

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of)	
LAKE ORION COMMUNITY SCHOOLS against)	
THE DETROIT EDISON COMPANY regarding)	Case No. U-13767
terms and conditions of attachments of the)	
educational telecommunications facilities to)	
utility poles.)	
_____)	

In the matter, on the Commission’s own motion,)	
to monitor THE DETROIT EDISON COMPANY ’s)	
treatment of new pole attachment applications for)	Case No. U-14445
educational telecommunications facilities.)	
_____)	

At the February 24, 2005 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

I. History of Proceedings

On April 17, 2003, Lake Orion Community Schools (LOCS) filed a complaint against The Detroit Edison Company (Detroit Edison) alleging that Detroit Edison had violated provisions of the Michigan Telecommunications Act (MTA), MCL 484.2101 et seq., the National Electrical Safety Code (NESC), R 460.813, Michigan’s Pole Attachment Act, MCL 460.6g, and Detroit Edison’s Pole Attachment Tariff No. 1.

On April 25, 2003, LOCS filed a motion for the immediate issuance of an emergency relief order (ERO) under the MTA. On April 30, 2003, Detroit Edison filed an answer to the motion.

On May 14, 2003, Detroit Edison filed an answer to the complaint, which denied the charges and set forth affirmative defenses. On July 2, 2003, the Commission Staff (Staff) filed an appearance. On July 8, 2003, a prehearing conference was held before Administrative Law Judge Daniel E. Nickerson, Jr. (ALJ). At the prehearing, LOCS insisted on a schedule consistent with provisions of the MTA, that requires a final order within 180 days from the date of filing the complaint (absent the parties' agreement to a longer schedule). Detroit Edison disputed that the MTA governs this case. The ALJ set a schedule longer than 180 days, based on practical considerations and without ruling on whether the MTA governed the proceeding.

The ALJ conducted evidentiary hearings on November 4, 5, 7, and 12, 2003. On December 19, 2003, LOCS, Detroit Edison, and the Staff filed briefs. On January 9, 2004, LOCS, Detroit Edison, and the Staff filed reply briefs. On April 2, 2004, the ALJ issued his Proposal for Decision (PFD). On April 16, 2004, LOCS and Detroit Edison filed exceptions. On April 30, 2004, LOCS and Detroit Edison filed replies to exceptions.

II. Background Facts

Detroit Edison has about one million utility poles. Under the NESC, utility poles must include a neutral zone, which provides an area between electrical and communication lines for the safety of workers. Various entities attach lines and equipment to Detroit Edison's poles, including telephone companies, cable TV providers, schools, and others.

Detroit Edison described its pole attachment permit process. In an initial request, an applicant specifically identifies each Detroit Edison pole the applicant would use on its desired route. After applications are verified for accuracy, an audit of each pole is conducted identifying existing

attachments, NESC issues, and pole design. An office review is conducted on the data collected, and a cost estimate for make-ready costs is prepared. After payment is received, Detroit Edison does the necessary construction work. After construction, the applicant is given the permit authorizing it to attach to Detroit Edison's poles.

LOCS' Wide Area Network (WAN) connects its schools and administrative buildings. LOCS intends to connect all of its buildings sometime in the future. The WAN transmits and receives information at broadband speed for use in a variety of educational tools. LOCS planned to build the network in phases. Phase I involved 12 buildings and about 326 poles. In April of 1999, LOCS submitted an application to Detroit Edison for permission to attach fiber to Detroit Edison's poles. Detroit Edison approved the application in about two months and the fiber was hung and operational within another two months.

Phase I was in operation for the start of the 1999 school year. LOCS hired DTE Energy Solutions, Inc. (DTEES), an affiliate of Detroit Edison, to construct Phase I. DTEES subcontracted the Phase I work to The Hydaker-Wheatlake Company. After LOCS used Phase I for about a year, Detroit Edison informed LOCS that about 60 violations of the NESC existed on Phase I. LOCS replied that it was unaware of the violations but considered the violations Detroit Edison's responsibility because one of Detroit Edison's affiliates was contracted to build Phase I. LOCS withheld the final payment to DTEES of \$99,092.36 under contractual terms that would permit LOCS to do so until final acceptance of the work. Shortly thereafter, LOCS received a letter from John LaDucer of Detroit Edison, stating that the violations had been corrected and that Phase I was "now in compliance with all NESC and Detroit Edison specifications." Subsequently, LOCS authorized payment.

In the fall of 2001, LOCS began Phase II, which involved attachment to 355 of Detroit Edison's poles with a portion of Phase II's fiber overlapping Phase I's fiber. LOCS awarded the construction job to Fiber Link, Inc. LOCS' plan was to complete Phase II and connect two new buildings to the WAN prior to the start of the 2002 school year. Thomas E. Davis, President of Fiber Link, testified that a portion of the route for Phase II is near his home and when driving past it, he noted numerous NESC violations on Detroit Edison's poles. Mr. Davis testified that in late 2001, he informed LOCS that he believed there were also unresolved NESC violations concerning Phase I. Fiber Link states that in March of 2002, Fiber Link employees met with Detroit Edison and presented a specific list of violations.

Phase II permits were requested in two batches in April 2002. The first batch involved the new build route. The second batch involved the overlap portion of the route. Detroit Edison performed data collection on 80% of the new build route within five days but did not perform the data collection on the overlap portion of the route until several months later.

