

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of)	
McLEODUSA TELECOMMUNICATIONS)	Case No. U-13981
SERVICES, INC. against the CITY OF SAGINAW.)	
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At the meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. J. Peter Lark, Chair
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

OPINION AND ORDER

On December 10, 2003, McLeodUSA Telecommunications Services, Inc. (McLeodUSA), filed a complaint against the City of Saginaw. The complaint alleged that the City had violated Section 252 and Section 253 of the Michigan Telecommunications Act (MTA), 1991 PA 179, as amended; MCL 484.2252 and MCL 484.2253; and Section 15(4) of the Michigan Extension Telecommunications Rights-of-Way Oversight Act (METRO Act), 2002 PA 48; MCL 484.3115(4). The City filed its answer on January 8, 2004.

On February 13, 2004, McLeodUSA filed a motion for summary disposition. On February 17, 2004, the City filed its response to McLeodUSA's motion.

On February 17, 2004, the City filed a motion for summary disposition and a motion for dismissal or partial summary disposition. On February 19, 2004, McLeodUSA filed its responses to the City's motions.

Pursuant to due notice, hearings were held before Administrative Law Judge Daniel E. Nickerson, Jr. (ALJ) on February 4, 20, and 26, 2004. McLeodUSA, the City, and the Commission Staff (Staff) participated in the proceedings.

At the February 26, 2004 hearing, the ALJ heard arguments from McLeodUSA and the City on their filed motions. Based on the written and oral arguments of the parties, the ALJ issued his Proposal for Decision (PFD) from the bench at the hearing. The ALJ dismissed the City's motion for dismissal, finding that the Commission had jurisdiction to hear the complaint. The ALJ granted summary disposition for McLeodUSA on Counts I and II of the complaint; he dismissed Count III of the complaint.

On March 18, 2004, McLeodUSA and the City each filed exceptions to the PFD. The Staff did not file exceptions. On March 25, 2004, the City and the Staff each filed replies to exceptions. On March 26, 2004, McLeodUSA filed replies to exceptions.

Motion to Intervene

On February 18, 2004, the Michigan Municipal League (MML) late-filed a petition for leave to intervene together with its brief in support of the City's motion for partial summary disposition. On February 17, 2004, McLeodUSA filed its response in opposition to the MML's late-filed petition. After hearing argument from the MML and from McLeodUSA at the February 26, 2004 hearing, the ALJ ruled that the late-filed petition would be held for review until either the Commission or the ALJ established a separate date for a hearing on the motion. From the record made at the February 26, 2004 hearing, the Commission finds that the parties to the proceeding have reviewed the MML's petition and have been able to present their arguments related to that petition. Therefore, another motion hearing is unnecessary.

The Commission has reviewed the MML's petition and brief, McLeodUSA's response, and the oral arguments of the parties. The MML raises issues regarding its member municipalities that are similarly situated to the City. Such issues concern the Commission. In the Commission's view, good cause has been shown to allow the late filing and to grant intervention.

Summary Motions

In its February 17, 2004 motion, the City argued that the Commission did not have jurisdiction to hear the complaint under the MTA. The City stated that Counts I and II of the complaint asserted violations of Sections 252 and 253 of the MTA, which had been repealed by the METRO Act, and that enactment of the METRO Act repealed the Commission's jurisdiction regarding those sections of the MTA. The City also argued that McLeodUSA was not harmed by any fee payment made to the City; that any right-of-way document provisions that may be in violation of the MTA have not been enforced against McLeodUSA; that the City's enactment of a METRO Act ordinance made inoperative any right-of-way document provisions that are not in compliance with the METRO Act; and that penalties should not be assessed against the City.

In its February 13, 2004 motion for summary disposition, McLeodUSA argued that the right-of-way document fee provisions are not in compliance with the standards of Section 253 of the MTA. McLeodUSA argued that the following sections of the right-of-way documents do not comply with the MTA or the METRO Act:

- 1) Section 9 (consent to transfer);
- 2) Section 10 (city enforcement of non-local laws);
- 3) Section 23 (McLeodUSA's rights in the City conditioned on its rights *vis-à-vis* the local electric utility);
- 4) Section 29 (City regulation of public telephones);
- 5) Section 30 (service requirements);

- 6) Section 31 (location of office and compliance with non-local consumer protection rules);
- 7) Section 32 (non-discrimination);
- 8) Section 33 (provision of non-right-of-way-related documents to the City);
- 9) Section 34 (City inspection of McLeodUSA's books and records);
- 10) Section 35 (restricting McLeodUSA's rights in small claims court); and
- 11) Section 36 (911 service).

