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FILED
APR -8 2004
MICHIGAN PUBLIC SERVICE COMMISSION

April 7, 2004

Ms. Mary Jo Kunkle
Executive Secretary Division
Michigan Public Service Commission
6545 Mercantile Way
P.O. Box 30221
Lansing, MI 48909

RE: **AT&T Communications of Michigan, Inc. and TCG Detroit**
vs. Michigan Public Service Commission
Michigan Court of Appeals Docket No. 254832
Ingham County Circuit Court No. 03-972-AA
MPSC Case No. U-12759

Dear Ms. Kunkle:

Enclosed please find an Application for Leave to Appeal which is being filed with the Michigan Court of Appeals on this date. Pursuant to MCR 7.205, please consider this our request that the Michigan Public Service Commission send its record in MPSC Case No. U-12759 to the Court of Appeals.

If you have any questions, or require anything further, please advise. Thank you.

Very truly yours,

Del A. Szura

DAS:dmm
Enclosure
cc: (w/encls.)
Michael A. Nickerson
Clerk, Michigan Court of Appeals
Clerk, Ingham County Circuit Court
John J. Reidy, III

Copy to Bauer-SH

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April 7, 2004

Clerk of the Court
Michigan Court of Appeals
Hall of Justice
P.O. Box 30022
Lansing, MI 48909-7522

RE: **AT&T Communications of Michigan, Inc. and TCG Detroit**
vs. Michigan Public Service Commission
Michigan Court of Appeals Docket No. 254832
Ingham County Circuit Court No. 03-972-AA
MPSC Case No. U-12759

Dear Clerk:

Enclosed is an Application for Leave to Appeal together with a Proof of Service for the above matter. Also enclosed is our firm check in the amount of $375.00 to cover the filing fee. Please file these documents in your usual manner.

Thank you.

Very truly yours,

Del Szura

Del A. Szura

DAS:dmm
Enclosure
cc: (w/encls.)
Michael A. Nickerson
Clerk, Ingham County Circuit Court
Mary Jo Kunkle, Michigan Public Service Commission
John J. Reidy, III

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MICHIGAN PUBLIC
SERVICE COMMISSION

April 7, 2004

Clerk of the Court
Ingham County Circuit Court
Veterans Memorial Courthouse
313 W. Kalamazoo, P.O. Box 40771
Lansing, MI 48901-7971

RE: **AT&T Communications of Michigan, Inc. and TCG Detroit vs. Michigan Public Service Commission**
Michigan Court of Appeals Docket No. ________
Ingham County Circuit Court No. 03-972-AA
MPSC Case No. U-12759

Dear Clerk:

Enclosed please find an Application for Leave to Appeal which is being filed today in the Michigan Court of Appeals. Also enclosed is our firm check in the amount of $25.00 to cover your filing fee. Pursuant to MCR 7.205, please consider this our request that the Ingham County Circuit Court send its record in Case No. 03-972-AA to the Court of Appeals.

If you have any questions, or require anything further, please advise. Thank you.

Very truly yours,

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Michael A. Nickerson
Clerk, Michigan Court of Appeals
Mary Jo Kunkle, Michigan Public Service Commission
John J. Reidy, III

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FILED

APR -8 2004

MICHIGAN PUBLIC
SERVICE COMMISSION

STATE OF MICHIGAN

IN THE COURT OF APPEALS

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

Plaintiffs-Applicants,

-vs-

MICHIGAN PUBLIC SERVICE COMMISSION,

Defendant.

_______________________________________/

Docket No. 254832

Ingham County Circuit Court
Court No. 03-972-AA

MPSC Case No. U-12759

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APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTIONS PRESENTED

1. **Whether the Michigan Public Service Commission and the Circuit Court erred in concluding that an error in the amount billed for Remote Call Forwarding, an optional service that had admittedly been ordered by the end-user, constituted a violation of Section 507 of the Michigan Telecommunications Act, MCL 484.2507; MSA 22.1469(507), which prohibits a provider from including or adding optional services in an end-user's telecommunications services package without the express written or oral consent of the end-user.**

   Plaintiffs-Applicants argue "Yes"
   Defendant argues, "No."

2. **Whether the Michigan Public Service Commission and the Circuit Court erred in concluding that Applicants had violated Section 502(1)(c) of the Michigan Telecommunications Act, MCL 484.2502(1)(c); MSA 22.1469(502)(1)(c), where the Complaint did not raise any claim that Applicants had violated Section 502(1)(c) and Applicants had no prior notice that they were being called upon to defend themselves against a claim that they had violated Section 502(1)(c).**

   Plaintiffs-Applicants argue "Yes"
   Defendant argues, "No."

3. **Whether the Michigan Public Service Commission and the Circuit Court erred in concluding that Applicants had violated Section 502(1)(c) of the Michigan Telecommunications Act, MCL 484.2502(1)(c); MSA 22.1469(502)(1)(c), where the record demonstrated only an error in the amount billed to the customer for Remote Call Forwarding service and not that the customer cancelled that service.**

   Plaintiffs-Applicants argue "Yes"
   Defendant argues, "No."

4. **Whether the Circuit Court correctly reversed the Michigan Public Service Commission's order requiring AT&T to pay attorney fees and actual costs under Section 601(f) of the Michigan Telecommunications Act, MCL 484.8601(f); MSA 22.1469 (601)(f), to a Complainant who**

was not a rate payer and who had not suffered an economic loss as a result of a violation of the Michigan Telecommunications Act.

Plaintiffs-Applicants argue "Yes"
Defendant argues, "No."

5. **Whether the Michigan Public Service Commission and the Circuit Court erred in requiring AT&T to pay attorney fees and actual costs under Section 601(f) of the Michigan Telecommunications Act, MCL 484.8601(f); MSA 22.1469 (601)(f), to a Complainant who had not suffered an economic loss as a result of a violation of the Michigan Telecommunications Act.**

Plaintiffs-Applicants argue "Yes"
Defendant argues, "No."

JURISDICTIONAL STATEMENT

Jurisdiction for this application for leave to appeal is vested in the Court of Appeals, and this application is timely under MCR 7.203. The decision of the Ingham County Circuit Court appealed from was entered March 17, 2004 (Attached hereto as Exhibit "A"). That decision was an appeal of right from a final Opinion and Order entered on July 11, 2001 in the Michigan Public Service Commission by Laura Chappelle, Chairman and David A. Svanda and Robert B. Nelson, Commissioners.

