

Synopsis: Attorney Fee Issues Resolved

On August 31, 2000, the Commission addressed several issues regarding the reimbursement of attorney fees under Section 209 and 506 of the Michigan Telecommunications Act. In Case No. U-12072, the Commission discussed how parties should proceed to resolve disputes that arise following an order directing a nonprevailing party to reimburse the attorney fees and costs of a prevailing party. In so doing, the commission established a time frame for prevailing parties to submit a bill of costs and for nonprevailing parties to submit objections thereto.

In Case No. U-12031 (<http://cis.state.mi.us/mpsc/orders/comm/2000/u-12031b.htm>), the Commission determined that a prevailing party is entitled to be reimbursed for attorney fees associated with representation provided by in-house counsel.

*Note: The above text is not part of the original order. Therefore page numbering on all subsequent pages is one greater than the original document.

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the complaint of)
DAGABERTO AND MARY CANALES)
against LCI INTERNATIONAL TELECOM CORP.,)
d/b/a QWEST COMMUNICATIONS SERVICES.)
_____)

Case No. U-12031

At the August 31, 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

In an order issued on December 16, 1999 in this docket, the Commission determined that LCI International Telecom Corp., d/b/a Qwest Communications Services, (Qwest) had switched the residential toll service of Dagaberto and Mary Canales without their authorization in violation of the Michigan Telecommunications Act (MTA), MCL 484.2101 et seq.; MSA 22.1469(101) et seq. The Commission ordered Qwest to pay a fine of \$21,000 for its violations of Sections 502 and 505 of the MTA. It also ordered Qwest to reimburse Mr. and Mrs. Canales for costs incurred for bringing this complaint of \$152.14. Additionally, the Commission determined that Qwest and its counsel should be required to reimburse the Commission Staff (Staff) for the costs and reasonable attorney fees associated with the Staff's participation in this proceeding.

On January 6, 2000, the Staff filed a two-page itemized list of the various tasks performed by the assistant attorney general assigned to represent the Staff in this case. According to the Staff's bill of costs, counsel for the Staff performed 28.6 hours of work. The Staff requested reimbursement for these legal services at the rate of \$150 per hour. Accordingly, the total amount of attorney fees sought by the Staff amounts to \$4,290.

On January 20, 2000, Qwest filed an objection to the Staff's bill of costs.

On March 15, 2000, the Staff filed a motion to compel payment of the attorney fees by Qwest. On March 20, 2000, Qwest filed an answer to the Staff's motion.

Discussion

Qwest contends that it should not be required to reimburse the Staff for its reasonable attorney fees because the assistant attorney general who represented the Staff in this proceeding is a full-time employee of the Department of the Attorney General. Accordingly, Qwest insists that the Staff did not incur any out-of-pocket expenses in having the assistant attorney general act as its attorney. Further, Qwest cites Escanaba & Lake Superior Railroad Company v Keweenaw Land Association, Ltd., 156 Mich App 804; 402 NW2d 505 (1986), in arguing that the recovery of attorney fees does not include salaries normally paid to in-house counsel. According to Qwest, an award of attorney fees should be compensatory, not punitive. Qwest argues that if it were to be required to reimburse the Staff for attorney fees that the Staff did not actually incur, then the Staff would be unjustly enriched. Finally, Qwest maintains that an award of attorney fees should never result in a windfall for the prevailing parties.

The Commission finds that Qwest's objection to the Staff's bill of costs is not well taken.

MCL 484.2506(4); MSA 22.1469(506)(4) provides:

If the commission find that a party's complaint or defense filed under this section is frivolous, the commission shall award to the prevailing party costs, including reasonable attorney fees, against the nonprevailing party and their attorney.

In the December 16, 1999 order, the Commission expressly determined that Qwest's defense against the Canales' complaint was "devoid of any arguable legal merit and frivolous" under the MTA. December 16, 1999 order, Case No. U-12031, p. 12. Having determined that Qwest's defense was frivolous, the Commission was obligated by Section 506(4) of the MTA to require Qwest and its attorneys to compensate the prevailing parties for their costs, including reasonable attorney fees.

