IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

WISCONSIN PUBLIC SERVICE CORPORATION,

Petitioner,

v.

MEMORANDUM AND ORDER

05-C-151-S

HOWARD SHANNON, DENNIS A. PUNKE,
VERIZON NORTH, INC.,
KEVIN HIEBL, BRIDGET HIEBEL,
WILLIAM KNETTER, SUSAN KNETTER,
FARM CREDIT SERVICES OF NORTH AMERICA FLCA,
CARL KALLBERG, LESTER KALLBERG,
CYNTHIA ROLAND, CLARK D. TURNER
and TERRI L. TURNER

Respondents.

Petitioner Wisconsin Public Service Corporation, having obtained a certificate of public convenience and necessity from the Wisconsin Public Service Commission for electrical transmission utility easements, filed these eight condemnation petitions in the circuit courts for Clark and Marathon Counties, Wisconsin pursuant to Wis. Stats. §§ 32.06 and 32.12. Respondents removed the actions to this Court pursuant to 28 U.S.C. § 1446 alleging 28 U.S.C. § 1331 as the sole basis for removal. On April 15, 2005 this Court remanded the matters to state courts finding that there was no original federal jurisdiction over the actions and awarding fees and costs to petitioner pursuant to 28 U.S.C. § 1447(c). The matters are presently before the Court on petitioner's request for approval of its fee submission.

MEMORANDUM

Petitioner requests $24,559.00 in attorney's fees and $2,718.13 in costs associated with its motion to remand. Respondents oppose the request in its entirety seeking reconsideration of the determination that the circumstances of removal warranted an award of fees. Respondents also oppose the request on the basis that the fees and costs were not actually incurred by petitioner. Finally, respondents urge denial on the basis that the request is excessive and unreasonable.

There is no basis to reconsider the determination that an award of fees under 28 U.S.C. § 1447(c) is appropriate. Like a party who succeeds in compelling withheld discovery, a party who succeeds in obtaining a remand on the basis that removal is improper is presumptively entitled to recover its fees. Garbie v. DaimlerChrysler Corp., 211 F.3d 407, 410-11 (7th Cir. 2000). The purpose of the rule is to make the victorious petitioner whole. Id. The presumption could be overcome by a demonstration that the removal was substantially justified and not contrary to settled law. See Id.; Rickels v. City of South Bend, Ind., 33 F.3d 785, 787 (discussing the standard for Rule 37 fees awards).

The only available argument for original federal jurisdiction over petitioner's state court condemnation claims is the "complete preemption" doctrine. Blackburn v. Sunstrand Corp., 115 F.3d 493, 495 (7th Cir. 1997). That is, that the underlying state claims were actually federal claims disguised by artful pleading. Id. If

the original claims are state claims the matters are not removable regardless of the prevalence of a federal defense: "[I]t has been understood for a very long time that a federal defense to a claim arising under state law does not create federal jurisdiction and therefore does not authorize removal." Id. Examination of respondents' brief confirms that they allege a federal defense but have no basis to assert that the original condemnation claims are federal claims.

Specifically, respondents contend that petitioner lacks standing because the true party in interest to bring the claim under state law is American Transmission Company, LLC (ATC), who has agreed to acquire the easements from petitioner at the conclusion of the condemnation proceedings. Respondents' brief at 12. Respondents also contend that the state agency lacked authority to issue the certificate of convenience and necessity on which the condemnation is based. Respondents' brief at 15. Both arguments are defenses to the condemnation claims, and were they based entirely on federal law "it has been understood for a very long time" that they cannot support federal jurisdiction or removal.

Considering whether petitioner "incurred fees as a result of removal," the record establishes that petitioner contractually agreed to pay counsel for its efforts in seeking remand. The affidavit of Shriner states that petitioner incurred the fees and

it defies common sense to suggest that counsel performed the services without a contractual agreement for payment. The real issue is whether petitioner's agreement to sell the easements it acquires in condemnation to ATC for a price that will permit petitioner to recover its costs in acquiring the easements, including attorney's fees, precludes petitioner from recovering under § 1447(c). Defendant relies on S.E.C. v. Comserv Corp., 908 F.2d 1407 (8th Cir. 1990) and United States v. Paisley, 957 F.3d 1161, 1165 (4th Cir. 1992) to support its position that the fees were not actually incurred under these circumstances. The existence of the agreement does not preclude recovery.

The fact that the fees may be recovered in a subsequent asset sale does not change the fact that they were actually incurred. Furthermore, a different policy is at work in § 1447(c) than in the Equal Access to Justice Act fee awards in Comserv and Paisly. Both cases relied on the purpose of EAJA fee awards "to avoid the deterring effect which liability for attorney fees might have on parties' willingness and ability to litigate meritorious civil claims or defenses against the Government." Paisley, 957 F.2d at 1164; See also Comserv, 908 F.2d 1415. When the litigant ultimately had no personal liability to pay fees, the Courts reasoned there was no deterrent to overcome by awarding them. In contrast, the award of fees under § 1447(c) has nothing to do with fees acting as a deterrent to remand motions. Rather it is designed to compensate petitioners for incremental costs "when

their adversary wrongfully drags them into a second judicial system." Wisconsin v. Hotline Industries, Inc., 236 F.3d 363, 367 (7th Cir. 2000)(quoting Garbie 211 F.3d at 411). Respondents' improper removal surely imposed incremental costs on petitioner. The policy would be subverted if the incremental cost shift could be averted on the basis that those incremental costs might ultimately be recovered in a subsequent transaction.

The final issue is whether the fees requested are reasonable. Petitioner correctly acknowledges that its recovery is limited to the market rate for its services. People Who Care v. Rockford Bd. of Educ., School Dist. No. 205, 90 F.3d 1307, 1310 (7th Cir. 1996). However, petitioner has not sufficiently established that its fees in this instance reflect market rate. Because petitioner is in a position to recover its fees from ATC it would clearly be less motivated to negotiate for the best available rate and most efficient use of time so that the contract itself is not persuasive evidence of market value.

Petitioner might have established that the fees were at market value with evidence that the fees are those customarily charged in the marketplace. Review of the of Shriner affidavit, however, reveals that it does not establish this: "The rates charged to WPSC on this case are at least as much as the rates customarily charged by Foley & Lardner and paid by the firm's clients (including WPSC), for comparable work." (emphasis added). The insertion of the underlined phrase implies, or at least does nothing to rule out the

possibility, that the rates are more than those customarily charged. The affidavit having been executed by an attorney billing over $500 per hour, one presumes that it means exactly what it says.

According to the billing records petitioner's attorneys spent more than 60 hours at an average rate of about $400 per hour to prepare materials in support of the remand and fees. Although the jurisdiction issue was not entirely obvious, 60 hours seems extraordinary in light of the experience level indicated by the billing rates. Considering the absence of evidence supporting a conclusion that the fees were the market rate and the large number of hours billed the Court is left with a conviction that the requested fees are excessive. A reduction of approximately one third to 40 hours at $400 per hour resulting in a total fee award of $16,000, together with costs of $2718.13, is adequate to make petitioner whole for the expense imposed by the unsuccessful removal attempt.

ORDER

IT IS ORDERED that petitioner's request for attorney's fees is approved in the amount of $16,000 and its request for costs is approved in the amount $2,718.13 and that judgment be entered accordingly.

Entered this 26th day of May, 2005.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge