

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN BELL TELEPHONE CO., d/b/a
AMERITECH MICHIGAN,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
and HARPER AVENUE LLC, d/b/a CUSTOM
VAN ENTERPRISES INC., and CENTRAL
AUTO LEASING,

Appellees.

UNPUBLISHED
December 28, 2001

No. 226087
Public Service Commission
LC No. 00-011983

HARPER AVENUE LLC,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
and MICHIGAN BELL TELEPHONE CO.,

Appellees.

No. 228193
Public Service Commission
LC No. 00-011983

Before: O'Connell, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

In this consolidated appeal both Michigan Bell Telephone d/b/a Ameritech Michigan, and Harper Avenue LLC, d/b/a Custom Van Enterprises Inc., appeal from the Public Service Commission's opinion and order finding that Ameritech Michigan committed five violations of the Michigan Telecommunications Act (MTA), MCL 484.2101 *et seq.* These violations arose from Ameritech Michigan's disconnection of the phone service to Custom Van Enterprises and subsequent refusal to restore that service. The PSC fined Ameritech Michigan a total of \$100,000 for those violations and ordered it to pay Custom Van Enterprises \$16,484.74 for reimbursement of economic loss and expenses. The PSC further ordered Ameritech Michigan to

cease and desist from including unregulated charges on its shut-off notices or from further violations of the MTA. We affirm.

The complainant before the PSC, Harper Avenue LLC, owns and operates Custom Van Enterprises and Central Auto Leasing, two businesses located in separate parts of the same building. Custom Van Enterprises (CVE) repairs and modifies vans and other motor vehicles. Central Auto Leasing (CAL) leases motor vehicles. According to Harper, CVE obtains ninety percent of its business through telephone referrals and refers a substantial amount of business to CAL.

In 1999 Ameritech claimed that CVE owed it approximately \$14,000 in charges for yellow pages advertising charges which dated back to 1993. CVE disputed this debt, claiming that it never ordered any yellow pages advertisements. CVE never paid the yellow pages charges and Ameritech apparently never pursued legal action to collect this bill. Instead Ameritech added the amount it claimed due for the yellow pages advertising into the past due amounts stated on CVE's monthly telephone bill. Since this advertising debt was for charges not regulated by the MTA, MCL 484.2314(1) barred Ameritech from disconnecting CVE's phone service for failure to pay the yellow pages charge. CVE merely paid the current regulated charges listed on its monthly bill. CVE's payment of its monthly phone bills was frequently late. It also failed to make payments for its January and March 1999 bills before Ameritech cut off its phone service.

Ameritech shut off CVE's telephone service on the afternoon of May 11, 1999. Harper Avenue President John Maniaci testified that CVE did not receive any advance notice of this pending shut-off; the line simply went dead. Ameritech employee George Scarlett testified that Ameritech's automated billing and collection system mailed a notice to CVE on May 3, 1999 which stated that CVE must immediately pay an overdue amount of \$12,816.89 or face disconnection on May 11. This overdue amount included the disputed and unregulated yellow pages advertising charges.

When CVE employees called Ameritech they were told that the phone service had been disconnected for nonpayment and that CVE would have to pay \$16,367.66 in overdue charges to have service restored. Maniaci called Ameritech several times himself and explained that most of the overdue charges were for the disputed yellow pages ad. He offered to pay all of the regulated phone charges immediately. In response Ameritech's employees insisted that the entire amount was past due and had to be repaid to reinstate service. When PSC staff made inquiries about the overdue amount, Ameritech employees told them that the \$16,367 demanded did not include charges for unregulated services. Maniaci contacted Jim Burns, the head of Ameritech's collections department. Burns told him that the collections department records did not go far back enough to verify CVE's claims that the overdue amount involved six-year-old charges for unregulated services. Burns asked Maniaci to present documentation establishing which amounts were due for unregulated services. On May 20, 1999 Harper Avenue filed its complaint with the PSC. On May 21, 1999 Ameritech informed CVE that the total past due regulated charges amounted to \$1,233.80. Maniaci immediately paid that amount and Ameritech restored CVE's phone service the same day.

Harper Avenue claimed that Ameritech violated MTA §§314, 502(a), 502(b), 503(e), and 305(1)(n) by cutting off CVE's phone service for nonpayment of unregulated charges,

demanding payment of those charges as a condition of reinstating service, charging for services CVE never ordered, and combining regulated and unregulated charges on CVE's phone bills. Harper's witnesses claimed that both CVE and CAL lost revenue due to the loss of CVE's phone service between May 11 and 21, 1999. Harper sought approximately \$60,000 in lost revenue and out of pocket expenses. It also sought attorney fees, fines totaling \$400,000 and cease and desist orders against Ameritech. The PSC staff agreed that Ameritech violated the MTA and supported Harper's request for relief. In response Ameritech argued that CVE's phone service had been legitimately stopped for failing to pay regulated phone charges. Ameritech argued that it had not violated the MTA and corrected the problem within a reasonable time under the circumstances. Ameritech blamed its inability to distinguish the regulated and unregulated charges on its automated bill collection system and the fact that its billing system did not include records over six months old.

At the evidentiary hearing John Maniaci testified that CVE received ninety percent of its business over the telephone. Maniaci estimated that CVE lost approximately \$11,000 in revenue based upon documents showing CVE's earnings for the second quarter of 1999. Maniaci also estimated that CAL lost \$7,400 due to the loss of CVE's phone service. Harper also claimed out-of pocket expenses of approximately \$31,000 due to the litigation. This figure included fees for John Maniaci and Cheryl Maniaci's time at the respective rates of \$200 and \$75 per hour. In response Ameritech presented the testimony of CPA David Jones, who testified that there was no proof of lost sales and no objective data to support CAL's claim of lost referrals.

The hearing officer's proposal for decision (PFD) following the evidentiary hearing recommended that the PSC deny the complaint and all remedies sought. The PFD concluded that CVE's telephone service was properly cut off for failing to pay regulated monthly telephone charges, noting that CVE owed \$1,233.80 for unpaid regulated services at the time its phone service was shut off and that it repeatedly failed to make timely payments for regulated monthly phone charges. The hearing officer found no violation of MTA §§314(1) or 502, noting that there was no prohibition against listing unregulated charges on the bill and that the monthly bills did not state that service would be cut off if unregulated charges went unpaid. The hearing officer concluded that it was disingenuous for CVE to assert these violations when it had clearly never been misled to believe that it must pay for unregulated charges for phone service to continue. The hearing officer found that while Ameritech did misrepresent the amount of the regulated charge necessary to restore service, this was an inadvertent misstatement due to its reliance upon its automated collection system. The hearing officer found that the error was corrected within a reasonable time under the circumstances. The hearing officer concluded that any error was of minimal significance and recommended no action against Ameritech for an excusable violation of §502.

Both parties filed exceptions to the proposal for decision. Ameritech challenged some of the hearing officer's evidentiary rulings, and Harper challenged the hearing officer's ultimate conclusions.

Among other evidentiary rulings, Ameritech challenged the hearing officer's denial of its motion to exclude Harper's exhibit C-12, the final compilation of CVE's out-of-pocket expenses. Ameritech sought to exclude this exhibit on the basis that it was untimely. Complainant Harper was required to submit the list seven days before the start of the hearings, but did not submit the final version of the exhibit until the last day of the three-day evidentiary hearing. Ameritech

argued that the exhibit should be stricken from the evidence because CVE's delay in submitting all its expenses effectively precluded Ameritech rebutting that evidence. The PSC agreed with Ameritech's argument, but found that striking the entire exhibit was too harsh a remedy. Instead the PSC concluded that it should strike all employee expenses for work performed by John and Cheryl Maniaci, pointing out that Mr. and Mrs. Maniaci were the ones who prepared and filed this list of expenses late and that "no reasonable justification was provided in support of their respective requests for \$200 and \$75 per hour for their time."

In response to Harper Avenue's exceptions, the PSC found that Ameritech had committed five violations of the MTA, consisting of one violation of §314(1); two violations of §502(a); one violation of §502(e), and one violation of §305(1)(n).

