

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of	)	
<b>HARPER AVENUE L.L.C., d/b/a CUSTOM VAN</b>	)	
<b>ENTERPRISES, INC., and HARPER AVENUE</b>	)	Case No. U-11983
<b>L.L.C., d/b/a CENTRAL AUTO LEASING, against</b>	)	
<b>AMERITECH MICHIGAN.</b>	)	
_____	)	

At the February 22, 2000 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman  
Hon. David A. Svanda, Commissioner  
Hon. Robert B. Nelson, Commissioner

**OPINION AND ORDER**

**I.**

**HISTORY OF PROCEEDINGS**

On May 20, 1999, Harper Avenue L.L.C., d/b/a Custom Van Enterprises, Inc. (CVE), and Harper Avenue L.L.C., d/b/a Central Auto Leasing (CAL), (collectively, Custom Van) filed a complaint against Ameritech Michigan alleging violations of the Michigan Telecommunications Act, MCL 484.2101 et seq.; MSA 22.1469(101) et seq. (the Act). Among other things, Custom Van alleged that Ameritech Michigan discontinued CVE's regulated local exchange service for failure to pay disputed charges for unregulated service, namely yellow pages advertising provided by an Ameritech Michigan affiliate, Ameritech Publishing, Inc. The initial hearing in this case, scheduled for July 7, 1999, was adjourned so that Custom Van could retain the services of an attorney.

On July 26, 1999, Custom Van filed an amended complaint adding allegations of misrepresentation on the part of Ameritech Michigan and specifically asserting that Ameritech Michigan violated Sections 314, 502, and 305 of the Act. On July 30, 1999, Custom Van revised the complaint a second time. Ameritech Michigan submitted its answer on August 20, 1999.

Pursuant to due notice, a prehearing conference was held on October 7, 1999 before Administrative Law Judge Daniel E. Nickerson, Jr., (ALJ). Custom Van, Ameritech Michigan, and the Commission Staff (Staff) participated in the proceedings.

In the course of the prehearing conference, the ALJ adopted the schedule proposed by the parties.<sup>1</sup> He also granted, in part, Custom Van's first motion to compel. Additional motion hearings took place on November 18, December 1, and December 2, 1999.

Evidentiary hearings were conducted on December 14, 15, and 28, 1999, at which time the parties presented testimony from a total of 10 witnesses. The record consists of 612 pages of transcript and 20 exhibits, all of which were received into evidence.

Custom Van and Ameritech Michigan each filed briefs and reply briefs on January 12 and 18, 2000, respectively. On January 28, 2000, the ALJ issued a Proposal for Decision (PFD) in which he concluded that (1) CVE's service was properly discontinued as a result of its failure to pay charges for regulated, as opposed to unregulated, services, and (2) although Ameritech Michigan technically violated Section 502 of the Act--by initially demanding payment of unregulated charges before it would restore CVE's service--no penalties should be imposed for that violation.

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<sup>1</sup>Among other things, the parties stipulated that the 210-day statutory deadline for completion of this case would run from July 30, 1999, the filing date of CVE's second amended complaint.

Custom Van, the Staff, and Ameritech Michigan filed exceptions to the PFD on February 4, 2000. Replies to exceptions were filed on February 11, 2000 by Custom Van and Ameritech Michigan.

## II.

### **FACTUAL BACKGROUND**

CVE and CAL are separate, albeit closely-related, businesses. Despite having separate phone systems (and thus receiving separate bills), these businesses occupy adjacent offices, are connected by an inside hallway, and are each owned and operated by John and Cheryl Maniaci. CVE repairs and restores conversion vans and other customized vehicles. As for CAL, it rents and leases automobiles and limousines. Thus, some of CVE's business activities result in direct referrals to CAL (such as when a customer dropping off a vehicle for repairs at CVE needs to rent a car). See Tr. 168.

Custom Van's primary witness, Mr. Maniaci, testified that CVE's phone service was shut off "with no advance notice" on the afternoon of May 11, 1999. Tr. 169. Because this discontinuance of service was not discovered until after Ameritech Michigan's business offices had closed for the day, Mr. Maniaci instructed CVE's office manager to contact Ameritech Michigan first thing the next morning. Upon making contact with Ameritech Michigan on May 12, 1999, Mr. Maniaci continued, his office manager was informed that Custom Van would have to pay \$16,367.66 in overdue charges before CVE's basic local exchange service would be restored. See Tr. 169-170.

After reviewing CVE's records, Mr. Maniaci concluded that approximately \$15,000 of the payment demanded by Ameritech Michigan related to disputed yellow pages charges that had been showing up on CVE's bills since at least 1994, and possibly as early as 1993. These records (set

forth in Exhibits C-3, C-4, and C-7) further indicated that, throughout this period, Custom Van had gotten into the habit of making payments solely for the regulated services portion of CVE's monthly telephone bills. No payments had been made toward Ameritech Publishing's yellow pages charges, Mr. Maniaci asserted, due to his belief that Custom Van never requested those advertisements.

According to Mr. Maniaci, he and his office manager contacted Ameritech Michigan numerous times between May 12 and 20, 1999 seeking restoration of CVE's phone service. During each contact, he continued, Custom Van (1) asserted that a significant portion of CVE's outstanding balance was for unregulated services, (2) asked Ameritech Michigan to compute how much of that balance was for regulated, as opposed to unregulated, service charges, and (3) offered to immediately pay all regulated service charges. Tr. 170-172, 191. Nevertheless, Mr. Maniaci asserted, those discussions always concluded with Ameritech Michigan claiming that the balance consisted solely of charges for regulated services and demanding payment of the entire \$16,367.66 before restoring CVE's service.

Mr. Maniaci went on to testify that Custom Van talked to several people in the Commission's Communications Division in an effort to resolve the dispute. When more than a week passed without reaching a resolution, Custom Van acted on the Staff's recommendation to file a formal complaint. Immediately thereafter, Mr. Maniaci noted, Ameritech Michigan "called us and gave us an amount that would be accepted as payment for restoration of service." Tr. 171. Custom Van promptly paid that amount, \$1,233.80, and CVE's service was restored on May 21, 1999.

