

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 application and complaint of)
WORLDCOM TECHNOLOGIES, INC., against)
AMERITECH MICHIGAN, AMERITECH)
SERVICES, INC., AMERITECH INFORMATION)
INDUSTRY SERVICES, and AMERITECH LONG)
DISTANCE INDUSTRY SERVICES relating to)
unbundled interoffice transport.)
_____)

Case No. U-12072

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 March 3, 2000 in Case No. U-12072, the Commission found that Ameritech Michigan unlawfully failed to provide unbundled local transport to WorldCom Technologies Inc., an MCI WorldCom company (which will be referred to as such in this order). In addition to ordering Ameritech Michigan to cease and desist from refusing to provide unbundled local transport to MCI WorldCom and imposing a fine of \$3,750,000 on Ameritech Michigan, the Commission also ordered Ameritech Michigan to pay MCI WorldCom's reasonable attorney fees and costs.

On March 9, 2000, MCI WorldCom filed a statement of attorney fees and costs totaling \$98,452.07. The statement of costs was accompanied by an affidavit and detailed billing summary prepared by MCI WorldCom's outside counsel, an affidavit and detailed billing summary prepared by MCI WorldCom's in-house counsel, and a detailed invoice from a consultant who testified on behalf of MCI WorldCom as an expert witness.

On March 23, 2000, Ameritech Michigan filed a response to MCI WorldCom's bill of costs. In so doing, Ameritech Michigan raised five specific objections. First, Ameritech Michigan argues that MCI WorldCom should not be compensated for the full 332 hours of time listed in the affidavit submitted by its in-house counsel because his itemized statement indicates that he spent only 323.5 hours on the case. Accordingly, Ameritech Michigan urges that the Commission reduce the award of attorney fees to MCI WorldCom by \$1,487.50 to \$56,612.50 to correct for MCI WorldCom's mathematical mistake.

Second, Ameritech Michigan objects to compensating MCI WorldCom for 24.5 hours of time spent by MCI WorldCom's outside counsel's secretary/paralegal. According to Ameritech Michigan, because the fees of an outside counsel traditionally include office overhead such as clerical, paralegal, and support staff, the objected-to expenses for outside counsel's secretary/paralegal should be rejected.

Third, Ameritech Michigan objects to MCI WorldCom's requested reimbursement for \$10,174.19 of "disbursements" for lack of sufficient detail as to each item in this broad category of expenses. Ameritech Michigan argues that, at a minimum, MCI WorldCom should be required to provide the individual charges for each claimed expense.

Fourth, Ameritech Michigan maintains that MCI WorldCom's claim to recover \$2,495.44 in expenses incurred by QSI Consulting, the employer of its expert witness, should be rejected

because the expenses are not itemized with sufficient detail to identify why the money was expended.

Fifth, Ameritech Michigan objects to MCI WorldCom's claim to recover \$8,730 in "expert witness fees" on the ground that the description of the work performed in the invoice includes "travel time" without indicating either how much time was expended in travel or the departure and destination of the travel.

On April 14, 2000, MCI WorldCom filed a motion to enforce the award of attorney fees and costs. In so doing, MCI WorldCom states that it will not resist Ameritech Michigan's proposal to reduce MCI WorldCom's in-house counsel's attorney fees by \$1,487.50 and that it would waive its claim to the disputed amount associated with the paralegal's time. However, with regard to Ameritech Michigan's third objection, MCI WorldCom argues that it should not be required to provide additional detail regarding the \$10,174.19 of expenses set forth in outside counsel's affidavit. Citing Board of Commissioners of Lapeer County v Markley, 260 Mich 455; 245 NW 496 (1932), MCI WorldCom argues that a paid bill is prima facie evidence of the reasonableness of the bill. Because MCI WorldCom's outside counsel typically bills MCI WorldCom with the type of detail set forth in outside counsel's affidavit and because MCI WorldCom typically pays such bills, MCI WorldCom argues that the Commission should determine that its outside counsel's expenses of \$10,174.19 should be paid by Ameritech Michigan without further explanation.

Finally, with regard to Ameritech Michigan's fourth and fifth objections, which concerned the \$2,495.44 of expenses and \$8,730.00 of billable hours associated with the preparation and testimony of its expert witness, MCI WorldCom argues that the expert witness's billings to MCI WorldCom are sufficiently detailed to support the reasonableness of these costs. Specifically, MCI

WorldCom states that the objections to the expert witness's travel expenses are not well taken because his itemized billings specifically set forth his travel dates, which clearly correspond to a deposition in Chicago and the hearing in Lansing.

On April 21, 2000, Ameritech Michigan filed a response to MCI WorldCom's motion. In so doing, Ameritech Michigan reiterates that the party seeking to recover attorney fees and costs has the burden of proving the reasonableness of those expenses. Accordingly, Ameritech Michigan insists that MCI WorldCom must further substantiate the validity of the costs that are in dispute. Ameritech Michigan also maintains that in the event that objections are not resolved through the submission of additional documentation, the Commission should direct an administrative law judge (ALJ) to conduct a hearing.

MCL 484.2209; MSA 22.1469(209) requires the Commission to award to the prevailing party its costs, including reasonable attorney fees, against the nonprevailing party and its attorney if the Commission finds that the nonprevailing party's position in a proceeding under the MTA was frivolous. However, MCL 484.2209; MSA 22.1469(209) does not establish a process for resolving disputes regarding the reasonableness of costs and attorney fees. Therefore, the Commission finds that it is appropriate in this proceeding to establish guidelines that will provide a structure for future litigants to follow in resolving such disputes.

Courts have struggled with the issue of how to review the reasonableness of claims for attorney fees and costs for many years. Pennsylvania v Delaware Valley Citizens Council, 478 US 546; 106 S Ct 3088; 92 L Ed 2d 439 (1986). For example, in Johnson v Georgia Highway Express, Inc., 488 F2d 714 (CA5, 1974), the court adopted an approach that called for the consideration of 12 factors that included (1) the time and labor required, (2) the novelty and difficulty of the questions, (3) the skill required to perform the legal services properly, (4) the

preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitation imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorney, (10) the “undesirability” of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. 488 F2d at 717-719.

However, in Lindy Bros. Builders Inc. of Philadelphia v American Radiator & Sanitary Corp., 487 F2d 171 (CA3, 1973), another method, known as the “lodestar” approach, was developed.

Under this methodology, a court first calculates the “lodestar,” which is determined by multiplying the hours spent on the case by a reasonable hourly rate of compensation for each attorney involved. Next, using the “lodestar” figure as a starting point, the court makes adjustments in light of various factors including the contingent nature of the case, the quality of work performed, the complexity of the issues, and the recovery obtained.

In Hensley v Eckerhart, 461 US 424; 103 S Ct 1933; 76 L Ed 2d 40 (1983), the United States Supreme Court expressed its preference for a hybrid approach that shares elements of both the Johnson case and the “lodestar” approach. Later, the United States Supreme Court refined the issue in Blum v Stenson, 465 US 886; 104 S Ct 1541; 79 L Ed 2d 891 (1984), when it indicated that the “lodestar” should be considered to be more than a mere rough guess or initial approximation of the final award. Rather, Court stated that “[w]hen . . . the applicant for a fee has carried his burden for showing that the claimed rate and the number of hours is reasonable, the resulting product is presumed to be the reasonable fee” to which counsel is entitled. Id. at 897; 104 S Ct 1541; 79 L Ed 2d 891.

The United States Supreme Court again visited the issue of the calculation of reasonable attorney fees in Pennsylvania v Delaware Valley Citizens Council, supra, wherein it stated:

A strong presumption that the lodestar figure--the product of reasonable hours times a reasonable rate--represents a "reasonable" fee is wholly consistent with the rationale behind the usual fee-shifting statute, including the one in the present case. These statutes were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws. Hence, if plaintiffs, such as Delaware Valley, find it possible to engage a lawyer based on the statutory assurance that he will be paid a "reasonable fee," the purpose behind the fee-shifting statute has been satisfied.

Moreover, when an attorney first accepts a case and agrees to represent the client, he obligates himself to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interests. Calculating the fee award in a manner that accounts for these factors, either in determining the reasonable number of hours expended on the litigation or in setting the reasonable hourly rate, thus adequately compensates the attorney, and leave very little room for enhancing the award based on his postengagement performance. In short, the lodestar figure includes most, if not all, of the relevant factors constituting a "reasonable" attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance.

Locally, in Crawley v Schick, 48 Mich App 728; 211 NW2d 217 (1973), the Michigan Court of Appeals has indicated that "[t]here is no precise formula for computing the reasonableness of an attorney's fee." Crawley, supra, at 737. However, the court indicated that among the factors to be considered are (1) the professional standing and experience of the attorney, (2) the skill, time, and labor involved, (3) the amount in question and the results achieved, (4) the difficulty of the case,

(5) the expenses incurred, and (6) the nature and length of the professional relationship with the client.

In Wood v The Detroit Automobile Inter-Insurance Exchange, 413 Mich 573; 321 NW2d 653 (1982), the Michigan Supreme Court specifically approved the guidelines for determining the reasonableness of attorney fees set forth in the Crawley case. However, in so doing, the Michigan Supreme Court recognized that there is no precise formula for computing the reasonableness of an attorney's fee and it refused to limit a trial court's determination to the six criteria contained in the Crawley case. The court indicated that an "award will be upheld unless it appears upon appellate review that the trial court's finding on the reasonableness issue was an abuse of discretion." 413 Mich at 588.

After considering all of these approaches, the Commission is persuaded that, in the absence of a clear and compelling reason to do otherwise, the Commission should follow a strict "lodestar" approach for resolving disputes over the reasonableness of costs and attorney fees. It is the Commission's desire to simplify the process of making these decisions. The Commission finds that by adhering to the "lodestar" approach, the primary goal of the fee shifting provisions in the MTA will be furthered without the necessity of the weighing and balancing of a dozen or more subjective factors.

In this proceeding, MCI WorldCom seeks reimbursement of the attorney fees through use of the strict "lodestar" approach. MCI WorldCom merely summed the hours performed by each attorney and multiplied those hours by an hourly rate. Ameritech Michigan's objections to the calculation of the attorney fees do not involve consideration of any other factors or a challenge to the hourly rate proposed for MCI WorldCom's attorneys. Rather, Ameritech Michigan's objections were limited to correcting a mathematical error in the addition of the hours worked by MCI

WorldCom's in-house counsel and to the inclusion of paralegal time in calculation of MCI WorldCom's outside counsel attorney fee. In both cases, MCI WorldCom acquiesced in Ameritech Michigan's objections. Therefore, all of the issues concerning the reasonableness of the attorney fees proposed by MCI WorldCom have been resolved and those amounts should be paid forthwith.

Turning to the remaining disputed issues, the Commission finds that Ameritech Michigan's objection to the bundled cost item submitted by MCI WorldCom's outside counsel of \$10,174.19 is reasonable. Ameritech Michigan's objection is based on MCI WorldCom's failure to provide sufficient detail as to the individual cost items included in its request for reimbursement. Indeed, citing Michigan Court Rule (MCR) 2.625(G)(1), Ameritech Michigan argues that MCI WorldCom should have provided specific information for each charge. At a minimum, Ameritech Michigan insists that MCI WorldCom must set forth each expense separately rather than grouping them together.

The Commission finds that MCI WorldCom's response to Ameritech Michigan's objection is inadequate. To merely contend that a bill exceeding \$10,000 for unspecified costs was rendered and paid in the ordinary course of business does not provide Ameritech Michigan or this Commission with sufficient information to determine whether the underlying costs are reasonable. It cannot be forgotten that the burden of proving the reasonableness of its reimbursable costs is on the proponent of those costs. Giannetti Brothers Construction Company v Pontiac, 175 Mich App 442; 438 NW2d 313 (1989). Accordingly, the Commission directs that, if MCI WorldCom desires to collect its costs, it should support its claim in accordance with the requirements of MCR 2.625(G)(1) as proposed by Ameritech Michigan. Although strict compliance with MCR 2.625 is not specifically required by Section 209 of the MTA, the Commission is persuaded

that this matter and all future disputes regarding attorney fees and costs should be resolved by following procedures styled after those described in MCR 2.625(F) and (G), adjusted to be consistent with the practice and procedure before the Commission. In this case, the Commission finds that MCI WorldCom should be given 14 days to file with the Commission and to serve on Ameritech Michigan an itemized list of its outside counsel's unspecified costs of \$10,174.19 in accordance with the requirements of MCR 2.625(G). Failure by MCI WorldCom to do so will result in a waiver of its claim for these costs.