McLeodUSA further argued that the right-of-way documents do not form a contract between the City and McLeodUSA, nor can McLeodUSA's alleged agreement to the fee levels and document provisions render such in compliance with either the MTA or the METRO Act.

The PFD

In his February 26, 2004 PFD from the bench, the ALJ found that the Commission had jurisdiction to hear the complaint; that the provisions of the right-of-way documents described in Count II of the complaint did not comply with Section 252 of the MTA; that Count III of the complaint should be dismissed because a permit had never been issued under the METRO Act and the events under review had occurred prior to the effective date of the METRO Act; and that the application fee and the quarterly fees paid to the City did not comply with the standards of Section 253 of the MTA. The ALJ determined that the application fee and the quarterly fees should be refunded by the City (less the fixed and variable costs to the City of granting the permit and of maintaining McLeodUSA's use of the City's rights-of-way). He also determined that McLeodUSA should be awarded its costs and reasonable attorneys fees. Finally, the ALJ found that the City should not be assessed a penalty inasmuch as construction of McLeodUSA's network had not been delayed by City action nor had the City interfered with the operation of the McLeodUSA network.

Jurisdiction

The City excepts to the ALJ's jurisdictional determination regarding the alleged violations of Section 252 and Section 253 of the MTA. In the City's view, the 2002 repeal removed the Commission's review authority for events related to those repealed sections notwithstanding that the events occurred prior to repeal and while those sections were effective. The Commission does not agree; it has jurisdiction to review this complaint and to order appropriate remedies.

Section 201 of the MTA; MCL 484.2201, grants the Commission all necessary jurisdiction and authority to administer the MTA. Section 601 of the MTA; MCL 484.2601, provides that the Commission may order appropriate remedies for a violation of the MTA. A violation may have occurred before the filing of a complaint and it also may be on-going. Section 252 and Section 253 were effective during the time period in which the events underlying the complaint occurred. Taken together, Section 201 and Section 601 provide the Commission jurisdiction to hear and to remedy violations of Section 252 and Section 253 of the MTA during the time period of their effectiveness. The Commission's action will have no other effect.

On exception, the City raises its argument that either the 6-year statute of limitation for general contract matters contained within MCL 600.5807(8) or the "catch-all" 6-year statute of limitation contained within MCL 600.5813 apply to this administrative action. Applying these statutes of limitation would bar McLeodUSA's claims stated in Counts I and II of the complaint because either the fee payment, or the clause giving rise to that fee payment, occurred or was entered into more than 6 years prior to commencement of this administrative proceeding.

McLeodUSA responds that these statute-of-limitation provisions of Michigan's Revised Judicature Act are not applicable to an administrative proceeding, Federal Mogul Corp v Dept of Treasury, 161 Mich App 346, 367; 411 NW2d 169, 178 (1987). Moreover, McLeodUSA states

that in an administrative proceeding a party may not raise an issue on exception that was not presented to the presiding officer.

The Commission is not persuaded by the City's argument and agrees with McLeodUSA's position. The Commission finds that neither MCL 600.5807(8) nor MCL 600.5813 apply to this administrative proceeding. Additionally, administrative efficiency requires that all relevant arguments be presented to the ALJ for review and proposed decision, with response by parties by way of exceptions. The Commission will not encourage insertion of issues at this late stage of a proceeding; the City's statute-of-limitation argument should have been raised before the ALJ. For this same reason, the Commission considers waived the City's late-raised argument that McLeodUSA is not the real party in interest for this proceeding.¹ This argument should have been presented to the ALJ for his review and consideration.

Section 252

The right-of-way documents at issue involve an initial June 6, 1997 telecommunications permit agreement; a July 8, 1997 agreement; a September 13, 1999 amended permit agreement; a January 3, 2000 amended permit agreement; and a June 26, 2000 amended permit agreement (the right-of-way documents). Section 252 of the MTA provides that any conditions within these right-of-way documents must be limited to the telecommunication provider's access and usage of any right-of-way, easement, or public place granted by the local unit of government. McLeodUSA argues that the following sections of the initial June 6, 1997 telecommunications permit agreement do not comply with Section 252 of the MTA:

¹In its replies to exceptions, McLeodUSA requests leave to amend its complaint at paragraph 3 to correct the name of McLeodUSA's predecessor-in-interest from "BRE Communications, Inc." to BRE Communications, LLC". The Commission finds that leave should be granted and the complaint is so amended. Additionally, the City's counsel recognized the succession from BRE Communications, LLC to McLeodUSA, 3 Tr. 84.