STANDARD OF REVIEW

The standard of review is whether the decision of the Ingham County Circuit Court affirming in part and reversing in part the decision of the Michigan Public Service Commission was lawful and reasonable. An order is unlawful if it is based on an erroneous interpretation or application of the law. Statutory interpretation is subject to de novo review. Although the Court of Appeals will normally defer to the construction placed upon statutory provisions by the governmental agency charged with applying them unless the agency interpretation is clearly wrong, an agency's initial determination of new legislation is not entitled to the same deference given a longstanding administrative interpretation. An order is reasonable if it is supported by competent material and substantial evidence on the whole record. A party challenging an order of the Michigan Public Service Commission bears the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. *Miller Bros. v Public Service Commission*, 180 Mich App 227, 446 NW2d 640 (1989); *In re MCI Telecommunications Complaint.* 229 Mich App 664, 583 NW2d 458 (1998), modified 460 Mich 396; 596 NW2d 144 (1999).

STATEMENT OF FACTS

The underlying case involved a whole litany of diverse and, in many instances, unrelated claims asserted by the underlying complainants against AT&T Communications of Michigan, Inc. and TCG Detroit (collectively "AT&T," "Respondents" or "Applicants"). However, most of these claims were ultimately rejected by the Michigan Public Service Commission and were not appealed to the Circuit Court. The issues that are being raised by this appeal include the first ever statutory interpretation of penal statutes by the Commission and the application of those statutes to the operative facts. Therefore, in order to better provide the Court with the context of the issues that are on appeal, the Statement of Facts is divided into two sections. The first is an overview of the procedural history of the case and the second is a summary of the underlying operative facts.

A. <u>Procedural History</u>

On December 14, 2000, Complainants Covenant House Michigan ("Covenant House") and Great Lakes Telecom, Inc. ("GLT") filed a Formal Complaint against AT&T with the Michigan Public Service Commission pursuant to Section 203 of the Michigan Telecommunications Act, ("MTA"), MCL 484.2203; MSA 22.1469(203).

The Complaint included numerous allegations that AT&T had violated specific, enumerated provisions of the MTA. Attached to the Complaint was prefiled testimony and exhibits intended to support the allegations of the Complaint, which is a specific requirement of a complaint filed under the Michigan Telecommunications Act. MCL 484.2203(7); MSA 22.1469(203)(7).

The Complaint was premised upon, and the supporting testimony and exhibits focused in large part upon, claims that AT&T was not honoring the terms of a contract between it and Covenant House for a high capacity form of telecommunications service provided to business customers; that AT&T had overcharged and improperly billed Covenant House for a variety of tariffed services in the past; and that AT&T had misrepresented the terms and conditions of various services. Ultimately all of the foregoing claims were rejected by the Commission and not appealed. However, the Complaint also alleged that AT&T was guilty of adding an unordered service to the package of telecommunications services that had been ordered by Covenant House in violation of MCL 484.2507(1); MSA 22.1469(507)(1). (Complaint, ¶ 12). The proper interpretation of this provision and its application to the facts in evidence are among the issues that are the subject of the instant appeal.

Pursuant to the direction of the Commission's Executive Secretary, AT&T filed its Answer on February 1, 2001, denying all of the alleged violations of the MTA raised in the Complaint. The matter was set for hearing in accordance with the contested case provisions of the Michigan Administrative Procedures Act. MCL 24.201 et seq; MSA 3.560(101), et seq. In addition to the named Complainants and Respondents (the instant Applicants), the Commission Staff participated in the proceeding below. On February 5, 2001, a prehearing conference was held before the Honorable James N. Rigas, Administrative Law Judge, during which a schedule was set for filing Respondents' and Staff's testimony, reply testimony, evidentiary hearings to permit cross-examination of the prefiled testimony, the filing of post-hearing briefs, the issuance of a Proposal for Decision ("PFD") by the Administrative Law Judge, the filing of any exceptions to the PFD by the parties, and the issuance a Commission order within 180 days of the filing of the Complaint. The 180 day time limit is a deadline expressly set by the MTA. MCL 484.2203(11); MSA 22.1469(203)(11).

On February 20, 2001, AT&T filed a Motion for Partial Summary Disposition, seeking dismissal of GLT from the case because, as merely the agent for Covenant House, it was not a real party in interest and lacked standing to maintain a claim against AT&T under the MTA. On February 28, 2001, after hearing argument on the motion, the Administrative Law Judge denied the motion stating, "it would be premature on my part to make a determination that Great Lakes is without standing in this particular case to have the opportunity to demonstrate if in fact it did suffer an economic loss." Tr. 49.

On March 23, 2001, the parties filed motions to strike certain witnesses' pre-filed testimony. On March 28, 2001, the Administrative Law Judge heard argument on the motions to strike and largely denied all motions. On March 24 and 25, 2001, a hearing was held to bind into the record the prefiled testimony of the parties and permit cross-examination. Although not formally consolidated, the hearing was held concurrently with the hearing in a separate case, MPSC Case No. U-12764, in which GLT and another AT&T customer for whom GLT acted as an agent, Molly-Maid, alleged some of the same claims raised in the Covenant House case. A single transcript was prepared from these hearings and the entire transcript was made a part of the record of both cases. The Complainants presented testimony by two witnesses: Mr. Gregory Sevelis, Finance Director for Covenant House, and Mr. Ted Apostoleris, president of GLT. Respondents presented five witnesses: Ms. Adriane Jensen, a customer care specialist with AT&T (Tr. 164), Mr. Daryl Peguese, formerly an AT&T account executive to Covenant House (Tr. 271), Mr. Jeffrey Kiefer, an AT&T Sales Manager (Tr. 310), Mr. Doug Minnis, an AT&T Project Manager (Tr. 376), and Mr. Livingston Taylor, the AT&T account executive who followed Mr. Peguese on the Covenant House account (Tr. 412). The Administrative Law Judge admitted fifty-seven (57) exhibits. Exhibits C-7, C-41, C-42, and C-43 were not received into the record. At the conclusion of the hearing on March 25, 2001, the Administrative Law Judge closed the evidentiary record. Tr. 538.