In the event that MCI WorldCom files the required itemization of costs, Ameritech Michigan shall have 14 days to respond to it. If Ameritech Michigan desires to challenge any of the proposed costs, it shall file objections to the costs challenged and it shall file proof that the unchallenged costs have been paid in full. If necessary, the ALJ who originally presided over the hearing in this proceeding shall resolve any remaining disputes. In so doing, the ALJ should reach a determination regarding the dispute as expeditiously as possible and without further formal proceedings unless a reconvening of the parties is deemed necessary.

In future proceedings, within 28 days of a Commission order awarding attorney fees and costs, the prevailing party shall file a detailed bill of costs and all required supporting documentation and affidavits and shall serve it on the nonprevailing party from which reimbursement has been ordered. Within 14 days of the filing and service of the bill of costs, the nonprevailing party shall pay all amounts that it does not dispute and shall file objections to any amount that it does dispute. The nonprevailing party's filing of objections shall be accompanied by proof of payment of the amount not in dispute. Further, in the event that the nonprevailing party objects to the reasonableness of either the opposing attorney's hourly rate or the reasonableness of a specific cost item, the nonprevailing party shall state its opinion regarding what would be a reasonable hourly rate or

reasonable cost for the disputed items and include proof of payment of the disputed items at the rate considered reasonable by the nonprevailing party.

Within 14 days of the nonprevailing party's filing of its statement of objections, the prevailing party shall file a response indicating its position on the disputed issues. If the nonprevailing party's objection concerns a reasonable request for clarification or more information regarding a particular item or items, then the prevailing party shall provide the clarification or additional information.¹ Failure of the prevailing party to provide such clarification or additional information in a timely manner shall be considered a waiver of any further claim with regard to that item or items. Failure of the prevailing party to respond to a nonprevailing party's objections in a timely manner shall be considered a waiver of the prevailing party's right to reimbursement for the amounts in dispute. In the event that a dispute remains after the parties have made the required filings, the dispute shall be decided by the ALJ who presided over the proceedings, in an expeditious manner and without further proceedings unless an additional hearing is deemed necessary. The Commission desires to avoid a further escalation of proceedings that would unnecessarily increase the legal expenses of the parties.

Turning to Ameritech Michigan's fourth objection, which concerns MCI WorldCom's request for reimbursement of costs of \$2,495.44 billed to it by its expert witness, the Commission finds that Ameritech Michigan's objection is not well taken. The client invoice prepared by QSI Consulting, Inc., which was attached to MCI WorldCom's bill of costs, contains a day-by-day

¹ A request for clarification or more information should be limited to eliciting a reasonable amount of additional supporting data or documentation. Requests for clarification or more information that are designed to require the preparation of voluminous responses are not acceptable. Future litigants would be well advised to heed the Commission's handling of Ameritech Michigan's fourth and fifth objections in this proceeding.

itemization of expenses that specifically describes the expenses in a manner that permits a determination of their reasonableness. Moreover, the Commission finds that the amounts charged as expenses are within the range of reasonableness for the described activities. The only exception involves a \$10.00 charge on October 31, 1999 that contained absolutely no explanation. Accordingly, the Commission finds that it should approve reimbursement in the amount of \$2,485.44 to MCI WorldCom for the costs incurred by its expert witness that were sufficiently explained and should disallow the \$10.00 expense that was not adequately explained.