Several of the witnesses presented by Custom Van offered testimony to the effect that Ameritech Michigan's actions resulted in financial injury to both CVE and CAL. For example, Cheryl Nieporte, CVE's sales manager, estimated that as many as 360 sales were lost during the interrup-

tion due to customers' inability to reach CVE by phone. Tr. 199. Based on an analysis of the company's usual receipts for that time of the year, Mr. Maniaci concluded that "\$11,000.00 is reasonable and conservative as a loss figure" for CVE as a result of those missed sales. Tr. 181. He further stated that CAL likely lost one business referral per day due to CVE's reduced traffic, thus depriving it of between \$4,500 and \$5,400 in total revenue. Id. James Taylor, a financial consultant familiar with Custom Van's operations, agreed with Mr. Maniaci's estimates regarding lost revenues for both CVE and CAL. See Tr. 246-48. Finally, Mr. Maniaci testified that (1) the use of CAL's phone by CVE's employees during the service interruption may have caused CAL to miss some sales calls of its own, thus producing an additional \$2,000 drop in CAL's likely revenue, (2) discontinuing CVE's service may have harmed its reputation and, thus, cost it some of its regular customers, and (3) the time and effort expended in getting CVE's service reestablished and in litigating this complaint resulted in Custom Van's expenditure of approximately \$31,000 in out-of-pocket costs, not including attorney fees.

Evidence introduced by the Staff provided a detailed account of the interactions between the parties during CVE's service interruption. For example, Donald Casterline, a complaint officer in the Service Quality Section of the Commission's Communications Division, testified that he received a call from Custom Van on the morning of May 12, 1999 during which Mr. Maniaci indicated that CVE's service had been shut off for nonpayment of advertising charges. Tr. 416. According to Mr. Casterline, he and other Staff members made several inquiries of Ameritech Michigan regarding whether any part of the \$16,367.66 that it was demanding from Custom Van was for unregulated services, such as yellow pages advertising, and seeking a specific breakdown of all regulated and unregulated charges. With regard to the Staff's first question, Ameritech Michigan sent Mr. Casterline an E-mail on May 13, 1999 assuring him (incorrectly, as it was later

discovered) that “no directory advertising was included.” Tr. 425; Exhibit S-15. As for the second issue, the Staff’s records indicated that it got no final response regarding the precise breakdown between regulated and unregulated expenses until after Custom Van paid \$1,233.80 to get CVE’s service restored. Exhibit S-16.

Ameritech Michigan presented testimony from two witnesses. The first was George Scarlett, from the Credit and Collection Division of Ameritech Michigan’s parent company, Ameritech Corporation. According to Mr. Scarlett, Ameritech Michigan has long used an automated billing and collection system that sends out late payment reminders and (where the customer fails to respond to that reminder within the stated time frame) shut-off notices for any account that has a delinquent balance of over \$76. Tr. 534-35. Although neither Ameritech Michigan nor Custom Van<sup>2</sup> produced a copy of a shut-off notice regarding CVE’s service, and despite the fact that Ameritech Michigan’s system does not allow it to retain copies of those notices, Mr. Scarlett testified that the system’s records confirm that such a notice was mailed to Custom Van on May 3, 1999 setting forth both the amount of “deniable charges” and the date by which those charges must be paid to avoid an automatic<sup>3</sup> shut-off. Mr. Scarlett defined deniable charges as those arising from local or long distance service, “other than the advertising.” Tr. 534. Nevertheless, he conceded that the notice sent to Custom Van (which his records indicate requested immediate payment of \$12,816.89, rather than the \$16,367.66 that Ameritech Michigan later demanded) mistakenly included advertising fees in the amount listed as deniable charges. Tr. 537.

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<sup>2</sup>Custom Van offered into evidence, as Exhibit C-2, several late payment reminders, but no actual shut-off notices. Moreover, those reminders all concern CAL, not CVE.

<sup>3</sup>According to Mr. Scarlett, once the shut-off notice is issued and no response is received from the customer, Ameritech Michigan’s system performs the service interruption--without any further steps having to be taken by the company’s employees. See Tr. 544-45.

Mr. Scarlett went on to state that he first became involved in this case on May 11, 1999, when Mr. Maniaci called in an attempt to get CVE's service restored. After explaining that restoration could not occur until all deniable charges had been paid, Mr. Scarlett continued, Mr. Maniaci asserted that much of the amount being requested involved an unresolved "advertising claim against Ameritech that dated back to 1993." *Id.* However, because the Credit and Collection Division's system could only access CVE's billing history for the prior six months, and because the customer was unable to provide the specific amount of disputed charges, Mr. Scarlett referred Mr. Maniaci to one of Ameritech Michigan's billing managers to determine the precise amount of the undisputed, past due charges. Until his division "got a breakdown of the bill," he advised Mr. Maniaci, "I couldn't restore service." Tr. 538.

Finally, Mr. Scarlett testified that after "the executive office billing area went over the bill and gave an exact amount" of deniable charges, and once Custom Van paid that new figure (approximately \$1,233), his division restored CVE's service. Tr. 568. Although it took approximately 10 days for Ameritech Michigan to determine what was deniable, he indicated that the delay arose from the fact that "billing only keeps accounts on microfiche for a certain number of years" and that it would take a much more time-consuming investigation to go "back as far as 1993." Tr. 570.

Ameritech Michigan's second witness was David Jones, a certified public accountant called for the purpose of rebutting Custom Van's estimates of economic damages. Mr. Jones began by challenging Mr. Maniaci's assertion that (based on the company's average daily sales during the second quarter of 1999) CVE likely lost approximately \$11,000 due to interruption of its service. According to him, Mr. Maniaci "has not provided any evidence that [CVE] lost any sales during this time period." Tr. 446. Mr. Jones went on to state that even if one accepts Mr. Maniaci's

claim that CVE should have had \$11,000 in sales between May 11 and 21, 1999,<sup>4</sup> that figure must be reduced by (1) CVE's "actual sales" during that period and (2) the "variable costs that would have been incurred to generate" CVE's lost sales. *Id.* Making these corrections, he claimed, results in a lost profit figure of only \$2,600 for CVE. *See* Tr. 449.