The PSC agreed with complainant that Ameritech violated MTA §314(1), MCL 484.2314(1) by discontinuing CVE's phone service for nonpayment of unregulated yellow pages advertising charges. The Commission explained its finding as follows:

The Commission agrees [that Ameritech violated §314(1)] for the following 4 reasons. First, uncontroverted evidence shows that Ameritech Michigan shut off a regulated service, namely CVE's basic local exchange service, on May 11, 1999. 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 interruption. Third, Ameritech Michigan's employees subsequently conceded that the LEC [local exchange carrier] 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. 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 cut 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 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 and established by the remainder of the record.

In a footnote the PSC further pointed out that it was irrational to conclude that Ameritech interrupted CVE's phone service for nonpayment of regulated phone charges when Ameritech claimed that it was unable to determine the amount of regulated charges until ten days after it shut off CVE's phones.

The Commission agreed with Harper that Ameritech committed multiple violations of MTA §502(a) and (e), MCL 484.4502(a) and (e). The opinion and order concludes that the shut-off notice stating that CVE would face interruption of its phone service unless it paid \$12,816 was a direct violation of §502(e) since most of that amount was for unregulated charges. The

Commission found that statements by Ameritech employees to CVE employees and PSC staff that CVE must pay \$16,367 in regulated charges to reinstate its phone service constituted two violations of §502(a). The PSC found that misleading its staff in the course of an investigation was a serious breach of §502(a). The Commission rejected the hearing officer's recommendation that these violations were insignificant and excusable. The PSC found that while many of the violations could be traced to Ameritech's automated billing and collection system, Ameritech remained responsible for that system's results. The opinion and order notes that "[i]n this case, those results include making numerous misrepresentations to Custom Van and the [PSC] Staff, improperly demanding payment of unregulated charges before restoring a customer's regulated service, and significantly disrupting CVE's business operations for over 10 days."

The Commission's opinion and order found no proof supporting Harper's claim that Ameritech violated MTA §502(b), MCL 484.2502(b):

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 recourses disputed charges back to their respective service providers ... and that this in no way constitutes an admission or a determination that those services were not requested by the end user.

Finally, the Commission found that Ameritech violated §305(1)(n), MCL 484.2305(1)(n), which forbids any act in violation of the MTA by a local exchange carrier. The PSC found that since Ameritech was a local exchange carrier its violation of MTA §502(a) was a concurrent violation of §305(1)(n).

The PSC ordered Ameritech to reimburse CVE the total amount of \$16,484.79, representing \$8,800 in lost profit plus \$7,684.79 in out-of-pocket expenses. The Commission agreed with Ameritech that complainant had failed to prove that CAL suffered a compensable loss, finding that there was no evidence corroborating claims that CAL would have received at least one additional vehicle lease referral per day but for the interruption of CVE's phone service, that each referral was worth between \$500 to \$600 each, or that CAL missed business worth \$2,000 due to CVE's use of its telephones. However, the PSC found adequate support to grant CVE lost profit damages. The Commission noted that financial exhibits showed that CVE had sales of \$100,173 for the second quarter of 1999 and that it could reasonably be assumed that it would have earned at least \$11,000 for the ten-day period its phone was shut off. The PSC reduced this amount by twenty percent, which they deemed to be a reasonable estimate of CVE's costs based on John Maniaci's testimony. Accordingly, the Commission found that Ameritech owed CVE \$8,800 in lost profits. The PSC found sufficient evidence supporting CVE's claim for \$31,000 in out-of-pocket expenses for non-law-firm costs. After deducting the expenses for John and Cheryl Maniaci's time, the Commission awarded a total of \$7,684.79 for CVE's out-of-pocket expenses.

The Commission rejected Harper's request for approximately \$40,000 in attorney fees and legal costs, concluding that it was not authorized to do so under MTA §601 and *In re Complaint of Southfield against Ameritech of Michigan*, 235 Mich App 523; 599 NW2d 760 (1999). The PSC found that Ameritech's arguments were not "so devoid of arguable legal merit" so as to justify awarding fees under MTA §209, MCL 484.2209.