Following this hearing the parties filed post-hearing briefs. AT&T argued that the record did not support any of the allegations of the Complaint and specifically challenged the notion that the facts relied upon by the Complainants established that AT&T had engaged in conduct prohibited by MTA § 507, MCL 484.2507, MSA 22.1469(507). Section 507 addresses the practice of adding unordered services to a customer's package of services and is commonly referred to as "cramming". "Cramming" should not be confused with "slamming", which is a term frequently used to refer to the practice of switching a customer's preferred long distance carrier without authorization. Slamming is itself prohibited by another section of the MTA, MCL 484.2506; MSA 22.1469(506).

The Administrative Law Judge agreed in large measure with AT&T's position and found the Complainants had failed to sustain their burden of proof with respect to the claims they had raised in the Complaint. Accordingly, he recommended that these claims should be dismissed. While he also agreed with AT&T that the record did not support the conclusion that AT&T had violated Section 507, he concluded that the facts did support the conclusion that there had been a violation of Section 502(1)(c), a provision of the MTA that has nothing to do with cramming. That section addresses an entirely different subject than Section 507 and prohibits a provider from billing for a service after the effective date the service has been cancelled by an end user. The Administrative Law Judge concluded that while AT&T was not guilty of cramming, it had billed Covenant House for "remote calling forwarding" in violation of MTA § 502 (1)(c). The PFD arrived at this conclusion even though the Complaint had not alleged any violation of Section 502(1)(c), the notice of hearing did not suggest that the purpose of the hearing was to address alleged violations beyond those raised in the Complaint, and no party had even addressed the issue of a Section 502(1)(c) violation in the post-hearing briefs. The record established that Covenant House had never actually paid any of the bills and AT&T was processing credits for the charges in question. Therefore, while the Administrative Law Judge correctly concluded that neither Covenant House nor GLT suffered any economic harm as a result of any violation of the MTA, he concluded that each monthly bill that included erroneous charges for Remote Call Forwarding was a separate violation of Section 502(1)(c) and recommended the Commission impose a fine of $20,000 per violation, or $180,000 in total for the nine bills that had been sent. He further recommended that Covenant House and GLT be awarded actual costs and attorneys fees. All of the PFD's recommendations were pursuant to the Commission's authority under MTA § 601.

With respect to the related proceeding, MPSC Case No. U-12764, the Administrative Law Judge recommended dismissing the entire case because no violation of the MTA was substantiated by the evidence.

The parties filed written Exceptions to indicate where they disagreed with the PFD and Replies to the Exceptions filed by other parties. AT&T agreed with the PFD's conclusion that the claims raised in the Complaint should be dismissed, including the PFD's conclusion that no Section 507 violation had occurred. However, AT&T excepted to the PFD's conclusion that AT&T be found in violation of Section 502(1)(c). AT&T objected to this finding because it had never been informed that it was being called upon to defend such an allegation, nor did the record support this conclusion. It also challenged the calculation of the fine and the award of costs and attorneys fees to GLT, since the latter had merely acted as Covenant House's agent in the underlying transaction. It had not been AT&T's customer and was not billed by AT&T for any service whatsoever. Finally AT&T objected to an award of attorney fees and costs to the extent that they were incurred in connection with claims and issues upon which AT&T prevailed. The Complainants challenged various findings and conclusions made by the Administrative Law Judge adverse to their position.

The Commission entered its Order on July 11, 2001. It adopted the recommendation to dismiss all claims in the Molly-Maid case and, with one exception, the recommendations made by the PFD in the Covenant House case. It adopted the PFD's findings that the Complainants had failed to sustain their burden of proof with respect to the bulk of the allegations made against AT&T. However, the Commission rejected the PFD's conclusion on the "cramming" issue and found that the actions of AT&T did amount to a violation of MTA § 507, in addition to a violation of MTA § 502(1)(c). The Commission also adopted the PFD's finding that the Complainants had failed to carry the burden of proving that they suffered any economic harm as a result of the violation. Nevertheless, the Commission fined AT&T $30,000 and awarded both Covenant House and GLT all of their actual costs and attorneys fees, even those incurred in connection with claims and issues upon which AT&T had ultimately prevailed. Furthermore, because the Commission found a violation of MTA § 507, it ordered one-half the fine to be paid to Covenant House pursuant to MTA § 506(2)(a), MCL 484.2506(2); MSA 22.1469(506)(2), which authorizes the Commission to require between 10% and 50% of the fine to be paid directly to the end-user. The authority to award a portion of a fine to the end-user is limited to fines imposed pursuant to MTA § 506 and applies only where there has been a violation of MTA §§ 506 (slamming) or 507 (cramming). It does not apply to fines imposed for violations of other provisions of the MTA, including a violation of Section 502(1)(c). MCL 484.2601; MSA 22.1469(2601).

On March 17, 2004, the Circuit Court affirmed the Commission's finding that Sections 502(1)(c) and 507 of the MTA had been violated as well as the fines and penalties assessed therefor, but affirmed only the award of attorneys fees and costs against Covenant House; it reversed the award of attorneys fees and costs against GLT. (Opinion and Order at p. 14).

B. Factual Background

Covenant House is a Michigan non-profit corporation that employs 60 people and provides vocational training and social services in Detroit. Tr.110, 111. Great Lakes Telecom, Inc. sells telecommunications equipment and services to end-users and, in addition, acts as an agent for end-users in dealing with other telecommunications service providers. Tr. 188, 189. From 1997 through 1999 Covenant House was purchasing various services from AT&T for its three existing locations, including a type of service called Centrex. During this period Covenant House regularly raised billing issues with AT&T and in some cases AT&T issued credits and in others denied any credit was due. Tr. 271, 272. The unresolved billing issues relating to the time when the Centrex service was provided was one of the subjects addressed in the Complaint filed against AT&T but was resolved in AT&T's favor. Order 7/11/01 pp. 14-15.