As for claims that CAL missed-out on up to \$5,400 in direct referrals from CVE and that it likely had another \$2,000 in lost sales due to tie-ups on its telephone system, Mr. Jones found those assertions to be wholly speculative. Specifically, he noted that Mr. Maniaci provided no objective data whatsoever to support his claims that (1) CAL lost one direct referral per day from CVE throughout the service interruption, (2) those lost referrals would have been worth between \$500 and \$600 each, and (3) potential customers were unable to reach CAL between May 11 and 21, 1999. *See* Tr. 451-52.

### III.

#### **POSITIONS OF THE PARTIES**

##### Custom Van

Custom Van asserts that Ameritech Michigan violated Section 314(1) of the Act by discontinuing CVE's regulated basic local exchange service for nonpayment of unregulated and disputed yellow pages advertising charges. According to Custom Van, this assertion is supported by the fact that of the \$16,367.66 (or \$12,816.89, according to Mr. Scarlett) payment demanded by Ameritech Michigan, only \$1,233.80 actually related to CVE's local or regulated service. It further contends that numerous statements by Ameritech Michigan employees (to the effect that the

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<sup>4</sup>In arriving at his figure, Mr. Maniaci multiplied the gross sales for the second quarter of 1999 (\$100,173) by the percentage of that period during which CVE lacked telephone service (10 days ÷ 90 days = 11%), and then rounded the result to \$11,000.

entire unpaid balance associated with CVE's account represented deniable charges that must be paid before the restoration of service) constituted misrepresentations to both Custom Van and the Staff in violation of Section 502(a). Similarly, Custom Van claims that because monthly bills, late payment reminders, and shut-off notices issued by Ameritech Michigan frequently combine regulated and unregulated charges and seek payment of the total, they violate Section 502(e) of the Act.

Custom Van further contends Ameritech Michigan violated Section 502(b) by charging it for services (such as Yellow Pages Plus advertisements undertaken by Ameritech Publishing, Internet yellow pages service, and miscellaneous services allegedly performed by toll providers) that no one at CVE ever ordered. Finally, Custom Van argues that because Ameritech Michigan is a provider of basic local exchange service, the above-described actions also constitute a violation of Section 305(1)(n) of the Act.

As a result of these alleged violations, Custom Van concludes that the Commission should (1) order Ameritech Michigan to reimburse Custom Van for approximately \$60,000 in economic damages, including lost revenue and all out-of-pocket costs incurred in pursuing this complaint, (2) require it to pay Custom Van's attorney fees and other law-related expenses, (3) insist that Ameritech Michigan refund all monies paid for CVE's basic local exchange service that relate to the period of May 11 through 21, 1999, (4) impose fines of not less than \$400,000 for Ameritech Michigan's various violations of the Act, and (5) issue all cease and desist orders necessary to prevent conduct like that exhibited by Ameritech Michigan in this case and to force it to reform its billing and collection practices.

## Staff

The Staff agrees with Custom Van that Ameritech Michigan committed several violations of the Act. Among other things, the Staff contends that evidence received in this case shows that Ameritech Michigan combined charges for regulated and unregulated services in CVE's shut-off notice and demanded payment for both types of charges in order to maintain, and later restore, CVE's basic local exchange service. In addition, it asserts that Ameritech Michigan made misrepresentations to both Custom Van and the Staff and that Ameritech Michigan failed to correct its billing error in a timely manner.

The Staff therefore concurs with many of Custom Van's requests for relief. For example, it asserts that the record supports entering a cease and desist order against Ameritech Michigan, imposing fines for the company's wrongdoing, and granting all relief necessary for Custom Van to be made whole, consistent with the Act.

## Ameritech Michigan

In contrast to Custom Van and the Staff, Ameritech Michigan contends that its actions concerning CVE in no way violated the Act. In support of that contention, Ameritech Michigan points out that Custom Van has a long history of delinquent and partial payments with regard to CVE's phone service. Moreover, it contends that at no time prior to the interruption of CVE's service did Custom Van advise Ameritech Michigan that it disputed any of the amounts appearing on CVE's monthly bills, whether for regulated or unregulated services. Only after CVE's service was shut off did Custom Van assert that a portion of the total delinquency--consisting of charges dating back to 1993--was somehow improper.

Ameritech Michigan goes on to note that at the time CVE's service was interrupted, it owed over \$1,200 in past due charges for regulated local services alone. It therefore contends that this shut-off did not violate Section 314(1) of the Act. Moreover, Ameritech Michigan contends that due to Custom Van's six-year delay in challenging the disputed portion of CVE's bill, a significant amount of time was required to review old, non-computerized billing records before an accurate separation of regulated and unregulated charges could be made. As a result, it argues that the delay in restoring CVE's service, as well as any misstatements made during the intervening period, are fully excusable.

Finally, Ameritech Michigan contends that Custom Van's request for damages is based on an overly-broad reading of the Act, and that--contrary to assertions set forth in the complaint--Section 601 provides no basis for recovering costs like those demanded in this case. Furthermore, Ameritech Michigan asserts that Custom Van failed to offer any competent, material, and substantial evidence that it actually sustained an economic or financial loss as a result of Ameritech Michigan's actions. As for the request to recover attorneys fees and legal expenses, Ameritech Michigan cites In re Complaint of City of Southfield, 235 Mich App 523; 599 NW2d 760 (1999), in support of the proposition that the Commission lacks authority under the Act to award that type of relief.

#### IV.

#### DISCUSSION

The parties' points of disagreement fall into six specific areas, ranging from the propriety of certain evidentiary rulings to arguments over potential penalties. Each of these areas will be addressed separately.

## Disputes Regarding Evidentiary Rulings

Ameritech Michigan excepts to five evidentiary rulings made by the ALJ in the course of these proceedings.

