

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's own motion,)	
to investigate pole attachments that violate the)	
National Electrical Safety Code as adopted in)	
R 460.813 on poles owned by The Detroit Edison)	Case No. U-13522
Company, Ameritech Michigan, and Consumers)	
Energy Company.)	
_____)	

At the December 6, 2002 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

In an order dated September 16, 2002 (September 16 order), the Commission initiated this case to examine attachments on poles owned by The Detroit Edison Company (Detroit Edison), Ameritech Michigan, and Consumers Energy Company (Consumers) that violate the National Electrical Safety Code (NESC), to design any necessary remedial plans, and to impose sanctions for violations as provided by law.

As provided in the order, a prehearing conference was held on October 8, 2002 before Administrative Law Judge James N. Rigas (ALJ). At that time, the ALJ took up the petitions for

intervention. After hearing arguments, the ALJ denied intervention to the Dearborn Public Schools, Rochester Public Schools, and EduNets¹ (collectively, the schools).

On October 18, 2002, the schools filed a joint application for leave to appeal. By November 1, 2002, Ameritech Michigan, Consumers, Detroit Edison, and the Commission Staff (Staff) filed responses to the application for leave to appeal.

The schools argue that it was educational institutions that first brought the problem with NESC violations on pole attachments to the Commission's attention. They state that it was a critical problem then and is even worse now. Yet, the schools argue, the ALJ denied intervention to the only parties that seek to represent the interests of educational institutions. They assert that they also have first-hand experience with difficulties in making pole attachments due to ongoing NESC violations and the pole owners' response to new attachments. The schools state that they can provide key information as to why long known NESC violations go uncorrected every year. That information, they assert, might permit the Commission to take a more systemic approach to the problem. The schools argue that they have been subjected to unjust and unreasonable rates, charges, terms, and conditions, as well as delays in attaching to poles. In some instances, they say that the schools have been forced to pay for remedying NESC violations caused by previously attaching parties.

In the schools' view, the September 16 order reflects the Commission's awareness of the problems associated with educational institutions and the NESC violations. They state that they

¹ EduNets is an ad hoc coalition of school districts, educational coalitions, and corporations providing broadband networking infrastructure to their constituent schools and school districts through Michigan. Its membership includes: Allen Park Public Schools, Ann Arbor Public Schools, Clarenceville School District, Genesee Intermediate School District, Lake Orion Community Schools, Muskegon Area Intermediate School District, Saginaw Intermediate School District, Shiawassee Regional Educational School District, Walled Lake Consolidated Schools, Childs Consulting, Inc., and FiberLink, Inc.

have an interest in the design of the first remediation plans for pole attachment violations of the NESC, including the timetable and cost. They assert that they meet the two-prong test for standing, and request that the Commission reverse the ALJ's determination.

Further, the schools submit that the ALJ erroneously narrowed the purpose of this proceeding to the extent that it will become a useless exercise. They argue that the Commission intended a broader examination than for the Staff to submit its evidence of violations and the pole owners to respond to the alleged violations. They argue that the ALJ's ruling specifically excludes from consideration tariff provisions and other means by which a remediation plan might achieve greater efficacy.

The Staff responds that the ALJ properly denied the schools' petition to intervene. In the Staff's view, the Commission initiated this case to consider the Staff's report that listed various violations of the NESC and the imposition of any appropriate penalties. It points out that the Commission's September 16 order provides that the pole owners are ultimately responsible for seeing to it that no NESC violations exist. The Staff argues that the order does not mention that the hearing should consider contract or other disputes regarding payment responsibility for correcting violations. The Staff asserts that the only parties properly participating in this case are the pole owners, the Staff, and any other party that can provide evidence regarding the alleged pole attachment violations.

Consumers agrees that the ALJ properly excluded the schools from this case. In Consumers' view, the schools' participation could inject issues into this case that are far beyond the scope of the proceedings as outlined in the Commission's September 16 order. Consumers states that those improper issues might include: (1) renegotiation of the pole attachment rates charged to educational institutions, (2) modifications to the current utility tariffs independent of any NESC

violation or public safety issue, merely to gain a more advantageous provision for schools, and (3) reapportionment of make-ready costs for alterations necessary to prevent a new attachment from creating a violation.

Further, Consumers argues, denying the schools' petition for intervention does not preclude the Commission's consideration of cost responsibilities for correcting NESC violations. In fact, Consumers argues, the schools' interest in safety code compliance is identical to the interests of the general public that attachments to poles be safe. In Consumers' view, the Staff will adequately represent those interests.

Consumers argues that this is not the appropriate case for the schools to air their laundry list of alleged abuses with regard to pole attachments. It asserts that the true motive of the schools is to lower expenses for pole attachments. According to Consumers, the Commission has already acknowledged the other interests that the schools assert. For example, Consumers states, no further proceedings should be necessary to confirm that the Commission has authorized tariffs to recognize and demand compliance with the NESC.

Ameritech Michigan also argues that the Commission should affirm the ALJ's determination. It argues that the Commission's September 16 order commenced an expeditious, narrow, discrete, contested case dealing with the specific incidents of alleged violations contained in the Staff report embodied in Exhibit A attached to the order. Because sanctions are possible, Ameritech Michigan argues, it is imperative that the respondents be fully notified of the matters that they are held responsible to address in this case. It states that this is a contested case that involves individual named parties and a disputed set of facts related to particular statutory violations. The mandates of the September 16 order, Ameritech Michigan argues, limit the lawful scope of the case to the violations described in the Staff report.

