

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 )		Case No. U-13522
on poles owned by The Detroit Edison Company, )		
Ameritech Michigan, and Consumers Energy )		
Company. )		
_____ )		

At the April 17, 2003 meeting of the Michigan Public Service Commission in Lansing, Michigan.

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

**ORDER GRANTING LEAVE TO APPEAL**

On September 16, 2002, the Commission issued an order initiating this case to examine attachments on poles owned by The Detroit Edison Company (Detroit Edison), Ameritech Michigan (now SBC), 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.

At a prehearing conference on October 8, 2002, Administrative Law Judge James N. Rigas (ALJ) denied petitions to intervene that were filed by Dearborn Public Schools, Rochester Public

Schools, and EduNets.<sup>1</sup> On December 6, 2002, the Commission reversed the ALJ's October 8 ruling and held that these parties should be permitted to participate in this case in the interest of obtaining a long term solution to a potentially systemic problem. The Commission limited their participation by stating:

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 the 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.

Id., p. 7. Thereafter, Consumers and Detroit Edison filed motions to strike testimony submitted by the Michigan Cable Telecommunications Association (MCTA).

On March 5, 2003, the ALJ convened a hearing for the purpose of entertaining motions filed by Detroit Edison and Consumers to strike all or portions of testimony by John W. Childs, Tim Smith, and Thomas E. Davis, all witnesses provided by EduNets, and portions of the testimony by Richard Babajoff, Raymond P. Clark, and Timothy Ransberger, witnesses presented by the MCTA. At the conclusion of the arguments, the ALJ granted the motions to strike, based on his finding that the testimony was outside the scope of this case.

On March 13, 2003, EduNets and MCTA filed applications for leave to appeal the ALJ's ruling granting the motions to strike. On March 21, Detroit Edison, Consumers, and SBC filed replies to the application for leave to appeal.

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<sup>1</sup>EduNets is an ad hoc coalition of school districts, education coalitions, and corporations providing broadband networking infrastructure to their constituent schools and school districts throughout Michigan. Its membership is detailed in fn 1 of the December 6, 2002 order.

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.

After a review of the arguments and proposed testimony, the Commission is persuaded that it should affirm in part and reverse in part the ALJ's ruling granting the motions to strike.

The ALJ based his determinations on his conclusion that this case is strictly a show cause proceeding, intended to deal only with the 462 violations that were set out in the Commission Staff's Report (Staff's Report), which was attached to the Commission's order commencing this case. He concluded that evidence of other violations or systemic remedies that might be proposed by other parties would be irrelevant to those issues. The ALJ's reading of the December 6, 2002 order led him to conclude further that the Commission agreed with his view of the scope of this case as being very narrow. Although he agreed that discussion in the body of the December 6, 2002 order might lead to a different conclusion, he noted the ordering sections did not specifically reverse his findings with regard to the scope of the case as he had outlined it at the October 8, 2002 hearing.

Some of the stricken testimony describes the difficulties that school districts have experienced in the past two years related to obtaining space on poles, due to NESC violations that are already present on those poles. The testimony asserts that Detroit Edison and Consumers have required those seeking to install pole attachments to pay the costs incurred to cure violations that are already present. One argument of the parties providing testimony is that requiring a new attaching party to cure violations that some other party has created relieves the cost causer of responsibility for violating the NESC. The witnesses indicate that this creates a disincentive for requiring careful installation to avoid creating NESC violations. Some witnesses propose new rules, changes to tariffs, or other procedure changes that would, in their view, provide greater incentives for compliance with the NESC when parties are installing pole attachments.

Although some of the testimony reflects the existence of problems that attaching parties have experienced in the past, it appears to the Commission that these portions of testimony provide background for the proposed remedies. Neither party has sought damages or other compensation for past violations, and they explicitly state their understanding that to do so in this case would not be appropriate. The Commission finds that, in keeping with the above discussion, the ALJ's ruling should be reversed as to witnesses Smith, Childs, and Davis. However, the Commission finds that the motions as to portions of testimony by Babajoff, Clark, and Ransberger related to proposed rule or tariff changes should be affirmed as those items are outside the intended scope of this case.

The purpose for which the Commission permitted the participation of the schools in this case, as outlined in the December 6, 2002 order, was to provide an opportunity for those parties to present evidence that NESC violations were systemic in nature and to propose remedies for those violations. The Commission recognized that the number of violations might well reflect the need for systemic remedies. It was also aware that the schools had experienced problems with NESC

violations when attempting to attach new fiber to the poles. The Commission did not intend to preclude evidence of NESC violations other than those listed in the Staff's Report in attempting to show the widespread or systemic nature of the violations. However, the Commission did not contemplate that this case should result in the adoption of new rules or major revisions to tariffs. A subsequent proceeding may be necessary if such action is warranted.

As to the objection to some of the testimony on hearsay grounds, the ALJ has not ruled on that issue, and the Commission declines to review an issue that is not yet ripe.

EduNets adds to its application for leave to appeal an argument that the motions to strike were frivolous, and requests that the Commission order the payment of attorney's fees and costs to the prevailing party. The Commission rejects this argument. In the Commission's view, the motions to strike reflect a misunderstanding concerning the intended scope of this case. Hopefully, this order resolves any lingering doubt concerning that issue.

The Commission FINDS that:

a. 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.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACR, R 460.17101 et seq.

b. The applications for leave to appeal should be granted and the ALJ's March 5, 2003 ruling that grants the motions to strike filed by Consumers and Detroit Edison should be affirmed in part and reversed in part as provided in this order.

THEREFORE, IT IS ORDERED that the applications for leave to appeal filed by EduNets and the Michigan Cable Telecommunications Association are granted, and the March 5, 2003

ruling striking the testimony of John W. Childs, Tim Smith, Thomas E. Davis, Richard Babajoff, Raymond P. Clark, and Timothy Ransberger is affirmed in part and reversed in part as provided in this order.

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/ Laura Chappelle  
Chairman

( S E A L )

/s/ David A. Svanda  
Commissioner

/s/ Robert B. Nelson  
Commissioner

By its action of April 17, 2003.

/s/ Dorothy Wideman  
Its Executive Secretary

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Case No. U-13522

Suggested Minute:

“Adopt and issue order dated April 17, 2003 affirming in part and reversing in part the Administrative Law Judge's March 5, 2003 ruling granting the motions to strike filed by The Detroit Edison Company and Consumers Energy Company, as set forth in the order.”