First, Ameritech Michigan argues that the ALJ incorrectly received into evidence various conclusions of law that were offered by Mr. Maniaci. Second, it contends that the ALJ mistakenly admitted into the record a written offer of settlement from Ameritech Michigan to Custom Van, as well as statements by Mr. Maniaci regarding the contents of that offer. Third, Ameritech Michigan asserts that the ALJ should have granted its motion to strike all testimony and exhibits concerning the alleged damages sustained by CAL as a result of CVE's service interruption. According to Ameritech Michigan, the fact that CAL "is a separate and distinct entity" from CVE, when coupled with the fact that the complaint concerns "the wrongful disconnection of service" to CVE, clearly indicates that testimony regarding CAL's damages is irrelevant and should have been held inadmissible. Ameritech Michigan's exceptions, p. 3. Fourth, Ameritech Michigan claims that statements from Custom Van's witnesses concerning the alleged damages sustained by CVE and CAL (such as claims for harm arising after CVE's service had been restored and assertions regarding the potential number of sales lost during the service interruption) constitute "pure speculation" and are therefore inadmissible. Id. at 5.

Fifth, Ameritech Michigan argues that the ALJ erred by not excluding Exhibit C-12(R), which consists of a list of Custom Van's alleged out-of-pocket costs and legal expenses. It supports this argument by pointing out that although Custom Van had been required to submit this list seven days prior to the commencement of evidentiary hearings, an incomplete version (received into evidence as Exhibit C-12) was produced at that time. Ameritech Michigan goes on to note that Custom Van was then given until the start of those hearings on December 14, 1999 to file an

updated version of the list. However, it continues, Custom Van again failed to adhere to that deadline and instead prevailed upon the ALJ to give it until the morning of December 27, 1999 to provide Ameritech Michigan with a copy of that document. Yet again, Ameritech Michigan notes, Custom Van neglected to comply with the ALJ's directive. Instead, it waited until the last day of hearings in this case (December 28, 1999) to provide Ameritech Michigan with this information.<sup>5</sup> According to Ameritech Michigan, Custom Van's "dilatatory tactics" deprived it of any reasonable opportunity to review these alleged expenses and present rebuttal testimony regarding their reasonableness. *Id.* at 6. Ameritech Michigan therefore contends that issues of fundamental fairness require excluding Exhibit C-12(R) in its entirety.

The Commission finds that the first two exceptions noted above are well taken. As Ameritech Michigan correctly asserts, Mr. Maniaci's conclusions of law and all references to the offer of settlement are inadmissible pursuant to Rules 701 and 408 of the Michigan Rules of Evidence. Although it is true that the Administrative Procedures Act of 1969, 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq., and the Commission's Rules of Practice and Procedure, as amended, 1992 AACCS, R 460.17101 et seq., allow the Commission to grant parties more latitude with regard to their submission of proofs, it finds no substantive reason for allowing this information into the record. Thus, the testimony and exhibits cited in these two parts of Ameritech Michigan's exceptions should be stricken.

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<sup>5</sup>Although counsel for Custom Van asserted that his office sent a copy of proposed Exhibit C-12(R) to Ameritech Michigan by facsimile shortly before 5:00 p.m. on December 27, 1999, Ameritech Michigan's attorney claimed that the first time she saw the document was when she was handed a copy at the start of the December 28, 1999 hearing (which was the last date available for taking testimony in this case).

Turning to Ameritech Michigan's claim that it should likewise strike all evidence regarding CAL's alleged damages, the Commission finds that the ALJ correctly admitted these proofs.

Section 601 of the Act states, in pertinent part:

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, . . . .

MCL 484.2601; MSA 22.1469(601) [emphasis added]. The highlighted portion of this statute expressly indicates that the "make whole" remedies available pursuant to Section 601 are not limited to the ratepayer whose service was discontinued. Rather, they extend to any "other persons" (like CAL) that can show they sustained an economic harm as the result of the carrier's alleged violation. Thus, Ameritech Michigan's request to reverse the ALJ's ruling on this issue must be rejected.

The Commission similarly finds that Ameritech Michigan's fourth exception is not well taken. Ameritech Michigan's claim (to the effect that the testimony regarding lost sales and long-term injury to Custom Van's business reputation is speculative) goes solely to the issue of how much weight that testimony should be given. The Commission therefore concludes that the ALJ properly received this information into evidence.

This brings the Commission to Ameritech Michigan's fifth and final exception, in which the company asserts that Exhibit C-12(R) should have been stricken due to Custom Van's failure to produce it in a timely manner. The record indicates that, after submitting Exhibit C-12 (its partial list of out-of-pocket costs and legal expenses) on December 14, 1999, Custom Van failed to submit its updated version of this exhibit in accordance with the schedule established by the ALJ. Moreover, it stands to reason that its delay in producing this document until the last day scheduled

for hearings significantly hindered Ameritech Michigan's ability to address the reasonableness of the alleged damages listed on Exhibit C-12(R). The Commission therefore finds that some sanction is warranted.

Nevertheless, the Commission agrees with the ALJ's statement that "to strike it is just too harsh a remedy." Tr. 528. A more reasonable result, the Commission concludes, would be to remove from Exhibit C-12(R)'s list of "employee costs" all expenses related to John and Cheryl Maniaci's work in resolving this dispute. This appears to be a particularly equitable result in light of the fact that (1) it was Mr. and Mrs. Maniaci who prepared and filed this information beyond the established date, and (2) no reasonable justification was provided in support of their respective requests for \$200 and \$75 per hour for their time. See Exhibit C-12(R), p. 5.

#### Alleged Violation of Section 314(1)

As noted earlier, the ALJ rejected Custom Van's claim that Ameritech Michigan discontinued CVE's basic local exchange service for nonpayment of unregulated and disputed yellow pages advertising charges in violation of Section 314(1) of the Act. In reaching his conclusion, the ALJ agreed with Ameritech Michigan that CVE's service was actually shut off for failure to pay \$1,233.80 in regulated charges. He went on to conclude that, notwithstanding Custom Van's assertion that it never received a warning letter or shut-off notice, the record indicates that the requisite notice was sent. Furthermore, the ALJ held that nothing in Section 314(1) prohibits a local exchange carrier (LEC) like Ameritech Michigan from including both regulated and unregulated charges in its late payment reminders and monthly bills. He thus recommended that the Commission dismiss the complaint with regard to this issue.

Both Custom Van and the Staff except to that recommendation. In support of their exceptions, these parties note that Ameritech Michigan's witnesses acknowledge that (1) the amounts demanded before and after CVE's shut-off included charges for unregulated services and (2) the LEC's own employees could not determine what portions of CVE's outstanding balance represented charges for regulated, as opposed to unregulated, services for over 10 days following the interruption of service. If Ameritech Michigan was unable to identify the charges for which it could lawfully disconnect CVE's basic local exchange service, they continued, it is unreasonable for the ALJ to conclude that Custom Van's failure to pay those amounts was the sole reason for the shut-off. Custom Van and the Staff therefore request that the Commission reject the ALJ's recommendation and find that Ameritech Michigan violated Section 314(1).

The Commission agrees for the following four reasons. First, uncontroverted evidence shows that Ameritech Michigan shut off a regulated service, namely CVE's basic local exchange service, on May 11, 1999. Tr. 169. Second, Ameritech Michigan's own records indicate that it demanded payment of between \$12,816.89 and \$16,367.66 to refrain from interrupting CVE's service and to restore that service after the interruption. Tr. 536, 557; Exhibit C-4. Third, Ameritech Michigan's employees subsequently conceded that the LEC had, in fact, included thousands of dollars of unregulated charges both in the shut-off notice and the company's subsequent demands for payment prior to the reinitiation of CVE's service. See Tr. 562; 577-78. Fourth, the LEC's dilatory tactic of depriving its business customer of service for over 10 days is both inexcusable and unacceptable.

The issue in this case is not, as suggested by Ameritech Michigan, whether the LEC could have lawfully shut off CVE's regulated service. Clearly, Custom Van's failure to pay the regulated portion of CVE's total monthly bill provided an opportunity to discontinue service for nonpayment

of that part of the total bill. Rather, the salient question is whether Ameritech Michigan shut off CVE's basic local exchange service based in any part on the nonpayment of unregulated charges like those arising from Ameritech Publishing's disputed yellow pages charges. The answer to that question is clearly in the affirmative, as conceded by Mr. Scarlett (Tr. 578) and established by the remainder of the record.<sup>6</sup> As a result, the Commission concludes that it should reject the ALJ's recommendation and, instead, find that Ameritech Michigan violated Section 314(1) of the Act.

Alleged Violations of Sections 502(a) and (e)

A significant amount of the testimony offered in this case concerns assertions by Custom Van and the Staff that Ameritech Michigan violated Section 502 of the Act, which states, in pertinent part:

Sec. 502. A provider of a telecommunications service shall not do any of the following:

(a) Make a statement or representation, including the omission of material information, regarding the rates, terms, or conditions of providing a telecommunication service that is false, misleading, or deceptive.

\* \* \*

(e) State to an end-user that their basic local exchange service or other regulated service will be discontinued unless the end-user pays a charge that is due for an unregulated service.

MCL 484.2502; MSA 22.1469(502).

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<sup>6</sup>Based on uncontroverted testimony to the effect that Ameritech Michigan was unable to identify immediately the regulated charges for which it could interrupt CVE's basic local exchange service, it is impossible to conclude that the LEC discontinued that service as a result of Custom Van's failure to pay an amount that was not determined until ten days after the shut-off occurred.

The ALJ rejected these parties' claims that Custom Van was misled by either Ameritech Michigan's monthly bills, late payment reminders, or shut-off notices. He based his conclusion on the fact that Custom Van had, for several years, made a practice of segregating CVE's bills into regulated and unregulated components, and "paying the current charges while ignoring the yellow pages advertising charges." PFD, p. 13. As for Ameritech Michigan's statements to Custom Van and the Staff regarding the amount of the regulated charges that CVE must pay prior to the restoration of CVE's service, the ALJ conceded that they constituted misrepresentations "according to the strict letter of the statute." *Id.* Nevertheless, he believed this was excusable because (1) those misrepresentations arose from a technological flaw in Ameritech Michigan's computerized billing and collection system, (2) Custom Van's failure to keep accurate records and its history of making sporadic, partial payments for CVE's telephone service contributed to the confusion regarding the delinquent balance, (3) the misrepresentations occurred after CVE's service had already been interrupted, and (4) Ameritech Michigan corrected those misrepresentations within a reasonable amount of time. As a result, he recommended "that there be no action taken" against Ameritech Michigan for its technical violation of Section 502. *Id.* at 14.

Custom Van and the Staff except to this recommendation on several grounds. For example, Custom Van claims that the interruption of service was certainly not "reasonable" as it pertains to CVE, "which endured considerable damage, injury, inconvenience, and greatly increased costs as a result" of Ameritech Michigan's misrepresentations. Custom Van's exceptions, p. 15. Moreover, it continues, nothing in the Act indicates that the remedies set forth in Section 601 shall not apply where an LEC retreats (after more than 10 days) from its repeated assertion that a customer must pay all outstanding regulated and unregulated charges before its phone service will be restored. For its part, the Staff contends that (1) CVE's payment history bears no relevance regarding

Ameritech Michigan's misrepresentations and provides insufficient justification for the LEC's conduct, (2) the Act provides no grace period for correcting a misrepresentation under Section 502, and (3) nowhere in the Act is contributory negligence acknowledged as a potential defense to making either a general misrepresentation--in violation of Section 502(a)--or a specific misstatement regarding the LEC's ability to discontinue regulated service for failure to pay charges for unregulated service--in violation of Section 502(e). For all of these reasons, Custom Van and the Staff request that the Commission reject the ALJ's recommendation, find that Ameritech Michigan repeatedly violated Sections 502(a) and (e), and conclude that those violations give rise to penalties pursuant to Section 601 of the Act.

The Commission agrees and finds that Ameritech Michigan committed multiple violations of Sections 502(a) and (e). For example, it issued a shut-off notice incorrectly advising Custom Van that it would have to pay thousands of dollars in unregulated charges in order to avoid the interruption of CVE's basic local exchange service. See Tr. 536-37, 578. This, by itself, was a direct violation of Section 502(e)<sup>7</sup>. Moreover, in response to repeated inquiries, Ameritech Michigan inaccurately advised the Staff that none of the payments being demanded of Custom Van related to unregulated services such as yellow pages advertising. Exhibit S-15; See also Tr. 424, 435-37. Misleading the Staff during the course of its investigation, the Commission concludes, constituted a serious breach of Section 502(a). Similarly, the record indicates that Ameritech Michigan also violated Section 502(a) by repeatedly and inappropriately advising Custom Van that it was required to pay what was ultimately found to be over \$14,000 in unregulated service charges

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<sup>7</sup>In reaching this conclusion, the Commission notes that nothing in Section 502 requires showing that the recipient relied on the misrepresentation. Thus, the issue of whether Custom Van was aware of the fact that CVE's regulated service could not legally be interrupted for nonpayment of unregulated charges is irrelevant.

before the LEC would resume providing CVE with basic local exchange service. See Tr. 172, 191, 537, and 562.

