

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of **SPRINT COMMUNICATIONS**)
COMPANY L.P.'s petition for de novo review by)
the Commission pursuant to MCL 484.3117 of) Case No. U-14878
Determination No. 5 made by the METRO Authority.)
_____)

At the November 9, 2006 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. J. Peter Lark, Chairman
Hon. Laura Chappelle, Commissioner
Hon. Monica Martinez, Commissioner

ORDER

This order sets aside the determination that telecommunications providers using leased facilities must, like the facility owners, also pay the annual maintenance fee imposed on those leased facilities by Section 8(5) of the Metropolitan Extension Telecommunications Rights-of-Way Oversight Act (the Act, 2002 PA 48, MCL 484.3101 *et seq.*). Deciding an issue of first impression, the Commission finds that only providers that own telecommunications facilities occupying public rights-of-way owe the annual maintenance fee imposed by the Act.

Background

On July 19, 2005, in response to inquiries about responsibility for paying the maintenance fee, the Metropolitan Extension Telecommunications Rights-of-Way Oversight (METRO) Authority

issued “Determination No. 5 – Public Rights-of-Way Leased/Owned Fee Payments.”¹ This determination concluded that “the maintenance fee is charged to each individual provider for their individual use of the public right-of-way, regardless of other providers that may be occupying the same facilities.” The METRO Authority (METRO) stated the reasoning for its determination as follows:

The METRO Authority interprets Section 8(5) of the METRO Act as follows:

- If a provider qualifies as a “telecommunication provider” under Section 2(k) of the METRO Act, the fee requirement of Section 8(5) of the Act is applicable, regardless of whether the provider owns or leases the facilities in the public right-of-way.
- Telecommunication providers, as defined by Section 2(k) of the METRO Act, whose facilities occupy a public right-of-way must pay a maintenance fee based on their individually reported linear footage occupied, regardless of whether their facilities are leased or owned.
- Educational institutions, privately owned utilities/affiliates, and publicly owned utilities are not required to obtain permits, pay fees, or fulfill mapping requirements of the METRO Act for telecommunication facilities located in the public rights-of-way used solely for their respective internal services. If these providers provide or lease their telecommunication services to other external entities for compensation, permits must be obtained; maintenance fees must be paid; and mapping requirements must be fulfilled pursuant to Sections 8(18), 8(19), & 8(20) of the Act.

METRO Authority Determination

Section 8(5) stipulates that *the maintenance fee charged a provider is based on the linear feet of facilities in the public rights-of-way occupied by the provider regardless of whether leased or owned*. Therefore, the maintenance fee is charged to each individual provider for their individual use of the public right-of-way, regardless of other providers that may be occupying the same facilities.

[METRO Determination No. 5, pp. 1-2 (emphasis added).]

On May 3, 2006, Sprint Communications Company L.P. (Sprint) appealed to the Commission for a de novo review of the METRO determination, as provided in the Act, MCL 484.3117. On

¹Available at http://www.michigan.gov/documents/Determination_No_131410_7_5.pdf.

May 25, 2006, the Commission issued an order inviting intervention in the case, which it noted presented an issue of first impression. Order, p. 1.² In addition to Sprint, METRO, and the Commission Staff (Staff), Administrative Law Judge Mark E. Cummins (ALJ) permitted intervention by AT&T Michigan, TCG Detroit, and AT&T Communications of Michigan Inc. (collectively, AT&T); TDS Metrocom, LLC, LDMI Telecommunications, Inc., Talk America, Inc., and XO Communications Services, Inc., (collectively, TDS); and the Michigan Municipal League, the Michigan Townships Association, and the Michigan Coalition to Protect Public Rights of Way (the municipalities).³

By consensus, the participants agreed that Sprint would move for summary disposition in its favor and that testimony and hearings would not be held if the Proposal for Decision (PFD) disposed of all the issues necessary for the Commission. Sprint then moved for summary disposition that the Act only required Sprint to pay the annual maintenance fee for facilities that it owned, rather than also for facilities it leased. The Staff, TDS, and AT&T filed briefs in support of Sprint's position. METRO filed a cross motion for summary disposition, supported by the municipalities. The Staff, Sprint, TDS, and AT&T filed replies opposing METRO's counter-motion.