Harper argued that the PSC should impose fines against Ameritech totaling \$400,000 and should order it to completely overhaul its billing and collection practices and immediately rescind its billing and collection agreement with Ameritech Publishing, the source of the original yellow pages charges. The Commission found complainant's proposals excessive under the circumstances. The Commission found that a substantial fine should be imposed for each of the five MTA violations committed by Ameritech, but determined that it was not necessary to fine Ameritech for each day of each violation. Instead the Commission determined that it was appropriate to fine Ameritech \$20,000 for each violation, the upper end of the range set by MTA §601. The PSC explained that this decision was based on the harmful effect to CVE and on the fact that Ameritech's billing system was a crucial component of the operational support system it provides to other carriers. The PSC noted that systemic problems with Ameritech's billing system would detrimentally affect those other carriers, their customers, and the local competitive environment. The Commission also ordered Ameritech to "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."

On appeal Ameritech Michigan challenges the PSC's findings that it violated the MTA, argues that the PSC exceeded its statutory power by awarding damages to Custom Van Enterprises, and argues that the fines imposed are excessive and unconstitutional. Harper Avenue LLC argues that the PSC erred by denying its demands for attorney fees, by reducing its claimed economic losses and expenses, by limiting the cease and desist directive, and by rejecting its claim that Ameritech Michigan violated MTA §502(b), MCL 484.2502(b). We reject these claims of error and affirm.

Our standard of review is provided by MCL 462.26(8), which states that "the burden of proof shall be upon the appellant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable." To prove that the Commission's order was unlawful Ameritech must show "that the commission failed to follow some mandatory provision of the statute or was guilty of an abuse of discretion in the exercise of its judgment." *In re MCI Telecommunications Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999) [quoting *Giaras v Public Service Comm*, 301 Mich 262, 269; 3 NW2d 268 (1942)]. Similarly, "[t]he hurdle of unreasonableness is equally high. Within the confines of its jurisdiction, there is a broad range or 'zone' of reasonableness within which the PSC may operate." *Id.* The Commission's findings of fact must be supported by competent, material, and substantial evidence on the whole record. *In re MCI Telecommunications Corp Complaint*, 240 Mich App 292, 303; 612 NW2d 826 (2000). A Commission decision is unreasonable when it is unsupported by the evidence. *Id.*

I

Ameritech argues that the PSC erred by finding that it violated MTA §314(1), arguing that the evidence showed that CVE's telephone service was disconnected for nonpayment of

regulated charges. Ameritech also argues that the PSC erred by finding that it violated MTA §§502(a) and (e) or MTA §305(1)(n) since any misstatements were made in good faith, were attributable to the billing system and CVE's lack of diligence, did not mislead CVE, and were promptly corrected. We find that the Commission's findings were supported by competent, material, and substantial evidence on the whole record and were neither unreasonable nor unlawful.

During the relevant time period,¹ MTA §502(a) and (e), MCL 484.2502(a) and (e) provided:

A provider of a telecommunication 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.

The PSC's conclusion that Ameritech committed two violations of §502(a) was supported by competent, material, and substantial evidence on the whole record. The testimony and documents presented at the evidentiary hearing showed that after CVE's telephone line went dead, Ameritech employees told CVE employees and John Maniaci that CVE would have to pay \$16,367 in overdue charges to have its phone service reinstated. When PSC staff contacted Ameritech about the dispute with CVE, Ameritech employees told PSC staff that CVE owed \$16,367 in overdue regulated charges which would have to be paid before it restored CVE's telephone service. These statements by Ameritech employees concerned the terms or conditions of providing CVE's telephone service and were false, misleading, or deceptive in violation of §502(a).

The PSC's conclusion that Ameritech violated §502(e) was supported by competent, material, and substantial evidence on the whole record. Testimony from Ameritech employee George Scarlett showed that on May 3, 1999, Ameritech mailed CVE a notice stating that it must pay \$12,816.89 in overdue charges by May 11 or face disconnection. Most of the \$12,816.89 demanded was for the unregulated yellow pages advertising charge rather than for regulated phone service charges.

MTA §305(1)(n), MCL 484.2305(1)(n) states:

¹ MTA §502 has since been amended. The present versions of §502(a) and (e) are §502(1)(a) and (1)(e), MCL 484.2502(1)(a) and (1)(e).

(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.

As noted above, the PSC's conclusion that Ameritech violated §502(a) was supported by competent, material, and substantial evidence on the whole record. Since Ameritech Michigan is a provider of basic local exchange service, the Commission correctly found that its violation of §502(a) also violated §305(1)(n).

