

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of )  
**MICHIGAN CABLE TELECOMMUNICATIONS** )  
**ASSOCIATION and CHARTER COMMUNICA-** )  
**TIONS OPERATING, LLC** against **CONSUMERS** ) Case No. U-15434  
**ENERGY COMPANY** to correct billing procedures )  
regarding pole attachment fees and associated charges.)

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In the matter of the complaint of )  
**ARIALINK TELECOM, LLC**, against )  
**CONSUMERS ENERGY COMPANY** and ) Case No. U-15483  
**CHARTER COMMUNICATIONS OPERATING,** )  
**LLC**, for denial of pole attachment permits. )

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In the matter of the complaint of )  
**GREAT LAKES COMNET, INC.**, against )  
**CONSUMERS ENERGY COMPANY** and ) Case No. U-15484  
**CHARTER COMMUNICATIONS OPERATING,** )  
**LLC**, for denial of pole attachment permits. )

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In the matter of the complaint of )  
**MIDLAND COUNTY ESA**, for itself and on behalf )  
of and as fiscal agent for **M.CO.NET FIBER OPTIC** )  
**CONSORTIUM**, against **CONSUMERS ENERGY** ) Case No. U-15486  
**COMPANY** and **CHARTER COMMUNICATIONS** )  
**OPERATING, LLC**, for denial of pole attachments. )

At the March 11, 2008 meeting of the Michigan Public Service Commission in Lansing,  
Michigan.

PRESENT: Hon. Orjiakor N. Isiogu, Chairman  
Hon. Monica Martinez, Commissioner  
Hon. Steven A. Transeth, Commissioner

## ORDER

On October 5, 2007, Michigan Cable Telecommunications Association (MCTA)<sup>1</sup> and Charter Communications Operating, LLC (Charter<sup>2</sup>, collectively with MCTA, the Cable Companies) filed a complaint, in Case No. U-15434, against Consumers Energy Company (Consumers). The Cable Companies have alleged that: 1) Consumers unilaterally increased the Commission-approved<sup>3</sup> annual pole attachment fee from \$3.74 per pole for all of the Cable Companies' attachments on any given pole to multiples of \$3.74 per specific configuration of equipment on each pole; 2) Consumers imposed penalties and related charges on cable attachments that Consumers unilaterally determined were unauthorized attachments even though the attachments had previously been covered by the Cable Companies' existing permits; 3) Consumers billed the Cable Companies for drop poles<sup>4</sup> on both a prospective and retrospective basis; and 4) Consumers billed the Cable Companies for the administrative costs of auditing Consumers' own billing records.<sup>5</sup>

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<sup>1</sup>MCTA is a non-profit corporation whose membership consists of the cable systems operators serving eighty-five percent of Michigan's cable subscribers. *See*, complaint, p. 1.

<sup>2</sup>Charter is a corporation providing cable services to customers in twenty-nine states including approximately 600,000 customers in Michigan. *Id.*

<sup>3</sup>The Cable Companies argued that the Commission set a statewide pole attachment fee in the Commission's February 11, 1997 order in Case No. U-10741 *et al.*

<sup>4</sup>Drop poles consist of a single J-hook and one service drop line and are generally viewed in the industry as inconsequential, requiring no additional attachment fees. *See*, complaint, p. 11.

<sup>5</sup>The Cable Companies state that the audits they are now being billed for "are not safety inspections or make ready assessments," but are solely "conducted for the purpose of calculating [Consumers'] billings to the Cable Companies." *Id.*, p. 13.

On November 19, 2007, Arialink Telecom, LLC (Arialink)<sup>6</sup> and Great Lakes Comnet, Inc. (Great Lakes)<sup>7</sup> filed petitions to intervene. On November 20, 2007, Midland County ESA<sup>8</sup> (Midland, collectively with Arialink and Great Lakes, Intervenors) filed a petition to intervene. Each of the Intervenors argued that they meet the 2-prong standing test<sup>9</sup> applied by the Commission in intervention determinations.

With regard to the Cable Companies' complaint, the Intervenors stated that Consumers had refused to issue pole attachment permits until Charter paid for its share of the remedial make-ready costs to correct preexisting violations of the National Electrical Safety Code regarding Charter's existing attachments to Consumers' utility poles. The Intervenors assert that Consumers offered them the option of paying Charter's remedial make-ready costs in order to continue with the Intervenors' pole attachments and avoid further delays. The Intervenors each argue that they have paid their share of the make-ready costs and that their attachments should not be held up by the disagreement between Consumers and Charter over Charter's share of the costs. The Intervenors proposed that the Commission establish a pole attachment remediation fund so that such delays

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<sup>6</sup>Arialink is a basic local exchange carrier, a cable video service provider, and also leases and builds the telecommunications systems of educational institutions. Arialink petition to intervene, p. 2.

<sup>7</sup>Great Lakes is a broadband network and switching infrastructure company. Great Lakes petition to intervene, p. 2.

<sup>8</sup>Midland filed the petition on its own behalf and on behalf of M.Co.Net Fiber Optic Consortium, which it owns and for whom it acts as the fiscal agent. Midland also builds and operates educational broadband telecommunications networks. Midland petition to intervene, p. 2.

<sup>9</sup>The two-prong standing test established by the United States Supreme Court in *Association of Data Processing Service Organizations, Inc v Camp*, 397 US 150, 90 SCt 827, 25 LEd 184 (1970) and applied by the Commission asks if the petitioner: 1) can demonstrate an injury in fact, and 2) is within the zone of interest that is protected under the applicable statute. See also, July 22, 2004 order, *In the matter of the application of Consumers Energy Company for approval of a resource conservation plan*, Case No. U-14031; September 30, 2003 order, *In the matter of the application of Cherryland Electric Cooperative for authority to implement a large resort service rate*, Case No. U-13716.

would not occur in the future. Additionally, the Intervenors complained that they were being charged some of the same charges that the Cable Companies are disputing as unauthorized.

On November 27, 2007, the Cable Companies filed an objection to the Intervenors' petitions. The Cable Companies asserted that the Intervenors' complaints are completely unrelated to the dispute between Consumers and Charter. The Cable Companies claimed that this case pertains to Consumers' unilateral modifications to its billing audit procedures. The Cable Companies stated that this case does not pertain to and will not resolve the Intervenors' attachment disputes.

A prehearing conference was held before Administrative Law Judge Mark D. Eyster (ALJ) on November 28, 2007. Consumers, the Cable Companies, the Intervenors, and the Commission Staff (Staff) participated in the proceedings. Addressing the petitions to intervene, the ALJ granted the petitions with some limitations. Arialink, Great Lakes, and Midland were granted intervenor status with regard to the four counts of unauthorized fees alleged in the Cable Companies' complaint against Consumers. The ALJ denied the petitions with respect to the Intervenors' separate claims, including the delay relating to Charter's failure to pay its portion of the make-ready costs. The ALJ further limited the Intervenors' participation by ruling that the Intervenors must submit consolidated pleadings.

On December 5, 2007, the Intervenors filed separate applications for leave to appeal the ALJ's ruling limiting their interventions to the issues within the Cable Companies' complaint and limiting their participation to that of consolidated pleadings. The Intervenors argue that Consumers is using the issues in this proceeding to hold the Intervenors hostage, causing injury and delaying the pole attachment process. The Cable Companies filed their response to the Intervenors' applications for leave to appeal on December 19, 2007. In their response, the Cable Companies reiterated that the dispute in Case No. U-15434 concerns Consumers' unilateral

modification of “the manner in which it calculates pole attachment rental fees by changing the manner in which it counts the number of pole attachments that cable companies have on [Consumers’] poles when conducting billing audits.”<sup>10</sup> The Cable Companies also respond that “while [Consumers] is indeed delaying [the Intervenors’] attachment permit applications, the reasons for the delay are not the issues raised in the instant case.”<sup>11</sup> As such, “resolution of MCTA’s and Charter’s instant audit complaint against [Consumers] bears no relation to, and will not solve the dispute between, Charter and [Consumers] regarding the alleged ‘violation correction work’ for which [Consumers] is attempting to bill Charter.”<sup>12</sup> The Cable Companies point out that MCTA, one of the complainants in Case No. U-15434, is not even involved in the dispute between the Intervenors, Consumers, and Charter.<sup>13</sup>