In Ameritech Michigan's view, the schools do not seek to comply with the narrow, show-cause proceeding commenced and authorized by the previous order. Rather, Ameritech Michigan argues, they seek a "wide-ranging inquiry into matters that do not fall within the limits of the proceeding initiated by the Order." Ameritech Michigan's reply, p. 4. Such broadening, Ameritech Michigan argues, would delay the conclusion of the case, contrary to the Commission's direction to set a schedule for its expeditious completion.

Ameritech Michigan further argues that to reverse the ALJ's ruling will require drastic action to restart and reform the entire case. Rather than a contested case proceeding, Ameritech Michigan argues, it would become in the nature of a rulemaking proceeding, subject to the rulemaking provisions of the Administrative Procedures Act.

Finally, Ameritech Michigan argues that within the scope of the case convened by the September 16 order, the schools lack standing to participate. It says that none of the schools alleges that it was identified as having caused any violation, and none alleges that it has responsibility for remediation of any alleged violation.

Detroit Edison also supports the ALJ's determination denying the schools' request to intervene in this case. In Detroit Edison's view, the schools do not meet the two-prong test for standing set out in Association of Data Processing Service Organizations, Inc v Camp, 397 US 150; 90 S Ct 827; 250 L Ed 184 (1970). However, Detroit Edison argues, if the Commission reverses the ALJ's determination, it must make additional findings. First, Detroit Edison argues, the Commission should require the schools to pick one forum in which to litigate their positions and dismiss with prejudice all other cases. Detroit Edison points out the schools admittedly have sued the Commission in the Oakland County Circuit Court in Rochester Public Schools v The Detroit Edison Company and the Michigan Public Service Commission, Case No. 02-038984-CZ.

Second, Detroit Edison argues, the Commission should precisely define the scope of the case. Detroit Edison argues that the scope as defined by the ALJ cannot remain the same if the schools are permitted to intervene.

Third, Detroit Edison argues, if the Commission grants the schools' appeal, it must set a second prehearing conference in order to establish a new schedule in light of the schools' intervention petitions and the resultant expansion of the scope of the case.

Rule 337 of the Commission's Rules of Practice and Procedure 1992 AACCS, R 460.17337, establishes the standards for reviewing applications for leave to appeal. Not every application merits immediate review. An appellant must establish one of the following conditions before the Commission will grant review:

1. A decision on the ruling before submission of the full case to the Commission for final decision will materially advance a timely resolution of the proceeding.
2. A decision on the ruling before submission of the full case to the Commission for final decision will prevent substantial harm to the appellant or the public-at-large.

If the Commission grants immediate review, it will reverse an administrative law judge's ruling if the Commission finds that a different result is more appropriate.

The Commission finds that the schools should be permitted to participate in this case, with certain limitations. This proceeding is intended to address what the Commission views as a potentially widespread problem with pole attachments that violate the NESC. As the Commission noted in the September 16 order, the pole owners are ultimately responsible for ensuring that all attachments are made in accordance with the NESC. The Commission further noted that the numerous currently existing violations had the potential for delaying the deployment of broadband. The Commission further intended that this proceeding would result in a long-term solution

to resolving problems with pole attachments that constitute NESC violations. The Commission noted that the number of violations indicated that the problem might be systemic and in need of a systemic remedy to resolve the problems and prevent their recurrence. To that end, it might be necessary to revise certain tariff provisions regarding pole attachments.

The Commission recognizes that the schools, as prospective pole attachers, have an interest in how these issues are resolved. However, this proceeding should not be viewed as an opportunity for the schools to alter the rates or terms and conditions of pole attachments that have no relationship to the problems with NESC violations at issue. Finally, this is not the appropriate proceeding for the schools to litigate any past alleged abuses. If the schools believe that one of the pole owners has violated a tariff or otherwise acted improperly, their pursuit of a remedy must be in a forum that is other than in this proceeding.

Therefore, the schools may participate in this case to present information on violations of which they are aware and to support the need for systemic remedies to prevent recurrence of this problem. Any presentation of evidence or argument must relate to the NESC violations and proposed remedies for the violations, for which this case was originally commenced. The Commission expects that Rochester Public Schools will reassess the naming of the Commission as a defendant in the pending action in Oakland County Circuit Court in light of the decision allowing its participation in this proceeding.

The Commission realizes that granting the application for leave to appeal will probably lengthen the time needed to finish the proceeding. However, the Commission is persuaded that the schools represent an important interest, and they should be permitted to participate in this proceeding. The ALJ should set an additional prehearing conference at which the schedule may be revised to accommodate the addition of the schools to this proceeding.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACCS, R 460.17101 et seq.

b. The application for leave to appeal should be granted and the schools should be permitted to participate in this proceeding as limited by this order.

THEREFORE, IT IS ORDERED that the October 8, 2002 decision of Administrative Law Judge James N. Rigas denying intervention to the Dearborn Public Schools, the Rochester Public Schools, and EduNets is reversed, and these parties shall be permitted to intervene as limited by this order.

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

MICHIGAN PUBLIC SERVICE COMMISSION

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of December 6, 2002.

/s/ Dorothy Wideman
Its Executive Secretary

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Company, Ameritech Michigan, and Consumers)
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Case No. U-13522

Suggested Minute:

“Adopt and issue order dated December 6, 2002 granting the application for leave to appeal filed by the Dearborn Public Schools, the Rochester Public Schools, and EduNets, as set forth in the order.”