Unlike the ALJ, the Commission finds these violations of Section 502(a) and (e) to be neither insignificant nor excusable. Although many of these violations can be traced to alleged shortcomings with the LEC's automated billing and collection system, Ameritech Michigan is ultimately responsible for the system's results. In this case, those results include making numerous misrepresentations to the Custom Van and the Staff, improperly demanding payment of unregulated charges before restoring a customer's regulated service, and significantly disrupting CVE's business operations for over ten days. The Commission therefore concludes that it should reject the ALJ's recommendation with regard to this issue and find that Ameritech Michigan's actions constitute actionable violations of Sections 502(a) and (e).

#### The Alleged Violation of Section 502(b)

In his PFD, the ALJ made no specific mention of the claim (set forth in Paragraph 9 of Custom Van's amended complaint) that Ameritech Michigan violated Section 502(b) of the Act by repeatedly including on CVE's and CAL's bills charges for services that the customer never requested.

Custom Van excepts to the ALJ's failure to address this alleged violation. According to it, the monthly bills assembled in Exhibits C-3, C-4, and C-5 are replete with charges for long distance, Internet yellow pages, and Yellow Pages Plus services that it never ordered. It goes on to assert that the bill payment summaries set forth on Exhibits C-7 and C-9 indicate that, "following review and complaint," credits were issued regarding many of those unwanted services. Custom Van's exceptions, p. 21. In further support of this alleged violation, Custom Van notes that Ameritech

Michigan has likewise recoured to Ameritech Publishing over \$14,000 of the disputed charges that gave rise to the interruption of CVE's service. Custom Van thus requests that the Commission find Ameritech Michigan to have violated Section 502(b) of the Act.

Although, the Commission is deeply concerned about this issue, it does not find these arguments persuasive. Custom Van cites no testimony in support of its claim that CVE and CAL were charged for services that they never requested. In addition, the record indicates that Custom Van largely ignored this issue throughout the proceedings. Moreover, the only significant testimony relating to this issue serves to rebut Custom Van's contention that bill credits like those identified on Exhibits C-7 and C-9 support its claim for a violation of Section 502(b). Specifically, Ameritech Michigan employee Cathleen Marsh noted that her company routinely recoures disputed charges back to their respective service providers (who are then free to pursue collection on their own) and that this in no way constitutes either an admission or a determination by Ameritech Michigan that those services were not requested by the end-user. Tr. 347, 362. The Commission therefore finds that Custom Van failed to prove that Ameritech Michigan violated Section 502(b) of the Act.

That having been said, the Commission is troubled by the increasing frequency with which customers are alleging violations of Section 502(b).<sup>8</sup> Billing customers for services that they never requested is, in the Commission's eyes, worse than theft. This is due to the fact that, because they relate to necessary (and often life-sustaining) services, utility bills tend to carry elevated weight in the eyes of many end-users. All telecommunication service providers operating in Michigan

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<sup>8</sup>Recent statements from the Federal Communications Commission (FCC) indicate that the practice of placing charges for unrequested services on end-users' telephone bills, which the FCC refers to as "cramming," has likewise become an increasingly frequent problem at the national level.

should therefore take notice that, if a violation of this or any similar provision is found, the Commission will strive to impose the maximum penalties available under law.

Alleged Violation of Section 305(1)(n)

In addition to the violations addressed above, Custom Van claims that other actions taken by Ameritech Michigan ran afoul of Section 305(1)(n) of the Act, which states:

Sec. 305. (1) A provider of basic local exchange service shall not do any of the following:

\* \* \*

(n) Perform any act that has been prohibited by this act or an order of the commission.

MCL 484.2305; MSA 22.1469(305). These alleged actions consist of (1) failing to respond promptly to Custom Van's requests to clarify the disputed bill and to provide for the immediate restoration of CVE's basic local exchange service following payment of less than the full amount demanded in the shut-off notice, (2) failing to respond quickly and accurately to the Staff's inquiries regarding what, if any, portion of CVE's delinquency arose from the provision of unregulated services, and (3) letting its misrepresentation to the Staff stand uncorrected even after Ameritech Michigan determined that a significant portion of its demand for payment included charges for unregulated and disputed services. Custom Van contends that the ALJ erred by failing to conclude that these actions constitute a violation of Section 305(1)(n).

In response to this contention, Ameritech Michigan reasserts that any delay in resolving the dispute and restoring CVE's service arose, in significant part, from Custom Van's inability to provide the LEC with the specific amount of regulated charges that remained unpaid. Ameritech Michigan goes on to assert that it diligently attempted to provide quick and accurate answers to the

Staff's questions. Any failure to do so, it contends, should be excused by the fact that its computerized billing and collection system is not capable of providing a breakdown between regulated and unregulated charges where (as in this case) the dispute centers on charges that were incurred six or seven years earlier. Finally, Ameritech Michigan argues that Custom Van cites no violation of a specific Commission order. Thus, the company claims, no basis exists for finding that it violated Section 305(1)(n).

The Commission agrees with Ameritech Michigan's last argument and concludes that Custom Van has not shown a specific violation of a prior Commission order. Nevertheless, it finds the LEC's other two arguments unpersuasive. Not only does Ameritech Michigan prepare and issue bills arising from customers' use of its own telecommunications services, it contracts with other service providers to satisfy their billing and collection needs at the same time. Based on Ameritech Michigan's expertise in this area, its assertion that Custom Van was in a better position to determine the precise amount of CVE's unpaid charges for regulated service rings hollow. Moreover, this order previously indicated that Ameritech Michigan is ultimately responsible for any misrepresentations arising from flaws in its automated billing and collection system.