Finally, with regard to Ameritech Michigan's fifth objection, which concerns MCI WorldCom's request for reimbursement of expert witness fees of \$8,730.00, the Commission finds that these expenses were also sufficiently explained by the same invoices that supported the expert witness's statement of costs. The invoices demonstrate that the expert witness billed MCI WorldCom for 44.5 hours of work. In each instance, the invoice contains a day-by-day explanation of the number of hours worked and a sufficient description of the tasks performed to permit the Commission to review the reasonableness of the request for reimbursement. Therefore, the Commission finds that the proposed reimbursement for the work performed by MCI WorldCom's expert witness is reasonable. Accordingly, Ameritech Michigan's objection to MCI WorldCom's request for reimbursement for \$8,730.00 for expert witness fees is rejected.

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 AACSR 460.17101 et seq.

b. Ameritech Michigan's objection to the payment of MCI WorldCom's in-house counsel attorney fees is moot because MCI WorldCom indicated that it would not pursue reimbursement of the amount in dispute. Accordingly, Ameritech Michigan should be ordered to reimburse MCI WorldCom \$58,132.44 for its in-house counsel attorney fees and costs.

c. Ameritech Michigan's objection to the disputed amount of MCI WorldCom's outside counsel's attorney fees is moot because MCI WorldCom indicated that it would waive its right to reimbursement of the amount in dispute. Accordingly, Ameritech Michigan should be ordered to pay MCI WorldCom \$17,034.50 for the attorney fees of its outside counsel.

d. Ameritech Michigan's objection to the lump sum of \$10,174.19 in costs submitted by MCI WorldCom's outside counsel is valid. Accordingly, this matter should be remanded to the ALJ for further proceedings consistent with this order unless MCI WorldCom waives its claim or Ameritech Michigan fails to challenge any of the proposed costs.

e. Ameritech Michigan's objection to MCI WorldCom's request for reimbursement of the costs of its expert witness should be rejected except for one \$10.00 item that was not adequately explained. Accordingly, Ameritech Michigan should be ordered to reimburse MCI WorldCom \$2,485.44 for the costs incurred by MCI WorldCom's expert witness.

f. Ameritech Michigan's objection to MCI WorldCom's request for reimbursement of \$8,730.00 for expert witness fees should be rejected. Accordingly, Ameritech Michigan should be ordered to reimburse MCI WorldCom \$8,730.00 for expert witness fees.

g. Ameritech Michigan should be ordered to reimburse MCI WorldCom a total of \$86,382.38 for the reasonable attorney fees and costs incurred by MCI WorldCom that are no longer in dispute.

THEREFORE, IT IS ORDERED that:

A. Barring an abjuration by either party, the issue of reimbursement by Ameritech Michigan for the costs billed by WorldCom Technologies, Inc., of \$10,174.19 for the expenses of its outside counsel is remanded to an administrative law judge for further proceedings consistent with this order

B. Ameritech Michigan is ordered to reimburse WorldCom Technologies, Inc., the sum of \$86,382.38 within 14 days of the date of this order for the reasonable attorney fees and costs that are no longer in dispute.

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 E A L)

/s/ John G. Strand
Chairman

By its action of August 31, 2000.

/s/ David A. Svanda
Commissioner

/s/ Dorothy Wideman
Its Executive Secretary

/s/ Robert B. Nelson
Commissioner

THEREFORE, IT IS ORDERED that:

A. Barring an abjuration by either party, the issue of reimbursement by Ameritech Michigan for the costs billed by WorldCom Technologies, Inc., of \$10,174.19 for the expenses of its outside counsel is remanded to an administrative law judge for further proceedings consistent with this order

B. Ameritech Michigan is ordered to reimburse WorldCom Technologies, Inc., the sum of \$86,382.38 within 14 days of the date of this order for the reasonable attorney fees and costs that are no longer in dispute.

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

By its action of August 31, 2000.

Commissioner

Its Executive Secretary

Commissioner

In the matter of the application and complaint of)
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INDUSTRY SERVICES, and AMERITECH LONG)
DISTANCE INDUSTRY SERVICES relating to)
unbundled interoffice transport.)
_____)

Case No. U-12072

Suggested Minute:

“Adopt and issue order dated August 31, 2000 granting a motion to enforce an order of attorney fees and costs filed by WorldCom Technologies, Inc., against Ameritech Michigan, as set forth in the order.”