- Section 9 Requiring City consent to any merger or consolidation or substantial change in ownership of McLeodUSA’s business.
- Section 10 Requiring compliance with state and federal laws regarding the ownership and use of McLeodUSA’s telecommunication system.
- Section 23 Revoking rights-of-way access should a separate pole/conduit license agreement with Consumers Energy Company terminate.
- Section 29 Concerning the placement of public telephones within the City and the provision by McLeodUSA of telecommunication services to those public telephones.
- Section 30 Requiring universal service to all potential customers within the City.
- Section 31 Requiring that McLeodUSA maintain a local office within Saginaw County, Michigan and allowing the City to enforce the Commission’s customer service and consumer protection standards.
- Section 32 Prohibiting discrimination in the provision of services to McLeodUSA’s customers.
- Section 33 Requiring McLeodUSA to provide the City upon request copies of all McLeodUSA’s filings with the Commission and the Federal Communications Commission (FCC) as well as all decisions of, correspondence to, and records required to be maintained by those administrative bodies.
- Section 34 Permitting the City to inspect all books and records of McLeodUSA.
- Section 35 Limiting McLeodUSA’s conduct of proceedings within the small claims divisions of the State of Michigan’s district courts.
- Section 36 Requiring the provision of 911 emergency service by McLeodUSA under the terms of this section.

McLeodUSA argues that insofar as the provisions concern matters not related to the City’s management of its rights-of-way, easements, or public places, then these provisions are contrary to Section 252 of the MTA and are unenforceable against McLeodUSA.

The City argues that when it “opted in” to the METRO Act through the passage of its new telecommunication ordinance, any provisions of existing telecommunication provider right-of-way permits were conformed to the METRO Act’s provisions. According to the City, Section 15(4) of

the METRO Act; MCL 484.3115(4), is substantially equivalent to the repealed Section 252 of the MTA. Consequently, the City states that the listed provisions are not enforceable against McLeodUSA.² Moreover, the City notes that it has not sought to enforce the questioned provisions against McLeodUSA, other than Section 9 of the June 6, 1997 agreement regarding change of control. In that case, the City notes, McLeodUSA asked the City to consent to a change of control.

The ALJ found that the questioned provisions were not in compliance with Section 252 of the MTA. He also determined that a permit had not been issued by the City under the METRO Act; rather, the prior right-of-way documents continued pursuant to Section 4(2) and Section 5(1) of the METRO Act; MCL 484.3104(2) and MCL 484.3105(1). For this reason, the ALJ dismissed Count III of the complaint. The City excepts to the ALJ's holding regarding Section 252 of the MTA, arguing that Section 252 has been repealed. Moreover, the City states, the new Saginaw METRO Act ordinance renders inoperative the questioned provisions.

The Commission agrees that the questioned sections of the June 6, 1997 agreement did not comply with Section 252 of the MTA. At best, each of these provisions deals with matters that are only tangentially related to McLeodUSA's access to and occupancy of the relevant public rights-of-way. The provisions are broadly drafted and they attempt to control McLeodUSA's business-entity format, Section 9; McLeodUSA's day-to-day business activities and locations, Sections 23, 31, 33, and 34; and McLeodUSA's telecommunication service offerings, Section 29, 30, and 36. These expansive provisions attempt to allow City enforcement of Commission- and FCC-related laws and regulations, Sections 10, 31, and 32. They also attempt to restrict McLeodUSA's access

²Affidavit of Mr. Thomas Fancher, City Attorney, Paragraph 26, appended to the City's brief in support of its February 17, 2004 motion.

to certain Michigan courts. For these reasons, the Commission must find that Sections 9, 10, 23, 29, 30, 31, 32, 33, 34, 35, and 36 did not comply with Section 252 of the MTA.

The METRO Act

The ALJ dismissed Count III of the complaint, finding the METRO Act inapplicable because a permit had not been issued under that act. McLeodUSA excepts arguing that Section 15(4) of the METRO Act must apply to all municipal rights-of-way grants under the MTA. McLeodUSA states that it requested the City to re-issue its right-of-way documents under the METRO Act. However, McLeodUSA notes the City insisted that the existing documents satisfied the “authorizations or permits previously obtained” language of Section 5(1) of the METRO Act and, consequently, the City did not need to re-issue an authorization under the METRO Act. McLeodUSA argues that the City’s attempted collection efforts for past fees under the existing right-of-way documents occurred after the effective date of the METRO Act and, accordingly, that the METRO Act then became applicable to the documents.

All parties acknowledge that the fee provisions of the METRO Act apply to the relationship between the City and McLeodUSA on and after November 1, 2002. The City’s METRO Act ordinance at Section 116.11 provides that all fees charged after November 1, 2002 to telecommunication providers for usage of the City’s rights-of-way must comply with the METRO Act and must be paid in accordance with that act.

The Commission agrees with the ALJ’s determination that a permit was not issued by the City to McLeodUSA under the METRO Act. However, coupling this determination with the prior repeal of Section 252 of the MTA does not lead to the conclusion, as argued by McLeodUSA, that the contested right-of-way document provisions remain applicable under Section 4(2) of the METRO Act. They do not. Because the contested right-of-way document provisions did not

comply with Section 252 of the MTA, they would not have continued under Section 4(2) of the METRO Act, which provides that the enactment of the METRO Act did not affect any *existing* rights that a telecommunication provider had under either a permit or a contract with a municipality related to use of public rights-of-way. For such rights to continue, they must have been properly created. The questioned provisions did not comply with Section 252 of the MTA and, hence, were not rights that could have continued under Section 4(2) of the METRO Act.³ Accordingly, Count III of the Complaint was appropriately dismissed by the ALJ.

Section 253

McLeodUSA's right-of-way documents provide for a \$10,000 application fee, a continuing fee, and terms and conditions for use of the City's rights-of-way. McLeodUSA has paid to the City a \$10,000 application fee and certain continuing fees totaling \$33,293.30. McLeodUSA ceased payments to the City in April, 2001. Subsequent to the effective date of the METRO Act, the City has not received payments under the right-of-way documents. The City indicated to McLeodUSA that it will comply with the provisions of the METRO Act.

Count I of McLeodUSA's complaint alleges that the fees paid to the City under the right-of-way documents violated Section 253 of the MTA. The ALJ found that the fees did not comply with the standards of Section 253. The City excepts to that finding.

The City argues that the parties to the right-of-way documents agreed to the fee levels. Consequently, those fee levels are appropriate and approximate the fixed and variable costs inasmuch as the McLeodUSA request for right-of-way access was the first that the City had encountered—it did not know the actual fixed and variable costs. The City states that at the

³Right-of-way document provisions that violate Section 252 of the MTA were recognized as unenforceable by the City's counsel, 3 Tr. 81.

summer 1997 execution of the initial right-of-way documents, the City had no empirical data on which to compute its fixed and variable costs leaving it no choice but to estimate what those costs would be based on fees charged by other municipalities. Consequently, the parties agreed to fees to be paid, and such agreed-upon fees should be permissible under Section 253 of the MTA.

McLeodUSA replies that, realistically, it had no alternative but to agree to the fees imposed by the City. McLeodUSA argues that the City has not produced any data substantiating the \$10,000 application fee and the 15¢-per-foot continuing fee as representative of the City's fixed and variable costs. McLeodUSA states that once the Commission's position regarding what constituted fixed and variable costs was established, it ceased paying the recurring fee to the City. McLeodUSA only sought refund of the prior, non-conforming fees after the City began a court action to collect fees for the period from April 2001 through October 31, 2002.⁴

The ALJ found that the fees payable during the time period in question—1997 through the effective date of the METRO Act—could not violate the standards contained within Section 253 of the MTA. The ALJ did not determine that the City's calculation of its fixed and variable costs was inaccurate. Rather, the ALJ determined from the record before him that the fee established by the City was not calculated by an appropriate method. He recommended refund of those fee amounts paid, less an appropriately calculated level of fees under Section 253 of the MTA.

For the period from November 1, 2002 forward, all of the parties agree that the METRO Act governs the fee amount payable. For the period prior to November 1, 2002, the Commission finds that Section 253 of the MTA governs. The Commission agrees with the ALJ that the fees charged by the City may not have been appropriately calculated pursuant to Section 253 of the MTA.

⁴The METRO Act became effective on November 1, 2002; it established a new fee level and collection mechanism.

It is well-established that application fees and continuing fees for access to municipal rights-of-way under the MTA must reflect the fixed and variable costs to the local government unit in granting a permit and in maintaining the rights-of-way that are utilized by the telecommunication provider. TCG Detroit v Dearborn, 2004 WL 414040, Mich App, March 4, 2004. See also, the October 16, 2001 order in Case No. U-12797 and the August 16, 2001 order in Case No. U-12354.

A local unit of government should have made a reasonable attempt to quantify its own appropriate fixed and variable costs, whatever that amount would have been. The present record suggests that this was not properly done. Instead, the City established fees within a range that other municipalities had charged without regard to whether the costs underlying those fees approximated the costs that the City would encounter. However, the present record does not allow the Commission to determine whether the fees charged complied with the standards of Section 253 of the MTA.

A similar problem faced the ALJ. Finding for McLeodUSA on Count I of the complaint, the ALJ determined that those fees collected by the City that did not comply with the MTA fee provision should be refunded. However, the ALJ recognized that more information was needed because the amount of fees to be refunded would not include: “what the City is able to show as its actual fixed and variable costs.”⁵ In its reply exceptions, the Staff states that it is unable to offer comment to the Commission regarding the appropriateness of the City’s fixed and variable costs because testimony was not taken nor was the record developed.

The Commission agrees. The evidence before the Commission is incomplete and inconclusive. The Commission is unable to determine whether the fees that were collected by the City (or any portion of those fees) complied with the standards of Section 253 of the MTA. Additionally, as one of its remedies McLeodUSA requested refund of any non-MTA compliant

⁵3 Tr. 114.

fees—but it did not provide evidence supporting any mechanism for such a refund to the ratepayers of McLeodUSA as required by Section 601(c) of the MTA; MCL 484.2601(c).⁶

The Commission is mindful that its decision in this proceeding may affect actions to be taken by other Michigan local units of government and holders of right-of-way authorizations. As demonstrated in this proceeding, once the Commission’s determination of “fixed and variable costs” became apparent, McLeodUSA took action regarding its fee-payment level. Thus, Commission decisions can have wide-ranging effect, as noted by the MML. For the reasons stated, an informed and well-reasoned decision on Count I of the Complaint cannot be made at present; thus, the Commission must find that the count should be dismissed without prejudice. All exceptions of the parties not discussed within this opinion and order have been considered by the Commission and rejected.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 2002 PA 48, MCL 484.3101 et seq.; 1991 PA 179, as amended, MCL 484.2101 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission’s Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq.
- b. The petition for leave to intervene of the MML should be granted.
- c. McLeodUSA’s request for leave to amend its complaint should be granted.
- d. The MTA provides jurisdiction to the Commission to hear and to remedy the violations alleged within the complaint.
- e. Sections 9, 10, 23, 29, 30, 31, 32, 33, 34, 35, and 36 of the right-of-way documents, at the time they were signed, did not comply with Section 252 of the MTA.

⁶Section 601(c) of the MTA provides that the Commission may order: “[a] refund to the ratepayers of the provider of any collected excessive rates”. McLeodUSA is a “provider” under Section 102(cc) of the MTA; MCL 484.2102(cc).

f. Section 253 of the MTA applies to fees collected pursuant to the right-of-way documents for the period prior to the effective date of the METRO Act.

g. Count III of the complaint should be dismissed as recommended by the ALJ.

h. Count I of the complaint should be dismissed without prejudice.

THEREFORE, IT IS ORDERED that:

A. The petition to intervene of the Michigan Municipal League is granted.

B. The December 10, 2003 complaint of McLeodUSA Telecommunications Services, Inc. against the City of Saginaw is amended as requested by the complainant.

C. Count III of the complaint is dismissed as recommended by the Administrative Law Judge.

D. Count I of the complaint is dismissed without prejudice.

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

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark

Chair

(S E A L)

/s/ Robert B. Nelson

Commissioner

/s/ Laura Chappelle

Commissioner

By its action of June 3, 2004.

/s/ Mary Jo Kunkle

Its Executive Secretary

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

MICHIGAN PUBLIC SERVICE COMMISSION

Chair

Commissioner

Commissioner

By its action of June 3, 2004.

Its Executive Secretary