The question therefore becomes whether any of the three actions cited by Custom Van are "prohibited by this act." The Commission finds that at least one of them is. As noted earlier in this order, Ameritech Michigan violated Section 502(a) of the Act by inaccurately advising the Staff that none of the overdue payments being demanded of Custom Van related to unregulated services. Because that violation was committed by "a provider of basic local exchange service," it therefore gives rise to a concurrent violation of Section 305(1)(n).

## Remedies for Violations of the Act

As set forth above, the Commission finds that Ameritech Michigan's actions with regard to the discontinuance of CVE's service give rise to five violations of the Act.<sup>9</sup> The Commission must therefore determine which, if any, of the numerous remedies requested by Custom Van should be granted as a result of those violations.

### A. Economic Losses and Out-of-Pocket Expenses

Based on testimony offered by Messrs. Maniaci and Taylor, Custom Van contends that it sustained economic losses of up to \$11,000 for CVE and \$7,400 for CAL due to Ameritech Michigan's improper actions. Moreover, Custom Van claims that it incurred approximately \$31,000 in out-of-pocket expenses to resolve this dispute, as set forth on Exhibit C-12(R). In response, Ameritech Michigan contends that all allegations of lost revenue are speculative and that insufficient support exists for the recovery of claimed out-of-pocket expenses. The LEC therefore asserts that the Commission should reject all of Custom Van's claims in this regard.<sup>10</sup>

The Commission agrees, in part, with Ameritech Michigan's contention and concludes that Custom Van failed to prove that CAL sustained a compensable loss. Custom Van provided no corroboration for its assertion that CAL would have received at least one more direct referral per

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<sup>9</sup>Specifically, this order finds two violations of Section 502(a), one for misrepresentations made to Custom Van and the other for those made to the Staff, as well as one violation each of Sections 314(1), 502(e), and 305(1)(n).

<sup>10</sup>In footnote 2 on page 11 of its replies to exceptions, Ameritech Michigan also asserts that Section 601 of the Act does not authorize the Commission to award damages (other than re-funds), and that any such award of damages could only be granted following a trial by jury. These assertions are identical to those raised by the LEC, and subsequently rejected by the Commission, in Case No. U-11934. For all the reasons expressed on pages 11 through 13 of the September 28, 1999 order in that case, the Commission again concludes that Ameritech Michigan's assertions in this regard are incorrect and must be rejected.

day had it not been for the interruption of CVE's service. Similarly, it offered no documents in support of its claim that each lost referral would have been worth between \$500 and \$600. Furthermore, Custom Van provided no corroboration for its assertion that, due to CVE's occasional use of CAL's phones during the course of the service interruption, CAL missed calls that would have generated at least \$2,000 in additional revenue.

Nevertheless, the Commission finds adequate support in the record to grant Custom Van a portion of its claims for lost profit from CVE and for certain out-of-pocket costs incurred in pursuing its complaint. Turning first to CVE, Exhibit C-10 indicates that for the second quarter of 1999 (which includes the 10 days during which its service was interrupted), CVE's sales totaled \$100,173. Thus, as noted by Mr. Maniaci--and spelled out in footnote 4, supra--it can reasonably be assumed that CVE would have earned at least \$11,000 during that 10-day period, had its service not been discontinued. See Tr. 181. This is not to say that Ameritech Michigan should be held responsible for that entire sum. Rather, the Commission agrees with Mr. Jones that the \$11,000 in projected sales must be reduced by the variable costs attendant with those sales. See Tr. 449. According to Mr. Maniaci, a reasonable estimate of these costs is 10% to 20% of the projected sales. This estimate is supported by Mr. Taylor, who testified that a vast majority of Custom Van's expenses "were fixed costs and not variable costs." Tr. 247. Using the high end of the range provided by Mr. Maniaci, the Commission concludes that Ameritech Michigan should reimburse Custom Van for \$8,800 in lost profits<sup>11</sup> from CVE.

In reaching this conclusion, the Commission rejects Ameritech Michigan's claim that this figure should also be reduced to reflect CVE's actual sales between May 11 and 21, 1999.

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<sup>11</sup>This can be computed as follows:  $\$11,000 - (\$11,000 \times .20) = \$8,800$ .

Because the focus of this issue is on the incremental sales that Custom Van lost during CVE's service interruption, actual sales recorded during that period are of limited relevance.

Turning next to Custom Van's claim for out-of-pocket costs, Mr. Maniaci testified that it incurred approximately \$31,000 in non-law firm related expenses. Tr. 589. This figure, which is set forth in detail on Exhibit C-12(R), consists of approximately \$24,000 in employee costs, \$487.50 in phone and facsimile charges, \$528.00 in photocopying expenses, \$399.99 for transporting company personnel to and from various hearings and depositions, \$100.00 in mailing expenses, and \$5,425.00 for financial analyses provided by Mr. Taylor. Moreover, a substantial portion of the employee costs included in Mr. Maniaci's figure is drawn from records initially submitted as Exhibit C-12.

Notwithstanding Ameritech Michigan's arguments to the contrary, the Commission finds this evidence sufficient to support Custom Van's claim for out-of-pocket expenses. However, consistent with its earlier ruling concerning the use of Exhibit C-12(R), the Commission concludes that all expenses related to Mr. and Mrs. Maniaci's work in resolving this dispute must be removed from those set forth on the exhibit as "employee costs." This has the effect of reducing to \$7,684.79 the total out-of-pocket expenses recoverable by Custom Van.

The Commission therefore finds that, for the reasons set forth above, Ameritech Michigan should be ordered to reimburse Custom Van a total of \$16,484.79, consisting of \$8,800 in lost profits and \$7,684.79 in out-of-pocket expenses.

#### B. Attorney Fees and Miscellaneous Legal Expenses

Custom Van goes on to request that the Commission order Ameritech Michigan to pay nearly \$40,000 in legal expenses arising from this dispute. According to Exhibit C-12(R), this is

composed of approximately \$36,500 in attorney fees and nearly \$3,000 in miscellaneous costs incurred by its counsel's firm.<sup>12</sup>

Were it authorized to do so, the Commission would gladly award attorney fees to Custom Van. At a minimum, the events giving rise to this complaint express a wanton disregard by Ameritech Michigan for the well-being of this business customer. Nevertheless, as correctly noted by Ameritech Michigan, the Court of Appeals has ruled that no such recovery can be granted pursuant to Section 601 of the Act. See, In re Complaint of City of Southfield, supra. Moreover, although Section 209 grants the Commission authority to award attorney fees where it finds that "a party's position in a proceeding under this act was frivolous," the Commission does not find Ameritech Michigan's arguments in this case to be "so devoid of arguable legal merit" as to justify assessing attorney fees. MCL 484.2209; MSA 22.1469(209). The Commission therefore concludes that it has no alternative but to reject Custom Van's request for recovery of attorney fees and costs.

### C. Service Credits

As mentioned earlier, Custom Van sought to have CVE's bill credited for all charges relating to the 10-day period during which its service was interrupted. Moreover, Mr. Maniaci testified that, at least as of the time of the December 14, 1999 evidentiary hearing, no credit had been issued. See Tr. 180.

Ameritech Michigan offered no opposition to this request, and the Commission finds that the credit requested by Custom Van should be issued immediately. This credit should take the form of

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<sup>12</sup>Custom Van also submitted a request for the payment of interest on all of its lost profits, out-of-pocket costs, and legal expenses. However, because no testimony or legal argument was offered on this issue, the Commission finds that it should reject Custom Van's request for the payment of interest.

either (1) a reduction to any outstanding balance owed Ameritech Michigan for regulated service provided to CVE, or (2) in the absence of such a balance, a check payable to CVE for the amount of the 10-day service credit.<sup>13</sup>

#### D. Fines

Both Custom Van and the Staff contend that the ALJ erred in failing to impose a significant fine against Ameritech Michigan. Although the Staff provides no specific figure, Custom Van contends that the total of all fines imposed in this case should be no less than \$400,000.

The Commission agrees with these parties and finds that a substantial assessment should be imposed on Ameritech Michigan for each of the five violations found in this order. It nevertheless concludes that because this case arises from a single billing dispute, a \$400,000 fine (which arose from Custom Van's belief that daily assessments should be imposed for each and every violation) would be excessive. A more reasonable result, the Commission finds, is to impose a fine in the amount of \$20,000 (which represents the upper end of the \$1,000 to \$20,000 range provided for in Section 601 of the Act) for each violation, thus resulting in a fine totaling \$100,000.

The Commission's decision to impose the statutory maximum for each of these five violations is based, in significant part, on the harmful effect that the violations had on Custom Van. It is also based on the fact that Ameritech Michigan's billing system is a crucial component of the operational support systems (OSS) that it provides to other carriers. The continued existence of any systemic problems with regard to Ameritech Michigan's billing system would, by its inclusion in

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<sup>13</sup>This second option is offered in recognition of the fact that, according to Mr. Maniaci, Custom Van switched CVE's basic local exchange service to AT&T Communications of Michigan, Inc., as of August 1999. Tr. 176-77.

the LEC's OSS, detrimentally affect those other carriers and their end-use customers, as well as the environment for local competition.

#### E. Cease and Desist Orders

In its amended complaint and elsewhere, Custom Van requests a virtual panoply of cease and desist orders. These requests include everything from ordering Ameritech Michigan to overhaul its billing and collection practices to demanding immediate rescission of the contract set forth on Exhibit C-19, which is the Billing and Collection Agreement between Ameritech Michigan and Ameritech Publishing.

As with Custom Van's proposed fines, the Commission finds its requested cease and desist orders to be excessive. Absent a pattern of deceptive billing and collection practices involving more than the single customer whose service interruption gave rise to this complaint, the Commission concludes that a more reasonable result would be to order Ameritech Michigan to (1) cease including on its shut-off notices (except as an amount separate from charges for regulated service) any charges for unregulated service, and (2) cease all other violations of the Act.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACRS, R 460.17101 et seq.
- b. Ameritech Michigan's disconnection of CVE's telephone service, demand for payment of unregulated charges, and misrepresentations to Custom Van and the Staff violated Sections 314(1), 501(a), 502(e), and 305(1)(n) of the Act.

c. Ameritech Michigan should pay a fine in the amount of \$100,000 for its violations of the Act.

d. Ameritech Michigan should pay Custom Van \$16,484.74 for reimbursement of its economic loss and out-of-pocket expenses.

e. Ameritech Michigan should issue credits equal to any charges imposed on CVE for basic local exchange service during the period of May 11 through 21, 1999.

f. Ameritech Michigan should cease and desist from (1) including on its shut-off notices (except as an amount separate from charges for regulated service) any charges for unregulated service and (2) committing any further violations of the Act.

THEREFORE, IT IS ORDERED that:

A. Within 30 days of the issuance of this order, Ameritech Michigan shall pay a fine to the State of Michigan in the amount of \$100,000, shall issue all necessary bill credits, and shall pay Harper Avenue L.L.C., d/b/a Custom Van Enterprises, Inc., and Harper Avenue L.L.C., d/b/a Central Auto Leasing, \$16,484.79 for the violations addressed in this order.

B. Ameritech Michigan shall cease and desist from including on its shut-off notices (except as an amount separate from charges for regulated service) any charges for unregulated service and shall also cease and desist from committing any further violations of the Michigan Telecommunications Act, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand  
Chairman

( S E A L )

/s/ David A. Svanda  
Commissioner

/s/ Robert B. Nelson  
Commissioner

By its action of February 22, 2000.

/s/ Dorothy Wideman  
Its Executive Secretary

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

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Chairman

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Commissioner

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Commissioner

By its action of February 22, 2000.

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Its Executive Secretary

In the matter of the complaint of )  
**HARPER AVENUE L.L.C., d/b/a CUSTOM VAN** )  
**ENTERPRISES, INC., and HARPER AVENUE** )  
**L.L.C., d/b/a CENTRAL AUTO LEASING, against** )  
**AMERITECH MICHIGAN.** )  
\_\_\_\_\_ )

Case No. U-11983

Suggested Minute:

“Adopt and issue order dated February 22, 2000 granting the complaint filed by Harper Avenue L.L.C., d/b/a Custom Van Enterprises, Inc., and Harper Avenue L.L.C., d/b/a Central Auto Leasing, against Ameritech Michigan and imposing remedies and penalties, as set forth in the order.”