MTA §314(1), MCL 484.2314(1) expressly states that:

A provider of a regulated service shall not discontinue the regulated service for failure by a customer to pay a rate or charge imposed for an unregulated service. For the purposes of this section, the commission may determine how payments are allocated between regulated and unregulated services.

The evidence presented shows that Ameritech added the disputed, unregulated yellow pages advertising charges from 1993 into the "past due" amounts shown on CVE's monthly phone bill. Those bills did not separate past due amounts for regulated phone charges from those for unregulated charges. Testimony established that the shut-off notice sent by Ameritech on May 3, 1999, demanded that CVE pay \$12,816.89 in overdue charges by May 11 or face disconnection. Evidence established that most of the \$12,816.89 demanded was for the unregulated yellow pages advertising charge rather than for regulated phone service. Ameritech's claim that CVE's service was shut off on May 11, 1999, for failure to pay regulated services is simply not credible in light of its claims that it could not determine the amount of overdue regulated charges until May 21, 1999. Based on the competent, material, and substantial evidence presented on the whole record the Commission reasonably concluded that Ameritech discontinued CVE's regulated local telephone service for failure to pay charges for an unregulated service.

II

Ameritech argues that PSC acted outside its statutory authority by awarding damages to Harper Avenue and that the Commission's act of awarding damages denied Ameritech its constitutional right to a jury trial. We find that MTA §601 authorized the Commission to award damages for economic loss and out-of-pocket non-legal expenses. Granting this relief did not deny Ameritech's right to a jury trial.

MTA §601, MCL 484.2601, states in relevant part that when "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" We read this language as an express grant of the power to order the violator to pay the ratepayer the money damages suffered as a result of the violation. While §601(a) through (e)

lists a variety of other remedies which do not involve compensation for economic losses, the statute expressly states that remedies are not limited to those listed.

This Court has previously rejected Ameritech's arguments that PSC proceedings resulting in an award of damages violates its constitutional right to a jury trial, explaining as follows:

An exception to the right to a jury trial exists when the Legislature creates new public rights and remedies and delegates the enforcement of those rights and remedies to an administrative tribunal. *Id.*; see also 47 Am. Jur. 2d, Jury, § 31, p. 736. ... [T]he key question is whether the statutory right is so closely integrated into a public regulatory scheme as to be appropriate for resolution by an administrative agency. *Id.*

Here, MCI's allegations of anticompetitive conduct concerned violations of orders that the MPSC issued pursuant to its authority under the MTA to regulate the conditions for telecommunications services in the public interest. Thus, MCI's allegations involved matters integral to the administrative scheme established by the MTA. Moreover, the enactment of the MTA created "new public rights and remedies," whose enforcement was delegated to an administrative tribunal—the MPSC. Accordingly, the instant case fell within the exception to the right to a jury trial [*In re MCI Complaint, supra*, at 311-312].

By passing the MTA, the Legislature created new public rights and remedies and delegated the enforcement of those rights and remedies to the PSC, an administrative tribunal. Complainant Harper filed its complaint with the PSC alleging that Ameritech had committed several violations of the MTA. The allegations in Harper's complaint were completely within the parameters of the MTA's administrative and regulatory scheme and the PSC's jurisdiction to enforce that scheme. Ameritech had no right to a jury trial on those issues.

III

Finally, Ameritech argues that the PSC abused its discretion by assessing the maximum possible fine for an inadvertent violation of the MTA. We find no abuse of discretion.

MTA §601(a), MCL 484.2601(a), provides that, in addition to other penalties, the Commission may impose "a fine for the first offense of not less than \$1,000.00 nor more than \$20,000.00 per day that the person is in violation of this act" Contrary to Ameritech's arguments, the fine imposed was nowhere near the maximum amount permitted by statute since the PSC could have fined Ameritech up to \$20,000 per day of each of its five violations of the MTA. The violations of §§314 and 502(e) alone continued for at least 10 days and so could have been punished by a total fine of \$400,000 under §601(a). Rather than impose fines for each day of each violation, the PSC assessed a single fine of \$20,000 for each violation. These fines were based on the Commission's finding that Ameritech illegally shut off CVE's phone service for nonpayment of six-year-old unregulated charges and failed to restore CVE's service for ten days despite repeated contacts by CVE and the involvement of PSC staff. The Commission also found that Ameritech employees made false statements to PSC staff regarding the nature of the overdue charges and made little or no effort to promptly resolve the issue and restore CVE's service. The circumstances presented strongly suggest that Ameritech employees cut off CVE's