On October 10, 2006, the ALJ issued his PFD in favor of Sprint:

²The same order elsewhere stated that "The following facts do not appear to be in dispute. Sprint provides telecommunications services via fiber facilities located in the public rights-of-way. As such, Sprint is responsible for making payments to the METRO Authority for the use of these rights-of-way." Pp. 1-2. As Sprint suggested at the prehearing conference, that statement resulted from a clerical error and was not intended to suggest that the Commission had prejudged the case or decided the single issue in the dispute (Sprint's obligation to pay for leased facilities).

³Attorney General Michael A. Cox also intervened but withdrew shortly thereafter.

Based on the pleadings, the undisputed facts, and the clear and unambiguous language of the METRO Act, the ALJ recommends that—for all of the reasons stated above—the Commission (1) grant Sprint’s motion for summary disposition and deny the competing motion submitted by the METRO Authority, (2) overturn Determination No. 5 as being inconsistent with the METRO Act, and (3) find that the METRO Authority lacks the power under the Act to assess annual maintenance fees on a lessee of facilities in the public rights-of-way of Michigan’s municipalities.

[PFD, p. 20.]

METRO filed exceptions, and the municipalities filed exceptions concurring in and relying on those filed by METRO. The Staff, TDS, AT&T, and Sprint all filed replies supporting the ALJ’s conclusions and recommending that the Commission adopt the PFD.

Discussion

METRO first argues that the Commission should reject the PFD entirely because the ALJ did not properly apply the standard for deciding a motion for summary disposition under the Commission rule for summary disposition, Rule 323.⁴

Without citation, METRO claims that the Commission “has ruled that Rule 323 is the ‘administrative equivalent’ of MCR 2.116(C)(10),” which is the Michigan court rule for dismissal of claims where the court finds that there is no genuine issue of material fact and the claim can be decided as a matter of law. METRO exceptions, p. 3. METRO argues that, because Rule 323 is the equivalent of the court rule, the ALJ should have required Sprint to support its arguments by “affidavits, depositions, admissions, or other documentary evidence” and to then consider that evidence “in the light most favorable to the nonmoving party.” *Id.*, pp. 3-4. According to METRO, the ALJ “failed to either find a material fact in dispute and thus deny Sprint’s motion . . .

⁴1999 AC, R 460.17323: A party may make a motion for summary disposition of all or part of a proceeding. If the presiding officer determines that there is no genuine issue of material fact or that there has been a failure to state a claim for which relief can be granted, the presiding officer may recommend, to the commission, summary disposition of all or part of the proceeding.

or he failed to consider the facts ‘in the light most favorable to the nonmoving party (Metro Authority).’” *Id.*, p. 4. However, METRO continues by noting that the ALJ “stated that he found no genuine issue of material fact in dispute for purposes of making a determination as a matter of law.” *Id.* METRO argues that, from this finding, the ALJ should then have “found that Determination No. 5 encourages competition, increases investment in telecommunications infrastructure in the state, and streamlines the process for authorizing access to and use of public rights-of-way.” *Id.*

This exception is without merit. METRO’s argument incorrectly presumes that summary disposition is available only as a defensive tool for the nonmoving party. But Rule 323 explicitly allows the ALJ to recommend “summary disposition of all or part of the proceeding” when there is no factual dispute. A claim where there are no factual issues in dispute is decided as a matter of law, which is analogous to MCR 2.116(C)(8) (allowing a party to move for summary disposition because “the opposing party has failed to state a claim on which relief can be granted”) and also MCR 2.116(I)(1) (requiring that, “[i]f the pleadings show that a party is entitled to judgment as a matter of law . . . the court shall render judgment without delay”). In fact, the ALJ expressly begins his recommendations by noting that Rule 323 “is the administrative equivalent” of both MCR 2.116(C)(8) and 2.116(C)(10). PFD, p. 15. Given that the only issue in dispute in this case is the interpretation of a statute, it is not surprising that METRO has not identified any factual issues to dispute, either in its briefs to the ALJ or in its exceptions. Further, Sprint explicitly stated in its motion that “[t]here is no genuine issue of material fact in this proceeding. . . . The matter can be solely decided by the Commission’s de novo review of the METRO Act’s provisions.”