The Commission finds that Section 506(4) of the MTA should not be interpreted to preclude any party, including the Staff, that is forced to respond to a frivolous complaint or defense from reimbursement of its reasonable attorney fees simply because that party was represented by in-house counsel. In enacting Section 506(4), the Legislature clearly demonstrated its dissatisfaction with frivolous complaints and defenses. Given the Legislature's abhorrence of frivolous complaints and defenses, Qwest's position, which if adopted would allow a party to act frivolously with impunity whenever their opponents are represented by in-house counsel, is inconsistent with the intent of the Legislature. Moreover, because Section 506(4) is a recent addition to the MTA,¹ the Commission finds that any dispute regarding the extent to which Section 506(4) should apply

¹Section 506(4) became effective October 1, 1998 by virtue of passage of 1998 PA 259.

to an award of attorney fees in a situation where in-house counsel represents a prevailing party should be controlled by the current law on that issue.

The Escanaba case cited by Qwest is not binding precedent because it involves an interpretation of Section 16 of the Uniform Condemnation Procedures Act (UCPA), MCL 213.66; MSA 8.265(16). Due to the significant differences between Section 16 of the UCPA and Section 506(4) of the MTA, the Commission concludes that the Escanaba case has little, if any, influence over the outcome of this proceeding and cannot be considered of any precedential value. Moreover, the holding in Escanaba appears to be in direct conflict with an earlier decision of the Michigan Court of Appeals. In Johnston v Detroit Hoist & Crane Co., 142 Mich App 597; 370 NW2d 1 (1985), another panel of the Michigan Court of Appeals upheld an award of attorney fees to a party that was represented by in-house counsel. In the Johnston case, the Court agreed that a party could be compensated for the number of hours that its in-house counsel spent on a case times a reasonable hourly rate in that locale.

It appears to be widely accepted in other jurisdictions that attorney fees may be awarded for the litigation activities of in-house counsel. Broadcast Music v R Bar of Manhattan, 919 F Supp 656 (SD NY, 1996); Central States S.E. & Areas Pension Fund v Central Cartage Company, 76 F3d 114 (CA 7, 1996); Delaware Valley Citizens' Council v Pennsylvania, 762 F2d 272 (CA 3, 1985); Textor v Board of Regents, 711 F2d 1387 (CA 7, 1983); National Treasury Employees Union v United States Department of Treasury, 211 US App DC 259; 656 F2d 848 (1981); National Treasury Employees Union v Nixon, 172 US App DC 217; 521 F2d 317 (1975); Pittsburgh Plate Glass Company v Fidelity & Casualty Company, 281 F2d 538 (CA 3, 1960); Balkind v Telluride Mountain Title Company, _____ P2d _____ (Colo App, 2000); Dale Electronics, Inc., v Federal Insurance Company, 205 Neb 115; 286 NW2d 437 (1979); and Metropolitan

Mortgage & Securities Company v Becker, 64 Wash App 626; 825 P2d 360 (1992). Indeed, it has been noted that a blanket prohibition on compensation of in-house counsel could discourage some litigants from pursuing worthy claims. Delaware Valley Citizens' Council v Pennsylvania, 762 F2d 272 (CA 3, 1985), rev'd on other grounds sub nom Pennsylvania v Delaware Valley Citizens' Council, 478 US 546; 106 S Ct 3088; 92 L Ed 2d 439 (1986), Pennsylvania v Delaware Valley Citizens' Council, (after reargument) 483 US 711; 107 S Ct 3078; 97 L Ed 2d 585 (1987). Further, it has been held that an award of attorney fees for services performed by in-house counsel at prevailing market rates does not constitute a windfall. PLCM Group v Drexler, 22 Cal 4th 1084; 997 P2d 511 (2000). Additionally, courts have affirmed awards of attorney fees in situations where a governmental entity is represented by an in-house counsel or an assistant attorney general. See Washington v Seattle School District No. 1, 458 US 457; 102 S Ct 3187; 73 L Ed 2d 896 (1982), American Family Life Assurance Company of Columbus v Teasdale, 733 F 2d 559 (CA 8, 1984), and Agen v Alaska, 945 P2d 1215 (Alaska, 1997).

However, in order to qualify for reimbursement, in-house counsel must have performed the services in furtherance of the litigation. Milgard Tempring, Inc. v Selas Corporation of America, 761 F2d 553 (CA 9, 1985). Further, an award for in-house counsel is not appropriate in the situation where in-house counsel merely acts as a liaison between the client and outside counsel. Salsbury Labs, Inc. v Merieux Labs, Inc., 908 F2d 706 (CA 11, 1990). Moreover, it has been held that in-house counsel should not be compensated for doing client work, such as gathering information or documents that are then delivered to outside counsel. Delaware Valley Citizens' Council v Pennsylvania, *supra*. Nevertheless, if a party is represented by both in-house counsel and outside counsel, both may be compensated for their efforts if they shared the responsibility for

litigation on behalf of their common client. B-E-C-K Constructors, Inc. v Alaska, 604 P2d 578, 585 (Alaska, 1979).

Even a cursory examination of the pleadings filed by the Staff and the transcript of the hearing demonstrates that the assistant attorney general representing the Staff actively participated in the proceeding and was effective in its outcome. Furthermore, in examining the bill of costs submitted by the Staff, the Commission is persuaded that the work described in the bill of costs was actually performed in furtherance of the litigation by the assistant attorney general assigned to represent the Staff and was not excessive, redundant, or unnecessary. Finally, in the absence of an objection by Qwest to the Staff's proposed hourly rate of \$150 per hour and in recognition by the Commission that the rate proposed by the Staff is within the range of reasonableness for counsel appearing before the Commission, the Commission finds that Qwest should be ordered to pay the full amount of the Staff's bill of costs of \$4,290 within 14 days of the issuance of this order.

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. Qwest's objection to the bill of costs submitted by the Staff has no merit and should be rejected.
- c. The attorney fees set forth in the Staff's bill of cost are reasonable and should be paid by Qwest within 14 days of the date of this order.

THEREFORE, IT IS ORDERED that:

A. The objection filed by LCI International Telecom Corp., d/b/a Qwest Communications Services, regarding the Commission Staff's bill of costs in the amount of \$4,290 is rejected.

B. LCI International Telecom Corp., d/b/a Qwest Communications Services, shall pay \$4,290 to the State of Michigan within 14 days of the date of this order. Payment shall be made by check made out to "State of Michigan" and delivered to the Commission's Executive Secretary.

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 August 31, 2000.

/s/ Dorothy Wideman
Its Executive Secretary

THEREFORE, IT IS ORDERED that:

A. The objection filed by LCI International Telecom Corp., d/b/a Qwest Communications Services, regarding the Commission Staff's bill of costs in the amount of \$4,290 is rejected.

B. LCI International Telecom Corp., d/b/a Qwest Communications Services, shall pay \$4,290 to the State of Michigan within 14 days of the date of this order. Payment shall be made by check made out to "State of Michigan" and delivered to the Commission's Executive Secretary.

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

Chairman

Commissioner

Commissioner

By its action of August 31, 2000.

Its Executive Secretary

In the matter of the complaint of)
DAGABERTO AND MARY CANALES)
against **LCI INTERNATIONAL TELECOM CORP.,**)
d/b/a QWEST COMMUNICATIONS SERVICES.)
_____)

Case No. U-12031

Suggested Minute:

“Adopt and issue order dated August 31, 2000 ordering LCI International Telecom Corp., d/b/a Qwest Communications Services, to reimburse the State of Michigan for the Commission Staff’s attorney fees in the amount of \$4,290 within 14 days, as set forth in the order.”