On December 7, 2007, Arialink and Midland each filed formal complaints against Consumers and Charter for the denial of pole attachment permits and a request for immediate consideration and emergency relief.<sup>14</sup> Great Lakes filed a similar formal complaint on December 10, 2007, in Case No. U-15484. With one exception, the formal complaints address the same issues raised by the Intervenors in their application to appeal in Case No. U-15434.<sup>15</sup> The formal complaints pertain to Charter’s disputed make-ready charges that Consumers has alleged must be paid before

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<sup>10</sup>The Cable Companies’ response, p. 5.

<sup>11</sup>*Id.* at p. 9. Emphasis deleted.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.* at p. 8.

<sup>14</sup> Arialink’s formal complaint was filed in Case No. U-15483 and Midland’s formal complaint was filed in Case No. U-15486.

<sup>15</sup>The sole issue raised on appeal in Case No. U-15434 but not addressed by the Intervenors in their formal complaints is the request of the Intervenors to participate in Case No. U-15434 individually rather than collectively. This issue will be addressed subsequently in the order.

it will give the Intervenors the pole attachment permits and the Intervenors' proposed pole attachment remediation fund.

Great Lakes filed a stipulated motion to dismiss its complaint without prejudice on February 4, 2008 in Case No. U-15484. On February 7, 2008, Arialink filed a stipulated motion to dismiss its complaint in Case No. U-15483 without prejudice. On February 8, 2008, Midland also filed a stipulated motion to dismiss its complaint without prejudice in Case No. U-15486. Each of the Intervenors asserts that they have reached an agreement with Consumers and have or are scheduled to receive the pole attachment permits from the utility. The Intervenors also assert that a dismissal of the complaints as moot is in order. The Commission finds that the stipulated motions are in the public interest and should be granted, thus closing the proceedings in Case Nos. U-15483, U-15484, and U-15486.

With regard to the applications for leave to appeal, all but one of the issues are moot, having been resolved with the Intervenors' complaints and subsequent stipulations. The one remaining issue within the applications for leave to appeal, that of the ALJ's ruling requiring the Intervenors to file consolidated pleadings in Case No. U-15434, is addressed within the Commission's Rule 460.17205(2). Rule 205(2) states that, "[w]hen 2 or more parties have substantially identical interests and positions, the presiding officer may, to avoid repetition, cumulative, or redundant evidence, require coordinating participation." It being well within the ALJ's discretion to mandate collective participation in order to foster administrative efficiency, the Commission finds no reason to alter the ALJ's ruling and denies the Intervenors' applications for leave to appeal in Case No. U-15434.

THEREFORE, IT IS ORDERED that:

A. The stipulated motions to dismiss without prejudice filed by Arialink Telecom, LLC, Great Lakes Comnet, Inc., and Midland County ESA, in Case Nos. U-15483, U-15484, and U-15486, respectively, are granted.

B. The Executive Secretary is authorized to close Case Nos. U-15483, U-15484, and U-15486.

C. The applications for leave to appeal of Arialink Telecom, LLC, Great Lakes Comnet, Inc., and Midland County ESA in Case No. U-15434 are denied.

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, under MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

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Orjiakor N. Isiogu, Chairman

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Monica Martinez, Commissioner

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Steven A. Transeth, Commissioner

By its action of March 11, 2008.

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Mary Jo Kunkle, Executive Secretary