Summary disposition motion, p. 3. Therefore, METRO cannot claim that the ALJ erred by granting summary disposition to Sprint as a matter of law.⁵

Next, METRO claims that, rather than maintaining the burden of proof on the party moving for summary disposition (Sprint), the ALJ erred by shifting the burden onto METRO. METRO argues that “[e]ven assuming that Sprint’s petition is under Section 17, Sprint still carries the burden.”⁶ METRO exceptions, p. 4. METRO claims that the “ALJ required the Metro Authority to prove that Determination No. 5 was consistent with the Metro Act,” citing passages from the PFD such as “[i]n reaching this conclusion, the ALJ finds unpersuasive the claim expressed by the Metro Authority” and “[t]he ALJ likewise is not persuaded by claims to the effect that Determination No. 5 is wholly consistent with other sections of the Metro Act.” *Id.*, p. 5 (quoting PFD at 18-19).

This exception is entirely without merit. The PFD shows that the ALJ considered the language of the statute and the arguments of both sides before concluding that, “based on clear and unambiguous language of the METRO Act,” METRO lacks authority to “assess maintenance fees on the lessees of telecommunications facilities located in the public rights-of-way.” PFD, p. 17. Rather than revealing a burden shift, the language used by the ALJ merely serves as topic sentences, both serving to mark new paragraphs in his explanation for his finding. Indeed, had the ALJ not explained why he found METRO’s arguments unconvincing, METRO would have been

⁵Moreover, at the second prehearing conference, METRO did not object when the ALJ stated that the parties had reached a “consensus” that Sprint would file a motion for summary disposition and that there would only be hearings if the ALJ did not dispose of the entire case in deciding Sprint’s motion. Tr 18. Having agreed to the procedure, METRO’s objection appears to be to the result.

⁶In the motion initiating the case, Sprint explicitly requested de novo review “from the Commission pursuant to Section 17 of the METRO Act, MCL 484.3117.” Motion for de novo review, p. 3.

able to object that the ALJ had failed to include “a statement of the reasons therefor and of each issue of fact and law necessary to the proposed decision, prepared by a person who conducted the hearing or who has read the record” in the PFD as required. MCL 24.281(2).

Likewise, METRO’s third objection—that the ALJ failed to grant any deference to METRO’s interpretation of the Act—is without merit. METRO offers no support for its exception except for the fact that the ALJ ruled in favor of Sprint. Section 17 of the Act expressly provides for a *de novo* review of any “decision or assessment of the authority . . . by the commission upon the request of an interested person.” MCL 484.3117.

It is true that, even under *de novo* review of a statute that an agency has been given authority to interpret, reviewing authorities typically defer to the agency’s interpretation of the statute unless that interpretation is “clearly wrong.” However, other than the fact of the ALJ’s conclusion in favor of Sprint, METRO offers no support for its exception. Instead, the PFD makes clear that the ALJ based his recommendations on “the pleadings, the undisputed facts, and the clear and unambiguous language of the Metro Act.” PFD, p. 20. Implicit in that recommendation is a finding that, with respect to maintenance fees imposed on lessees, METRO’s interpretation of the Act is, in fact, clearly wrong. The Commission may ultimately accept or reject the ALJ’s recommendation. However, even if the Commission does reject the ALJ’s conclusion as erroneous, that simply means that the ALJ erred, not that the ALJ did not give sufficient deference to METRO’s interpretation of the Act.

METRO’s fourth exception is that, contrary to the ALJ’s findings, the agency does have the statutory authority to impose the maintenance fee on lessees:

As argued above and in the Response Brief, the Metro Authority is granted clear and unmistakable authority to assess the fees required under the Metro Act. Section 8 of the Metro Act identifies the providers that pay the fees as well as the amount of the fees. Section 8(5) explains that “The fee required under this

section is based on the linear feet occupied by the provider regardless of the quantity or type of the provider's facilities utilizing the public right-of-way or whether the facilities are leased to another provider.” Lessees, such as Sprint, occupy the public right-of-way similar to owners and Section 8(5) further explains that the fee is based on the occupier regardless of whether the facilities are leased. The burden on the municipality is similar for both owners and lessees. Determination No. 5 not only makes sense, but is consistent with the language of the Act.

Each provider that is occupying the right-of-way should pay a fee because each provider burdens the right-of-way.

[METRO’s exceptions, p. 12.]

While this exception presents greater merit than those previously addressed, the Commission nonetheless finds that the most direct reading of the Act, when read as a whole, compels the conclusion that the Legislature intended that the maintenance fee be imposed on the owners of telecommunications facilities occupying municipal rights-of-way and not on providers leasing those facilities.

The core of METRO’s argument is that Section 3(3) of the Act, MCL 484.3103(3), gives METRO the authority to “assess the fees required under this act,” with the fee at issue in this case specified in the Act’s Section 8, MCL 484.3108:

- (1) Except as otherwise provided by this act, a provider shall pay to the authority an annual maintenance fee as required under this act.
- (2) The authority shall determine for each provider the amount of fees required under this section. * * *
- (4) Except as otherwise provided under subsection (6), for each year after the initial period provided for under subsection (3), a provider shall pay the authority an annual maintenance fee of 5 cents per each linear foot of public right-of-way occupied by the provider’s facilities within a metropolitan area.
- (5) The fee required under this section is based on the linear feet occupied by the provider regardless of the quantity or type of the provider's facilities utilizing the public right-of-way or whether the facilities are leased to another provider.

Thus, METRO's argument can be summarized as follows:

- (1) Sprint is a provider under the Act;
- (2) Sprint leases facilities that occupy parts of the public right-of-way;
- (3) Section 8(1) and 8(4) require that providers pay an annual maintenance fee "for each linear foot of public right-of-way occupied by the provider's facilities;"
- (4) The Legislature gave METRO authority in both Sections 3(3) and 8(2) respectively to "assess the fees required under this act" and "determine for each provider the amount of fees required under this section;"
- (5) Section 8(5) of the Act emphasizes that only the only factor that determines the maintenance fee is the distance that facilities run within the right of way. The particular kind or number of the facilities does not matter, and providers cannot avoid the maintenance fee by leasing their facilities to others.
- (6) Therefore, because nothing in the Act exempts Sprint or other provider-lessees, they are required to pay the annual maintenance fee for "each linear foot of public right-of-way occupied."

Sprint and AT&T both challenge this interpretation vigorously. They argue that, contrary to METRO's reading of the Act, Section 3(3) is not three separate grants of authority at all. Where METRO sees two separate statements ("assess the fees required under this act" and "have the exclusive power to assess fees on telecommunication providers owning telecommunication facilities"), Sprint and AT&T see only the power to assess the fees, limited only to those providers who own the facilities.

Although the discrete sections of the statute can be combined to reach the result that METRO prefers, the Commission finds that this reading is neither the clearest nor unmistakably correct; indeed, the Commission finds METRO's interpretation incorrect because it does not derive from a fair reading of the Act as a whole:

However, the subsections . . . , as with all other provisions of law, are not to be read discretely, but as part of a whole. . . . Rather, to read the law as a whole, it must, in fact, be read as a whole. . . . The law is not properly read as a whole

when its words and provisions are isolated and given meanings that are independent of the rest of its provisions. This is especially true when, as here, one of these provisions expressly cross-references the other.

[*Mayor of Lansing v Public Service Comm*, 470 Mich 154, 167-168; 680 NW2d 840 (2004).]

Reading the entire Act closely, the Commission is convinced that the term “occupied,” used in Sections 8(4) and 8(5), refers to physical occupation of ground within municipal rights-of-way rather than use of those facilities. Therefore, the Commission finds that where, in these sections, the Legislature used the phrases “the provider’s facilities” and “the linear feet occupied by the provider,” the reference is to the owner of those facilities, not to other providers that might use them, such as lessees or licensees. The text in Section 8(5) noting that the maintenance fee is due even when “facilities [are] leased *to* another provider” is strongly persuasive that the provider responsible for the maintenance fee is the owner of the facilities running through the right-of-way. The statute expressly notes that lessors retain the obligation to pay the maintenance fee for facilities that they lease to others; by applying the doctrine of *expressio unius est exclusio alterius* (“express mention in a statute of one thing implies the exclusion of other similar things”), *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 572 n 8; 592 NW2d 360 (1999), the Commission is persuaded that the Legislature also intended to exclude non-owners from that obligation. “This Court long ago stated that no maxim is more uniformly used to properly construe statutes.” *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 75; 711 NW2d 340 (2006).

Further, as TDS argues, Section 8(19) of the Act strongly suggests that the ALJ’s conclusions were correct and that only the owners of facilities being used by telecommunications providers must pay the fees required by the Act. In Section 8(19), the Act expressly exempts electric and gas utilities from any fees imposed by the Act *unless* the otherwise-exempt facilities are being

“leased or otherwise provided to an unaffiliated telecommunications provider or used in providing telecommunications services to a person other than the utility, or its affiliate, for compensation.”

METRO further argues that the ALJ erred by concluding, as the Commission has, that METRO’s argument hinges on the meaning of Section 8(5). Rather, METRO avers, that section merely explains how the fees are computed, while Section 3(3) gives METRO all the authority required to impose the maintenance fee on Sprint by giving METRO the power “to assess the fees required under the Act.” This exception is without merit because it both begs the question and suggests that the ALJ somehow erred by taking METRO’s arguments involving Section 8(5) seriously, just as the Commission has in responding to METRO’s exceptions to the PFD.⁷ A statute stating that METRO shall “assess the fees required under this act” obviously presents the issue of what those fees are or, in the context of this case, which providers must pay them.

The Commission agrees with METRO that the ALJ misspoke by commenting that “Section 8 simply describes how maintenance fees are to be determined,” PFD, p. 18. Nonetheless, the Commission finds that the ALJ reached the right conclusion when he found that Section 8 did not impose the maintenance fee on telecommunication facility lessees such as Sprint.

Nor does the Commission agree with METRO concerning the third power listed in Section 3(3) of the Act, which gives METRO “exclusive power to assess fees on telecommunications providers owning telecommunications facilities in public rights-of-way within a municipality in a metropolitan area to recover the costs of using the rights-of-way by the provider.” METRO argues that the plain meaning of that text is that the Legislature intended it solely to bar municipalities from assessing fees on telecommunications facility owners. This would render the very

⁷METRO later calls the ALJ’s failure to deal with its argument concerning the second power in Section 3(3) the “central flaw” in the PFD. METRO exceptions, p. 11. As the Commission has noted, it is METRO that pointed the ALJ to Section 8(5) to explain what the Section 3(3) “fees required under this act” are.

next section of the Act redundant. Section 4(1) of the Act, MCL 484.3104(1), explicitly preempts municipalities from regulating telecommunications facilities in rights-of-way. Moreover, the most straightforward way to reconcile the third power in Section 3(3) with the explicit preemption statement in Section 4(1) is to read them as intended to mirror one another, which again bolsters the Commission's finding that the entire Act is aimed at facility owners, as Sprint argues, rather than lessees, as METRO argues.

METRO's next exception invites the Commission to address whether telecommunication facility lessees are providers under the Act. METRO claims that the ALJ's finding that "the METRO Authority lacks the power under the Act to assess annual maintenance fees on a lessee of facilities in the public rights-of-way of Michigan municipalities," PFD, p. 20, somehow creates a "question of whether lessees have access to the public rights-of-way as a provider under the Act." METRO exceptions, p. 14.

It is true that Sprint at one point argued that, "in the situation where Sprint does not own the facilities, it is not a 'provider' under this Act." Brief for summary disposition, p. 10. But the ALJ did not rest his recommendations on any argument that Sprint is only a "provider" under the Act when operating its own facilities, and that argument does not form the basis, explicitly or implicitly, in the Commission's conclusions. Further, unless the ALJ adopts an erroneous argument, the Commission need not address it. Therefore, the Commission declines to address this exception.

Finally, the Commission rejects METRO's exception alleging that the ALJ erred by failing to address METRO's arguments concerning the financial burden on municipalities should Sprint prevail. Like the Commission, the ALJ's duty was to examine the Act and determine its meaning, not to speculate about how that determination would benefit or harm one or the other party to a

dispute. And the Commission, after carefully considering the Act as a whole, agrees with the ALJ that telecommunication facility lessees are not subject to the annual maintenance fee that the Act imposes on the owners of those facilities.

Like METRO itself, the Commission is a body of limited powers, and rewriting legislation to its liking is not one of them. METRO may appeal this order and may also seek relief in the Legislature, the appropriate body for METRO's arguments concerning the harm to municipalities from this decision. The Commission is mandated to find the meaning of the statute as written, not as the Commission might have chosen to write it. Therefore, until either the Act is revised or a court rules otherwise, the Commission finds that lessees are not required to pay the annual maintenance fee, and the Commission declines METRO's invitation to consider how its determination will shift the financial burden from providers to municipalities.

Finally, in the future, the Commission directs that a party seeking *de novo* review of a decision or assessment of the METRO Authority pursuant to MCL 484.3117 shall simultaneously notify both the METRO Authority and the Director of the Commission's Telecommunications Division of its filing. Upon receipt of such notification, the Director of the Commission's Telecommunications Division shall electronically serve a copy of the request for *de novo* review on all providers of telecommunications services who routinely receive invoices from the METRO Authority, The Michigan Municipal League, and the Michigan Townships Association. In addition, in the interests of fairness and broad participation, the Commission encourages the METRO Authority to place a conspicuous notice of the filing on its website. Any person who is interested in commenting on the request for *de novo* review shall submit written comments to the Commission in the appropriate docket within 30 days of the filing of the request for *de novo* review. By

following these procedures, the Commission believes that it will be able to expedite resolution of these important matters in the future.

The Commission FINDS that:

a. Jurisdiction is pursuant to 2002 PA 48, as amended, MCL 484.3101 *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. Determination No. 5 by the METRO Authority should be overturned and telecommunications providers that lease telecommunications facilities in municipal rights-of-way are not subject to the annual maintenance fee imposed by the METRO Act for those leased facilities.

THEREFORE, IT IS ORDERED that:

A. The proposal for decision is adopted and Determination No. 5 of the Metropolitan Extension Telecommunications Rights-of-Way Oversight Authority is overturned.

B. Any party seeking *de novo* review of a decision or assessment of the METRO Authority under MCL 484.3117 shall simultaneously notify both the METRO Authority, which is encouraged to place a conspicuous notice of the filing on its website, and the Director of the Commission's Telecommunications Division, who shall electronically serve a copy of the request on all providers of telecommunications services who routinely receive invoices from the METRO Authority, The Michigan Municipal League, and the Michigan Townships Association.

C. Within 30 days after a request for *de novo* review under MCL 484.3117, any person may submit written comments on the request to the Commission in the appropriate docket.

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.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

(S E A L)

/s/ Laura Chappelle
Commissioner

/s/ Monica Martinez
Commissioner

By its action of November 9, 2006.

/s/ Mary Jo Kunkle
Its Executive Secretary

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

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

Chairman

Commissioner

Commissioner

By its action of November 9, 2006.

Its Executive Secretary