In 1999 Covenant House began to plan to open a fourth location and move its headquarters personnel to the new facility. Tr. 113, 114, 198. In connection with the planned move Covenant House began to seek an alternative to its existing Centrex service. On June 7, 1999, GLT made an initial proposal to Covenant House, which would involve abandoning the Centrex system and purchasing a PBX-based system from GLT. *See* Exhibit R-9. It was contemplated that Covenant House would obtain the equipment itself from GLT and appoint GLT to act as its agent to procure telecommunications services from other providers like AT&T. Tr. 112-113; Exhibit R-10. In September, 1999, GLT's president, Mr. Apostoleris, contacted the

AT&T Account Executive, Daryl Peguese, to obtain pricing information, including prices for a T-1 trunk and DID telephone numbers. Tr. 219. A T-1 trunk is the physical facility that connects the PBX, located on the customer's premises, with the AT&T switch. Tr. 274. A T-1 trunk can be configured in a variety of ways. *Id.* It can be configured to permit direct inward dialing (DID) or direct outward dialing (DOD) or both using customer premises equipment, such as a private branch exchange (or PBX). A DID/DOD T-1 is configured to permit both direct inward and outward dialing. Tr. 275. DID telephone numbers are separate from the trunk itself and are purchased in groups or blocks, typically of 10 or 20 numbers. A customer may elect to give each telephone handset, fax or modem its own telephone number so that a call placed to that number "rings" at the appropriate station "behind" the PBX. Tr. 276. Although all calls to the phone numbers associated with the T-1 trunk are carried over the same physical facility, the trunk can only carry up to 24 simultaneous calls. Tr. 278.

Covenant House ultimately ordered one T-1 trunk from AT&T and some 1000 DID/DOD phone numbers to be used in conjunction with the trunk. Tr. 414, 415. The terms, conditions and pricing for the phone numbers became a major point of disagreement between the parties and was another matter addressed in the Complaint filed against AT&T. The Commission rejected the claims raised by Covenant House and GLT related to these issues. Order 7/11/01 p. 24.

When the new building located on Martin Luther King, Jr. Blvd. was opened, the headquarters staff was relocated and Covenant House ordered Remote Call Forwarding so that calls placed to some of the old Centrex phone numbers would be routed to a new number at the new headquarters. AT&T added Remote Call Forwarding to the Covenant House account pursuant to this request, but the billing for the service was calculated on the basis of all 76 of the old Centrex numbers rather than on the basis of the nine numbers that were desired. Tr. 383-385, Exhibit C-48. When AT&T was advised of the billing error, its Project Manager, Mr. Minnis, processed a change order to correct it. *Id.* However due to a system problem the change order did not go through and the erroneous billing for Remote Call Forwarding continued for several months. Eventually, Mr. Minnis corrected the error and Covenant House was issued the appropriate credits. Tr. 378.

The Commission concluded that AT&T's conduct in connection with Covenant House's request for Remote Call Forwarding violated Sections 502(1)(c) and 507(1) of the MTA. The Circuit Court affirmed that portion of the Commission's ruling, and affirmed its awarding of costs and attorneys fees to Covenant House, but reversed its awarding of costs and attorney fees to GLT.

LAW AND ARGUMENT

I.

The Michigan Public Service Commission and the Circuit Court erred in concluding that an error in the amount billed for Remote Call Forwarding, an optional service that had admittedly been ordered by the end-user, constituted a violation of Section 507 of the Michigan Telecommunications Act, MCL 484.2507; MSA 22.1469(507), which prohibits a provider from including or adding optional services in an end-user's telecommunications services package without the express written or oral consent of the end-user.

The gist of the claim that ultimately survived dismissal by the Commission involved billing for Remote Call Forwarding. The Complainants alleged that AT&T added Remote Call Forwarding services "that were not ordered and then overcharged for them" in violation of MTA § 507(1). Tr. 205. In his Proposal for Decision the Administrative Law Judge agreed with AT&T's position and found that the facts offered in support of this claim failed to demonstrate that a violation of Section 507(1) occurred. However the Commission rejected the Administrative Law Judge's recommendation on this point, and found that the facts did support a finding that Section 507(1) was violated and the Circuit Court agreed.

The reach of Section 507(1) and what type of specific conduct it proscribes has not been the subject of any prior Commission rulings or appellate decisions. Hence this case involves the initial interpretation of a statute. Although the Court of Appeals will normally defer to the construction placed upon statutory provisions by the governmental agency charged with applying them unless the agency interpretation is clearly wrong, an agency's initial determination of new legislation is not entitled to the same deference given a longstanding administrative interpretation. *Miller Bros. v Public Service Commission*, 180 Mich App 227, 446 NW2d 640 (1989); *In re MCI Telecommunications Complaint,* 229 Mich App 664, 583 NW2d 458 (1998), modified 460 Mich 396; 596 NW2d 144 (1999). Here the Commission's and the Circuit Court's interpretation of Section 507 is clearly wrong and application of the statute to the operative facts mandates the conclusion that no violation of Section 507(1) occurred in this case.

When Covenant House opened its facility on Martin Luther King, Jr. Blvd. and relocated its headquarters personnel to that location, it ordered Remote Call Forwarding services from AT&T in connection with that move. Exhibit C-48. Section 507(1) states that "a telecommunications provider shall not include or add optional services in the end-users telecommunications service package without the express written or oral authorization of the end-user." (emphasis supplied). This provision is intended to address what is commonly referred to as "cramming." Cramming, however, involves the inclusion or addition of optional services "in the end-users telecommunications service package" that the end-user did not request or authorize. This is an entirely different matter than an error in billing an account for an optional service that was, in fact, ordered by the end-user. In this case, Covenant House did request Remote Call Forwarding as part of the "telecommunications service package" provided to it by AT&T. Therefore, the problem is not that Remote Call Forwarding was never ordered for the Covenant House account; the problem was due to an inadvertent error (that was eventually rectified) in that the bills for the optional service that was ordered were higher than they should have been. Tr. 378. An inadvertent billing error on a customer's account for an optional service that has been ordered for that account is not a "cramming" violation of Section 507.

In *Zakrewski v SBC Michigan*, Michigan Public Service Commission Case No. U-13762, the Commission interpreted Sections 507(1) and 502 of the MTA. The Commission held that billing mistakes differ significantly from cramming. It rejected the complainant's argument that a billing dispute rose to the level of prohibited cramming and stated:

> The intent of the Legislature in passing Section 507(1) was to stop a telecommunications provider from cramming a customer's regular service bill with additional charges for optional services, like call waiting, caller ID, or call forwarding, which the customer has not requested. In this regard, cramming differs significantly from the problem alleged by [the complainant] and described on the record, specifically, that he was billed for a repair call he never received. No optional services are at issue in this case.
>
> (Order, 10/7/03, pg. 10)

No matter how many numbers were on the list provided to AT&T, all forwarded calls were carried over the single trunk that AT&T provided to Covenant House at the Martin Luther King, Jr. Blvd. location. The fact that AT&T calculated its bill for this optional service based upon an incorrect number of telephone numbers is unfortunate, but it is not a violation of Section 507 of the MTA.

The record does not suggest that an optional <u>service</u> was added to the Covenant House telecommunications <u>package</u> without authorization. The specific testimony indicates that the service itself was requested, but that the billing for the requested service was incorrectly calculated:

> Q. No, the customer had requested only nine lines to have call forwarding?
>
> A. Actually <u>I won't say that is correct</u>. Ted brought it to my attention that <u>they only wanted to be billed</u> for nine remote call forward lines, and that's what initiated this order form.
>
> Tr. 383 (emphasis added).

Section 507 does not address or prohibit billing errors for an optional service that has, in fact, been ordered or even errors in the implementation of the ordered service to the customer. Here there is no claim that the optional service at issue, Remote Call Forwarding, was improperly added to the Covenant House package of telecommunications services. Rather, the complaint was that the <u>bill</u> for the optional service was miscalculated because the charge for the service was determined by multiplying a fixed charge times seventy-six lines rather than nine lines. Although the witnesses speak in terms of "lines," it is probably more appropriate to refer to "numbers" because, in this case, the purpose of ordering Remote Call Forwarding was to have calls dialed to a list of telephone numbers be "redirected" via the T-1 trunk from the AT&T/TCG switch to the PBX serving Covenant House's new facility. The "service" was ordered, but the correct list of numbers and the bill for the service was in error. It has been established that one physical line can serve many telephone numbers. Indeed, the T-1 trunk ordered by Covenant House was intended to serve some 1000 separate telephone numbers. Thus, while it might appear to an outsider that this represents 1000 lines, in fact all calls to and from each of these numbers were carried over the same single physical medium—the T-1 trunk. The single physical line could, however, be used to carry 24 simultaneous telephone conversations to or from any 24 of those 1000 numbers by electronically dividing the single physical "line" into multiple "channels." Tr. 278. Hence although the Remote Call Forwarding service ordered by Covenant House involved multiple numbers, all calls were forwarded over a single line, the T-1 trunk serving the new Covenant House location. Thus, there is a distinction between a number and a line. There is also a distinction between a line and a service. Section 507 does not use either the word "line" or "number." It speaks to an entire "optional service" that has not been authorized, not to errors in the details of how a requested and authorized service is billed as part of the package of authorized services provided to the end-user.

A violation of Section 507 may give rise to penalties under MTA § 506(2). Hence, like any other statute that is penal in nature, it must be strictly construed and any ambiguity is to be resolved in favor of lenity. *People v Gilbert*, 414 Mich 191, 211; 324 NW2d 834 (1982). Moreover even if this statute were not penal in nature, statutes granting power to an administrative agency like the Public Service Commission must be strictly construed and a "doubtful power does not exist." *Union Carbide v PSC*, 431 Mich 135, 146 (1988); *In re Public Service Commission Determination No 2,* 204 Mich App 350 (1994).

In the latter case the Court of Appeals held that the statutory authority of the Commission to regulate "coin operated" telephones did not authorize it to regulate public telephones that were operated via the use of a credit card. The statute at issue in that case was Section 207a of the original MTA, 1991 PA 179. That statute granted the Commission the authority to determine whether "coin operated" telephones should be regulated. The Commission elected to regulate coin operated telephones and further reasoned that this should include all "pay phones" since the general public draws no distinction between telephones operated with coins or credit cards. MPSC Case No. U-10049 Order 3/13/92, p. 15. The Court of Appeals reversed the Commission, holding that the word "coin" has an accepted meaning and is a piece of metal of definite weight and value stamped by a governmental authority. 204 Mich App at 352. Because public pay telephones operated via credit cards use a means of payment other than the use of coins, the Court held that the statute did not grant the Commission the requisite authority to regulate them. *Id.* at 354.

Section 507(1) uses the term "services." There is no basis to believe that the Legislature intended this to mean "lines" or "phone numbers" and Section 507(1) does not in any way suggest that violations are to be found on the basis of how many lines or phone numbers are involved in a service. In fact, the Legislature defined "services" to mean something very different from "lines." Section 102 (dd) of the MTA defines the term "services" as:

> "Telecommunication Services" or "services" includes regulated and unregulated services offered for the transmission of 2-way interactive communication and associated usage."

MCL 484.2102(dd); MSA 22.1469(102)(dd).

In contrast, "line" is defined as "the medium over which a telecommunications user connects into the local exchange." MTA § 102(n). Hence when the term "service" is used in Section 507(1) it must be presumed to be used in the manner defined by the MTA. There is no evidence that the "optional service" known as Remote Call Forwarding was not authorized to be added or included in the "package" of telecommunications services provided to Covenant House. Therefore, irrespective of errors that were made in the billing for that service, there is no basis for a finding that Section 507(1) was violated.

Furthermore, a violation of Section 507(1) consists of the act of "adding " or "including" the optional service in the "package" of telecommunications services provided to the end user. The statute does not make it a violation to "bill" for an "added" service once the service has been added to the service package. The MTA makes it very clear that it is the wrongful addition of the service itself that constitutes the offense. Section 506(2)(a) states, in pertinent part, that "Each ... <u>service added</u> in violation of 507 shall be a separate offense under this subdivision." Thus, the violation is judged based on the number of services added to the customer's package, not how the bill for the service is calculated or how many "lines" or "numbers" for which the customer is billed. Here, if Covenant House had not ordered Remote Call Forwarding service for its account and AT&T had added this service without any authorization, <u>which is not what occurred here</u>, then a violation of Section 507(1) would occur when the "service" itself was wrongfully added to the package of services being provided to Covenant House. If AT&T were to add both Remote Call Forwarding and Call Waiting, another optional service, to the package of services provided to Covenant House (without authorization for either service), then there would be two violations of Section 507 irrespective of the number of telephone numbers assigned to the customer. Here neither of these scenarios took place and the Commission's and the Circuit Court's conclusion that a billing error for a service that had been expressly ordered constitutes a violation of Section 507(1) is without merit and should be reversed.

II.

The Michigan Public Service Commission and the Circuit Court erred in concluding that AT&T had violated Section 502(1)(c) of the Michigan Telecommunications Act, MCL 484.2502(1)(c); MSA 22.1469(502)(1)(c), where the Complaint did not raise any claim that AT&T had violated Section 502(1)(c) and AT&T had no prior notice that it was being called upon to defend itself against a claim that it had violated Section 502(1)(c).

In addition to separately finding the same conduct to be a "cramming" violation under Section 507(1), the Commission concluded that errors contained in AT&T's bills for Remote Call Forwarding service violated Section 502(1)(c). The Circuit Court impliedly concurred with this analysis of Section 502(1)(c), without directly addressing it. The Commission determined that only six bills could be considered to constitute violations of this provision. The premise for the Commission's conclusion was that in September, 2000, AT&T's Project Manager submitted a change order to remove Remote Call Forwarding charges from being assessed to Covenant House for all but nine of its phone numbers. MPSC Order 7/11/01 pp. 18, 19. However, due to a system malfunction (or "glitch"), the error in billing for the Remote Call Forwarding continued and the charges were calculated based on more than nine phone numbers. *Id.* It is undisputed that AT&T undertook no collection efforts with respect to any of the charges billed to Covenant House for this service. In fact, Covenant House has never paid even the "correct" charges for the service. Moreover, AT&T's witness, Mr. Minnis, testified at the hearing that a credit was being processed for the full amount of the billing error. Tr. 378.

As will be discussed in Argument III, *infra*, the Commission's interpretation of Section 502(1)(c) is erroneous and the evidence does not support a finding that AT&T violated the statute by billing for a "service" that had been cancelled. Moreover, irrespective of the proper statutory interpretation, the Complainants never asserted in any pleading, testimony or post-hearing brief that AT&T had violated Section 502(1)(c). Given that this claim was never raised or even touched upon by Complainants, and the burden of proving a case filed under the MTA is on the party filing the complaint, MCL 484.2203(8); MSA 22.1469(203)(8), it follows that AT&T certainly never undertook to do any pre-hearing discovery on the issue, to present evidence on the issue at the hearing, or to otherwise defend itself against a claim that it had committed a violation of Section 502(1)(c). Indeed the first time AT&T even became aware that this theory of liability was being raised was long after the evidentiary record was closed; i.e. when the PFD was issued. Therefore, the Commission's adoption of the PFD's conclusion that AT&T violated a penal statutory provision never raised until after the hearing was over was improper and not consistent with even a minimal level of due process or fairness. These matters were not directly addressed by the Circuit Court.

Because an application or complaint filed under provisions of the Michigan Telecommunications Act must be completed within 180 days, Section 203(7) of the MTA imposes fairly strict requirements on what must be included in the initial filing:

> An application or complaint filed under this section shall contain all information, testimony, exhibits, or other documents and information within the person's possession on which the person intends to rely to support the allegation or complaint.
>
> MCL 484.2203(7); MSA 22.1469(203)(7)

The Complaint in this case specifically identified each subsection of the MTA that the Complainants claimed AT&T had violated. Complainants set forth a recitation of facts and asserted that those facts constituted violations of the following sections of the MTA and Section 502(1)(c) was not included:

- **Section 507(1):** This section prohibits a telecommunications provider from including or adding "optional services in an end users telecommunications service package without the express oral or written authorization of the end-user." (Complaint, ¶ 19 (a).)

- **Section 502(1)(a):** This section prohibits a telecommunications provider from making "a statement or representation, including the omission of material information, regarding rates, terms, or conditions of providing a telecommunications service that is false, misleading, or deceptive." (Complaint, ¶ 19(b).)

- **Section 502(1)(b):** This section prohibits a telecommunications provider from charging "an end-user for a subscribed service that the end-user did not make an initial affirmative order. Failure to refuse an offered or proposed subscribed service is not an affirmative order for the service." (Complaint, ¶ 19(c).)

- **Section 502(1)(g):** This section prohibits a telecommunications provider from representing "to a party to whom services are supplied that the services are being supplied in response to a request made by or on behalf of the party when they are not." (Complaint, ¶ 19(d).)

- **Section 502(1)(h):** This section prohibits a telecommunications provider from causing "a probability of confusion or a misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction." (Complaint, ¶ 19(e).)

- **Section 305(1)(n):** This section prohibits a provider of basic local exchange from performing "any act that has been prohibited by this act or an order of the commission." (Complaint, ¶ 19(f).)

Nowhere in the Complaint was there any claim that AT&T allegedly violated MTA § 502(1)(c). Likewise, in the direct testimony filed with the Complaint, Mr. Apostoleris identified both the factual basis for each alleged violation of the MTA and listed the specific provisions that Complainants alleged had been violated by such conduct. The sections he identified are the same as those listed above. Nowhere in his testimony is there any suggestion that this case involved any claim arising under MTA § 502(1)(c). Tr. 205-207. Indeed, even the Commission's Order concedes that there was no reference in the Complaint to any allegation that AT&T violated Section 502(1)(c). Order 7/11/01 p. 19.

A respondent has a statutory right to be notified of the claims that he is being called upon to defend. As noted above, Section 203(7) of the MTA requires that the Complaint contain "all information" upon which the Complainant intends to rely to support the complaint. Furthermore, a fine may be assessed under Section 601 only if after "notice" and hearing the Commission finds a person has violated the Act. MCL 484.2601; MSA 22.1469(601). The form of notice is dictated by statute. Pursuant to Section 203(1) of the MTA, MCL 484.2203(1); MSA 22.1469(203(1) the Commission is required to comply with the contested case requirements of the Michigan Administrative Procedures Act. Section 71 of the APA requires that notice be given and, furthermore, expressly requires that the notice contain a reference to the particular sections of any statutes or rules involved. It states:

> Sec. 71. (1) The parties in a contested case shall be given an opportunity for a hearing without undue delay.
>
> (2) The parties shall be given a reasonable notice of the hearing, which <u>notice shall include</u>:
>
> (a) A statement of the date, hour, place, and nature of the hearing. Unless otherwise specified in the notice the hearing shall be held at the principal office of the agency.
>
> (b) A statement of the legal authority and jurisdiction under which the hearing is to be held.
>
> (c) <u>A reference to the particular sections of the statutes and rules involved.</u>
>
> (d) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is given, the initial notice may state the issues involved. Thereafter on application the agency or other party shall furnish a more definite and detailed statement on the issues.
>
> MCL 24.271; MSA 3.560(171) (emphasis supplied)

Here the notice did not identify any particular sections of statute but simply referred to the Complaint and attachments to the Complaint, which were served along with the notice, and gave the date, time and location for a "public hearing in this matter." The Complaint itself identified the particular sections of the MTA that were involved and Section 502(1)(c) was not referred to as being involved in the case. Hence, the Commission failed to provide the requisite notice and, accordingly erred when it subsequently ruled that Section 502(1)(c) was involved and that AT&T had violated that section.