telephone service and deliberately delayed its restoration in order to force CVE to pay the disputed yellow pages bill. Even if the errors and misstatements were attributable to problems with Ameritech's automated billing and collections system, it appears that Ameritech employees did not bother to promptly resolve the problem. Moreover, Ameritech's billing system was an essential part of the operational support it provided to other carriers. Future problems with the automated billing system would be likely to affect other carriers, their customers, and the local competitive environment. The Commission did not abuse its discretion by determining that a substantial fine was necessary to deter similar misconduct and provide Ameritech with the economic incentive to reform its billing and collection system.

IV

Harper Avenue first argues that the PSC erred by denying it costs and attorney fees under MTA §209. Harper asserts Ameritech's position was devoid of arguable legal merit and therefore frivolous under MCL 484.2209(2)(a)(iii). Harper also argues that it was inequitable for the PSC to assess large fines in favor of the state while denying its request for legal fees and costs. We find no error. We review a finding whether a claim or defense is frivolous for clear error. *Meagher v Wayne State Univ*, 222 Mich App 700, 727; 565 NW2d 401 (1997).

The fact that Harper prevailed on the merits of several of its claims does not necessarily demonstrate that Ameritech's position was "devoid of arguable legal merit." While the PSC found that Ameritech had violated MTA §§314, 502(a) and (e), and 305(1)(n), there was evidence supporting of Ameritech's position. The evidence showed that CVE was not diligent in paying its phone bills and owed approximately \$1,200 in overdue regulated fees at the time Ameritech cut off its phone service. Those overdue regulated fees could have been a legitimate basis for shutting off CVE's phones. Moreover, the PSC found in Ameritech's favor with regard to the alleged violation of §502(b). The PSC agreed with Ameritech's position on the issue of CAL's damages and also ruled in its favor on the admission of Harper's exhibit asserting economic damages for loss of employee time. The Commission did not clearly err by concluding that Ameritech's defenses were not frivolous under MTA §209(2)(a)(iii).

The fact that the PSC found Ameritech's violations serious enough to impose substantial fines is not relevant to the issue of whether Harper should be awarded legal costs and attorney fees. It is well-established that "[a]ttorney fees may not be awarded in Michigan unless expressly authorized by statute or court rule." *In re Complaint of Southfield against Ameritech of Michigan*, 235 Mich App 523, 534; 599 NW2d 760 (1999). The provisions of the MTA in place at the time the PSC issued its orders did not provide for an award of attorney fees merely based on prevailing before the PSC or on the economic burden litigation presented to the prevailing party.² *Id.*

V

Harper Avenue argues that the Commission erred by significantly reducing its request for non-legal costs from approximately \$42,000 to \$7,684.79. We disagree.

² MTA §601 has since been amended to add subsection (f), which expressly permits an award of attorney fees and costs, MCL 484.2601(f).

We review the decision to impose discovery sanctions for abuse of discretion. *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999). We conclude that the PSC did not abuse its discretion by excluding from the evidence that portion of Harper's cost summary which stated employee expenses related to work by John and Cheryl Maniaci. Since there was no other evidence to support these employee expenses, the PSC's award omitting these expenses was both reasonable and lawful.

Complainant's final cost summary, exhibit C-12(R), lists Harper's total non-law firm costs at \$30,899.79. Of that total amount \$23,759.30 is for employee costs, most of which was for work performed by John and Cheryl Maniaci. John Maniaci's time was evaluated at \$200 per hour, and Cheryl Maniaci's time at \$75 per hour.

