorney fees to both CH and GL, as set forth on page 29 of his Opinion and Order, dated July 11, 2001.

> Although CH & GL did not prevail on every claim presented, they succeeded in proving multiple and serious violations of the MTA resulting in a $30,000.00 fine. Thus, a valid basis exists for awarding attorney fees. Moreover, it should be noted that the array of remedies described in Section 601 of the MTA are specifically open not only to taxpayers, but also to "other persons" who have been harmed as a result of the violation. MCL 484.2601; MSA 22.1469(201). Thus, because Great Lakes was forced to litigate this dispute in conjunction with Covenant House, it should not be banned from sharing in the recovery of attorney fees. For these reasons, the Commission finds that it should adopt the ALJ's recommendation and order AT&T to pay all reasonable attorney fees and costs incurred by CH&GL . . .

In reaching their decision, this Court understands that the Commission relied on *VanZanten v H. Vander Laan Company, Inc.*, 200 Mich App 139; 503 NW2d 713 (1993). In that case, the Michigan Court of Appeals stated:

> With respect to the second reason cited by the trial court, plaintiff's failure to prevail on the claim under the Consumer Protection Act, we are similarly unpersuaded that that disqualifies plaintiff from being considered a prevailing party. Although plaintiff did plead three different theories as to why she was entitled to recover damages against defendant, each of those theories sought to recover for the same injury and recovery under any theory would have allowed plaintiff to recover the full measure of her damages. Accordingly, it was necessary for plaintiff to prevail only on one theory in order to be considered a prevailing party. *Id.*

Moreover, the Commission now asserts that pursuant to GL's business relationship with CH, GL has incurred costs and attorney fees in litigating this complaint. These costs are in addition to the additional time expanded in efforts to advocate a settlement between CH and AT&T.

The Court is well aware that the pivotal issue is whether GL's attorney fees and costs related to this litigation constitute an "economic loss" as envisioned by § 601(f). For the following reasons, this Court finds that the Commission's award of costs and attorney fees incurred by GL to be outside its statutory authority.

The Commission as a creature of statutes and "has only such authority as is plainly granted by the Legislature." *Ameritech Michigan v Michigan Public Service Commission et al.*, 235 Mich App 523; 599 NW2d 760 (1999). With regard to this issue of attorney fees, this Court is persuaded by the analysis in *Ameritech.*

> [W]hether the PSC has de novo authority to award attorney fees is a question of law, subject to judicial determination.
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> As the PSC notes, § 601 of the MTA, MCL 484.2601; MSA 22.1469(601), empowers it to make whole ratepayers and other persons who have suffered an economic loss. This language is not sufficient to confer authority to award attorney fees to a prevailing party.
>
> The term "economic loss" is a legal term that has acquired a peculiar and specific meaning in the law, and it is to be so interpreted when the statute is construed. MCL 8.3a; MSA 2.212(1). "Economic loss" has acquired that meaning in the interpretation and application of the Uniform Commercial Code. *Neibarger v Universal Cooperatives, Inc.*, 439 Mich 512; 486 NW2d 612 (1992). Where, as in Michigan *State Farm Mut Automobile Ins Co v Allen*, 50 Mich App 71, 74; 212 NW2d 821 (1973), the American Rule prevails, "economic loss" does not include attorney fees. *Myrtle Beach Pipeline Corp v Emerson*

Electric Co., 843 F Supp 1027; 23 UCC Rep Serv 2d 683 (SC, 1993).

Furthermore, Michigan jurisprudence otherwise precludes such an expansive interpretation of statutory language with reference to the issue of attorney fees. Attorney fees may not be awarded in Michigan unless expressly authorized by statute or court rule. Here, when the Legislature wanted to authorize an award of attorney fees in the MTA, it did so explicitly. Subsection 209(1), MCL 484.2209(1); MSA 22.1469(209)(1), authorized the PSC to award to the prevailing party its costs, "including reasonable attorney fees," if the opposing party's position was frivolous. The present statute and situation are therefore indistinguishable from *In re 1987-88 Medical Doctor Provider Class Plan,* 203 Mich App 707, 732; 514 NW2d 471 (1994), where this Court concluded that, notwithstanding compelling reasons of public policy for authorizing such attorney fee awards, the agency had exceeded its authority in awarding attorney fees without express statutory authorization. The fact that the Legislature had authorized attorney fee awards in situations where a party took a frivolous position was held to evidence that the lack of other provisions for attorney fee awards was not inadvertent. There is no basis for applying *In re Attorney Fees of Ketman Loria, Downing, Schneider & Simpson,* 406 Mich 497, 503; 280 NW2d 457 (1979).

> The decision of the PSC with respect to attorney fees is reversed; in all other aspects, the order of the PSC is affirmed. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

The record reflects that the ALJ found that there was no economic loss shown by GL. Yet, the Commission, after adopting the ALJ's recommendation, awarded GL attorney fees and costs, on what appears to be the mere fact that GL was a named party to this action. Now, the Commission, via briefs and legal argument, seeks a finding of economic loss. Their argument, however, seeks to go beyond its findings on pages 30 and 31 of its Order, which stated specifically:

> Although the complaint filed by CH&GL requested recovery of economic loss, the ALJ concluded that insufficient evidence was presented to support that claim. CH&GL except to that conclusion. They contend that, based on testimony offered by Messrs. Sevelis and Apostoleris, an adequate record exists for ordering AT&T to pay economic damages to both Covenent House and Great Lakes.
>
> The Commission disagrees with that assessment and finds that the ALJ reached the right conclusion. The evidence cited by CH&GL consists of a few lines of testimony regarding the amount of time spent dealing with AT&T on billing-related matters. No additional detail is provided to show what that time actually represents.

Moreover, no estimate is offered regarding the value of that time, thus precluding any attempt to compute the alleged damages. Furthermore, the fact that 50% of the fine imposed in this case will be paid by Covent House, as well as the fact that CH&GL will be reimbursed for their attorney fees and costs, should help offset any economic losses incurred by these parties. For these reasons, the Commission concludes that it should adopt the ALJ's recommendation and reject the request for recovery of alleged economic losses.

This Court in reaching the conclusion that GL is not entitled to attorney fees and costs believes it does so within the confines of its limited review of the Commission's statutory construction. In its reasoning, the Commission created a disconnect when relying on the ALJ's recomendation of no economic loss and its award of attorney fees. In other words, once the Commission found that no economic loss was incurred by GL, it became unlawful and unreasonable under §601 to award attorney fees to GL – because there was insufficient evidence to satisfy the second prong of the analysis, as noted above "attorney fees" are not an economic loss.

ORDER

IT IS ORDERED THAT the Commission's Order is **AFFIRMED, in part, and DENIED, in part**, for the reasons consistent with this Opinion.

IT IS FURTHER ORDERED THAT this Court will uphold the fines and penalties as set forth by the Commission and award attorney fees and reasonable costs only to CH. This Court reverses the award of attorney fees to GL.

Dated: 3-17-04

Honorable Beverley Nettles-Nickerson
Circuit Court Judge

PROOF OF SERVICE

I certify that I mailed a true copy of the above **ORDER** upon all attorneys of record or parties by placing said copy in the first class mail with postage prepaid from Lansing, Michigan, on ____________, 2004.

Angela Morgan
Judicial Assistant

cc: Arthur J. LeVasseur
David A. Voges