See also Armstrong v Manzo, 380 U.S. 545, 552 (1965) (It is fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner"). Here AT&T had no meaningful notice that the purpose of the hearing was to determine if it had violated Section 502(1)(c). Therefore, the Commission's finding and the Circuit Court's "affirmance" that such a violation occurred cannot be sustained.

III.

The Michigan Public Service Commission and the Circuit Court erred in concluding that AT&T had violated Section 502(1)(c) of the Michigan Telecommunications Act, MCL 484.2502(1)(c); MSA 22.1469(502)(1)(c), where the record demonstrated only an error in the amount billed to the customer for Remote Call Forwarding service and not that the customer cancelled that service.

Aside from the notice issue discussed in Argument II, *supra*, the conclusion *sub judice* that a violation of MTA § 502(1)(c) took place is not supported by the record, but is based upon an erroneous interpretation of the statute. The provision in question states that a provider shall not, "[i]f an end user has cancelled a service, charge the end user for service provided after the effective date the service was cancelled." The evidence set forth below failed to establish that the Complainants had cancelled a service, and thus, there is no evidence from which the Commission could conclude that a violation of MTA § 502(1)(c) had been demonstrated. Like any other statute that is penal in nature, Section 502(1)(c) must be strictly construed and any ambiguity is to be resolved in favor of lenity. *People v Gilbert, supra*. Moreover statutes granting power to an administrative agency like the Public Service Commission must be strictly construed and a "doubtful power does not exist." *Union Carbide, supra*; *In re Public Service Commission Determination No 2,supra.*

Here, the evidence shows that the service itself, which is Remote Call Forwarding, was ordered and never cancelled by Covenant House. Covenant House merely instructed an AT&T Product Manager to reduce the number of lines upon which Remote Call Forwarding service would apply. Exhibit C-48; Tr. 134, 142, 370. However, the total amount of the bill for this service was admittedly in error because the charge was miscalculated. Respondents' Mr. Minnis testified that Mr. Apostoleris, the President of Complainant GLT, requested the bill for the Remote Call Forwarding service be calculated on the basis of nine lines. Tr. 383. Mr. Minnis attempted to implement this request in June 2000 but the error continued due to a "glitch" in the billing systems. Tr. 378. There are no other facts in the record and these facts do not amount to a violation because the action that is proscribed by Section 502(1)(c) is charging for a "service provided after the effective date the service was cancelled." There is no dispute that Covenant House wanted AT&T to continue to provide this service. Thus, the issue is not the provision of a service after the effective date the service has been cancelled, but, rather, a dispute regarding a mathematical error in calculating the total amount of a bill generated for a desired service. Covenant House does not claim that it should not have been billed for Remote Call Forwarding service, only that the bill for the service overstated the correct amount. An error in the total amount of the bill for a service that has not been cancelled is not a violation of MTA § 502(1)(c), especially where, as here, the carrier has (a) never attempted to collect the amount and (b) issued credits in an attempt to reverse the charges. For the Commission and the Court below to conclude otherwise is clearly an erroneous interpretation of the statute and cannot be sustained.

Application of the statute to the facts in evidence does not support the conclusion that an AT&T violation of Section 502(1)(c) occurred.

IV.

The Circuit Court correctly reversed the Michigan Public Service Commission's Order requiring AT&T to pay attorney fees and actual costs under Section 601(f) of the Michigan Telecommunications Act, MCL 484.8601(f); MSA 22.1469 (601)(f), to one Complainant who had not suffered an economic loss as a result of a violation of the Michigan Telecommunications Act; but erred in requiring payment of such attorneys fees and actual costs to another Complainant who had also not suffered an economic loss as a result of a violation of the Act.

Based upon the conclusion that a billing error for Remote Call Forwarding service concurrently violated both Sections 507(1) and 502(1)(c) of the MTA, the Commission awarded attorneys fees to both Covenant House, the ratepayer, and its agent, GLT. The Circuit Court affirmed as to Covenant House, but not as to GLT. If the Commission's and Circuit Court's substantive determinations regarding the violations are overturned, there is no statutory basis for an award of attorneys fees. However, even if the Circuit Court was correct in affirming the Commission's determination that AT&T violated the Act by merely incorrectly billing Covenant House for Remote Call Forwarding service, there is absolutely no legal basis for awarding attorneys fees to GLT (or Covenant House, AT&T submits) as the Circuit Court determined. There were two separate and distinct Complainants in this case. The first was Covenant House, who was the actual end-user customer billed by AT&T, and the second was Great Lakes Telecom, who is itself a telecommunications provider and was appointed by Covenant House as an agent to handle various matters related to its telecommunications needs. Tr. 192. There is no evidence in the record that any service at issue was provided by AT&T to GLT itself and certainly no evidence that AT&T billed GLT for any service provided to Covenant House. Thus, to the extent the Commission concluded that a violation of the MTA occurred when Covenant House was billed the incorrect amount for Remote Call Forwarding service, this violation simply does not give rise to any award to GLT for its attorneys fees and costs.

The Michigan Court of Appeals addressed the issue of attorneys fees in Commission proceedings in *In re Complaint of Southfield against Ameritech of Michigan*, 235 Mich. App. 523, 534; 599 N.W.2d 760 (1999). That case was decided under the former version Section 601, which did not include any provision for attorney fees. The Court rejected the Commission's conclusion that it could award attorney fees as part of its "make whole" authority under Section 601, and stated the following:

> Finally, whether the PSC has authority to award attorney fees is a question of law, subject to judicial determination de novo.
>
> 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 N.W.2d 612 (1992). Where, as in Michigan, *State Farm Mut Automobile Ins Co v. Allen*, 50 Mich. App. 71, 74; 212 N.W.2d 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), authorizes 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 N.W.2d 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.
>
> 235 Mich App at 533-535.