Harper was required to submit its complete costs summary seven days before the hearings. It did not do so. Harper presented an incomplete summary on the first day of the evidentiary hearing. That summary did not include employee costs attributable to the Maniacis' work. The final summary which contained this information was not presented until the last day of the hearing. The late submission of this exhibit effectively prevented Ameritech's counsel from being able to prepare or submit evidence rebutting the numbers asserted by the exhibit. Moreover, there does not appear to be any sound basis for the monetary rates assessed for the Maniacis' time. When cross-examined, John Maniaci explained that he rated his time at the same billing rate used by Ameritech's counsel and expert witness, but did not explain why his time should be billed at that rate. He did not explain the basis for billing Cheryl Maniaci's time at \$75 per hour. Nor did Harper provide evidence from which one could derive reasonable billing rates for the Maniacis. In light of the prejudice to Ameritech's ability to effectively rebut the employee costs listed and Harper's failure to substantiate the billing rates, excluding costs for the Maniacis' time was an appropriate sanction for failing to timely submit the exhibit. With the exclusion of employee costs attributable to the Maniacis, the evidence at the hearing showed that Harper sustained total non-legal costs of \$7,684.79, which is exactly what the Commission ordered Ameritech to pay.

VI

Harper argues that the Commission erred by rejecting testimony establishing CAL's lost revenues and profits. We disagree. The PSC's finding that CAL had not proven any business losses was supported by competent, material, and substantial evidence on the whole record and was neither unreasonable nor unlawful.

Ameritech's expert, CPA David Jones, testified that claimed losses by CAL were unsupported and purely speculative. Harper presented testimony from John Maniaci and others to the effect that CAL sustained approximately \$7,400 in business losses due to lost referrals from CVE and CVE's use of CAL's phone. However, that testimony was never corroborated by documentation showing that CAL's revenues for May 11 through 21, 1999, suffered compared to other periods in the history of that business. In contrast, CVE presented documentary evidence showing its quarterly earnings in support of its claimed losses. Since Harper presented no documentary evidence backing up CAL's claimed business losses, the PSC did not err by preferring Jones's testimony over the testimony of Harper's witnesses.

VII

Harper Avenue argues that the PSC erred by failing to order Ameritech to change its billing and collection system to prevent future violations of the MTA. Harper has not met its burden of showing that the cease and desist order issued by the PSC was unlawful, unreasonable, or otherwise an abuse of discretion. The PSC ordered Ameritech to cease and desist including charges for unregulated services in its shut-off notices unless separately listed as charges for unregulated services. That order and the total \$100,000 fine imposed for the violations should provide Ameritech with sufficient incentive to prevent future problems arising from its automated billing and collection system. While the PSC had the power to issue a more detailed cease and desist order there does not appear to be any reason to do so in this case.

VIII

Harper Avenue argues that the PSC erred by rejecting its claim that Ameritech violated §502(b) by charging CVE for numerous additional services it never ordered, a practice commonly called “cramming.” We find no error.

MTA §502(b), MCL 484.2502(b) prohibits a provider of telecommunications service from “[c]harg[ing] an end-user for a subscribed service that the end-user did not make an initial affirmative order.” There was no clear evidence indicating that Ameritech had violated §502(b), nor does Harper cite any such evidence in this appeal. While Harper’s John Maniaci testified that CVE’s telephone bills included charges which CVE never ordered, he did not explain which services were never ordered or when they appeared on CVE’s bills. The charges CVE claims it never ordered were apparently provided by companies other than Ameritech and were merely billed through Ameritech. Ameritech did not insist that CVE pay for those services and in fact would recourse those charges back to the service provider if they were disputed by the customer. The Commission’s finding that Ameritech did not violate §502(b) was supported by competent, material, and substantial evidence on the entire record and was neither unreasonable nor unlawful.

IX

Finally, Harper Avenue argues that the Commission erred by reversing evidentiary rulings of the hearing officer. Harper also asserts that these rulings are inconsequential to the outcome of this appeal. We agree with Harper’s characterization of this issue as inconsequential. The PSC’s rulings on those evidentiary issues did not affect the outcome of the PSC’s orders and are irrelevant to the other issues in this case. Accordingly this argument presents moot issues which will not be considered by this Court. *Michigan Nat’l Bank v St Paul Ins Co*, 223 Mich App 19, 21; 566 NW2d 7 (1997). Even if these issues were not moot, Harper has waived them by failing to adequately argue them on appeal. *Severn v Sperry Corp*, 212 Mich App 406, 415; 538 NW2d 50 (1995).

Affirmed.

/s/ David H. Sawyer
/s/ Michael R. Smolenski