Subsequent to the release of the City of Southfield opinion, the legislature amended Section 601 and added a new section that addresses attorney fees. Under the current version of Section 601, the Commission may award attorneys fees, but only to a ratepayer or other person <u>who has suffered an economic loss</u> as a result of a violation of the act.

The current version of the statute reads as follows:

> Sec. 601. If after notice and hearing the commission finds that a person has violated this act, the commission shall order remedies and penalties to 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) Except for an arbitration case under section 252 of part II of tile II of the communications act of 1934.chapter 622, 110 Stat.66, attorney fees and actual costs of a person or provider of less than 250,000 end-users.
>
> MCL 484.2601(f); MSA 22.1469(601)(f)

<u>The Circuit Court correctly interpreted Section 601 as requiring an "economic loss" to justify an award of attorneys fees</u>. (Opinion and Order at p.7)

Here, as a preliminary matter, GLT was not a ratepayer since it was Covenant House who was AT&T's customer, all bills were sent to Covenant House, and Covenant House was the party responsible for paying the bills. More importantly, GLT did not suffer an economic harm as a result of any violation. Indeed, because GLT's role was merely that of an agent for Covenant House and had no standing to pursue the claims of its principal, AT&T filed a motion for summary disposition seeking to have it dismissed from the proceeding. This motion was denied by the Administrative Law Judge without prejudice on the theory that GLT would be given an opportunity to demonstrate that it had, in fact, suffered an economic harm. *See* Motion Hearing 2/28/2001, Tr. Vol. 2, p. 49. However no such demonstration was made. Following the evidentiary hearing, the Administrative Law Judge specifically found that there was no evidence that either GLT or Covenant House suffered any economic harm for which they should be made whole pursuant to the provisions of the MTA. PFD p. 24. The Commission specifically adopted the PFD's conclusion that neither Complainant had established any economic losses. Order 7/11/01 pp. 30, 31. And the Circuit Court agreed with the Commission, quoting this salient portion of the Commission's Order. (Opinion and Order at pp. 12-14) Thus, the record is clear that neither GLT nor Covenant House suffered any economic loss as the result of any violation of the MTA, and therefore neither has met the requirements established under Section 601 to qualify for an award of attorneys fees. Since the case law makes it clear that absent express statutory authority to make such an award the Commission lacks the power to do so, and the statute does not authorize an award of attorney fees to a person who has not suffered an economic loss as a result of a violation, there is no statutory basis for awarding either complainant actual costs and attorney fees. Hence, the Circuit Court's decision respecting attorneys fees awarded to Covenant House should be reversed.[1]

[1] Furthermore, the Circuit Court further erred by awarding Covenant House attorneys fees regarding its failed claims. The primary focus of the case before the Commission was not allegations of improper Remote Call Forwarding charges, but claims arising out of or related to earlier billing disputes and charges associated with the T-1 contract that Covenant House signed. Substantial time and resources were devoted by both sides to litigating the numerous disputed claims and issues that had nothing to do with Remote Call Forwarding charges. Although the Commission sided with AT&T on every one of the claims asserted by Complainants that involved those matters, the Commission ordered AT&T to pay the Complainants' costs and attorneys fees, including fees incurred in connection with litigating claims that were rejected by the Commission. Fees and costs incurred in litigating unsuccessful claims may not be awarded under Section 601(f) of the MTA. An award of attorney fees can be made under that provision only as a remedy to protect and make whole ratepayers and other persons who have suffered an economic loss as a result of the violation. MCL 484.2601; MSA 22.1469(601). Costs and

RELIEF REQUESTED

WHEREFORE, AT&T requests that the decision of the Ingham County Circuit Court:

(1) be reversed insofar as it held that AT&T violated Sections 507 and 502(1)(c) of the Michigan Telecommunications Act (as AT&T made billing mistakes and did not improperly add or cancel a service to an end-user); and

(2) be affirmed regarding its ruling denying costs and attorney fees to GLT and reversed regarding its ruling allowing costs and attorneys fees to Covenant House (as neither party suffered any economic loss as required by statute).

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attorneys fees incurred in pursuing unsuccessful claims cannot be said to result from a violation of the Act and, accordingly, cannot be included as part of a remedy under Section 601. The mere fact that the claims were tried together is irrelevant. *See Farrar v. Hobby,* 506 U.S. 103, 113 S.Ct. 566, 574-75, 121 L.Ed.2d 494, 505 (1992) (instructed courts to compare what the plaintiff actually achieved with the total relief sought in determining "the degree of success" for setting attorney fees); *Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40, 50 (1983) ("work on an unsuccessful claim cannot be deemed to have been 'expended in the pursuit of the ultimate result achieved.' ... [T]herefore, no fee may be awarded for services on the unsuccessful claim." (Citation omitted)); *Sands v. Runyon,* 28 F.3d 1323, 1333 (2nd Cir. 1994) (affirmed reduction of fees for work on unsuccessful claims). Here, Covenant House was unsuccessful on multiple claims and should not be awarded attorney fees incurred in pursuing those claims.

DATED: April 7, 2004

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

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EXHIBIT "A"

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.

/

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.

[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 argues 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.
>
> 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

STATE OF MICHIGAN

IN THE COURT OF APPEALS

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

Plaintiffs-Applicants,

-vs-

MICHIGAN PUBLIC SERVICE COMMISSION,

Defendant.

______________________________/

Docket No.

Ingham County Circuit Court
Court No. 03-972-AA

MPSC Case No. U-12759

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PROOF OF SERVICE

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) ss.
COUNTY OF WAYNE)

DEL A. SZURA, being first duly sworn, deposes and says that he did on April 7, 2004 serve an Application for Leave to Appeal upon the following parties by depositing a copy thereof in the U.S. Mails, enclosed in a sealed envelope with first-class postage fully prepaid, addressed as follows:

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Del A. Szura

Del A. Szura

Subscribed and sworn to before me
this 7th day of April, 2004.

Diane M. MacArthur

Diane M. MacArthur
Notary Public, State of Michigan, County of Wayne
My commission expires: June 4, 2005
Acting in the County of Wayne