In June 2002, Detroit Edison hired ITRON, Inc., to perform data collection, provide planning, and prepare cost estimates. ITRON performed its tasks on the entire Phase II route, in part duplicating Detroit Edison's work. ITRON completed its tasks on Phase II in December 2002. On December 30, 2002, Detroit Edison invoiced LOCS in the amount of \$27,185.00 for ITRON's work on Phase II. On January 3, 2003, Detroit Edison e-mailed an estimate of approximately \$200,000 for make-ready costs of Phase II. LOCS, through Fiber Link, disputed the make-ready charges, which included costs to fix existing violations. Detroit Edison responded that the estimate was not a mistake, and Detroit Edison expected payment prior to any attachments. Several communications concerning the estimate produced Detroit Edison's revised estimate on

March 7, 2003, in the amount of \$159,423.82, and a further demand for the payment of the ITRON charges in the amount of \$27,185.00. On April 17, 2003, LOCS filed this complaint.

After the complaint was filed, the parties continued discussions. On August 1, 2003, a tentative agreement was reached concerning the make-ready costs. The amount agreed upon was \$10,857.39, which Detroit Edison invoiced and LOCS immediately paid. Subsequently, Detroit Edison lowered the make-ready costs to \$6,113.39, a figure that LOCS does not dispute. Also, Detroit Edison waived the ITRON charges of \$27,185.00. In August 2003, Detroit Edison issued LOCS pole attachment permits. At the time of the November hearings, Phase II construction was completed and operational.

III. Proposal for Decision and Discussion

A. Applicability of the Michigan Telecommunications Act

LOCS contends that Detroit Edison, an electric utility, is subject to regulation under the MTA. First, LOCS states that Detroit Edison provides telecommunications services for its affiliates that do not involve Detroit Edison at all. LOCS states that Detroit Edison maintains and operates a network and bills other companies in the organization. LOCS contends that Detroit Edison does not have to provide services to the public to be a telecommunications provider; it only needs to offer services to “customers,” which would include affiliates. Further, LOCS states that Detroit Edison does not own the affiliates, but the parent company of Detroit Edison does. Because Detroit Edison does not own the affiliates, LOCS states that Detroit Edison must charge the affiliates for the use of the facilities that belong to Detroit Edison alone. In fact, LOCS states that the affiliates contribute to the embedded cost of Detroit Edison’s infrastructure by “allocation, reallocation, [and] direct billing.” 8 Tr 679. Additionally, LOCS contends that the MTA requires that “compensation” be conferred, which is clearly satisfied where the affiliates are paying for the

network and maintenance services. LOCS insists that the affiliates pay for the use of the facilities the same way traditional telecommunications customers do. LOCS states that it is not asking the Commission to regulate all aspects of the private networks, but even unregulated telecommunications services are required to provide pole attachment at just and reasonable terms. Finally, LOCS insists that the ALJ erred when he found that Detroit Edison and its affiliates are one and the same.

Detroit Edison replies that the Legislature excluded private networks from regulation under the MTA. MCL 484.2401. Detroit Edison states that if it were regulated because of its private network, many companies such as Ford Motor Company and its affiliates, General Motors Corporation and its affiliates, and DaimlerChrysler Corporation and its affiliates, would also fall under the MTA. Also, Detroit Edison states that by using a private network among affiliates, it is not offering services to “customers.” Detroit Edison points out that the network is not available to the general public, nor is it part of a public network. Detroit Edison states that although costs to maintain the network are assigned to affiliates, there is no profit component accruing to Detroit Edison, and the costs are not for the “transmission of 2-way communication.”

The ALJ pointed out that the Commission is a creature of statute and has only those powers conferred upon it by the Legislature. *Ameritech Michigan v Public Service Comm*, 235 Mich App 523; 599 NW2d 760 (1999). The ALJ noted that under the MTA, a telecommunications provider is defined as, “a person or an affiliate of the person each of which for compensation provides 1 or more telecommunications services.” MCL 484.2102(cc). Telecommunications services are defined as, “regulated and unregulated services offered to customers for the transmission of 2-way interactive communication and associated usage. A telecommunications service is not a public utility service.” MCL 484.2102(dd).

The ALJ rejected the argument that Detroit Edison's network for communication among its affiliates makes it a telecommunications provider under the MTA. The ALJ found that the network is not offered or available to the public and that it only exists to provide an efficient, reliable, and economical means of inter-affiliate communication. Further, he found that there is no direct interactive communication with the public via the network. The ALJ found that the use of the network by Detroit Edison's affiliates does not make them Detroit Edison's customers. In so doing, he pointed out that under the MTA there is a compensation requirement, and there is no evidence in this case that the affiliates purchase the network from Detroit Edison.

MCL 484.2102(cc). The ALJ noted that Anne Pogue, a Specialist-Consultant in Detroit Edison's Information Technologies Department, testified that there are no usage charges for specific internal calls on the network, and that only maintenance costs were specifically identified and billed to an affiliate. The ALJ found that the exchange of money does not necessarily constitute compensation. In this case, the ALJ found that the affiliates are not compensating Detroit Edison, but rather sharing in the cost to maintain the network.

Next, LOCS contends that Detroit Edison's lease of fiber to TCG Detroit Holdings I, Inc. (TCG), Metropolitan Fiber Systems of Detroit, Inc.(MFS), and MCI Telecommunications Corporation (MCI) is a telecommunications service for purposes of the MTA. In this regard, LOCS relies on the August 16, 2001 order in Case No. U-12797, wherein LOCS contends that the Commission ruled that leasing dark fiber is a telecommunications service.

Detroit Edison replies that the Commission's determination in Case No. U-12797 turned on the fact that the company intended to provide telecommunications services, not on its provision of dark fiber. Detroit Edison contends that there is absolutely no evidence on the record that the fiber is lit, and in view of the recent over-building, Detroit Edison would not be surprised if the fiber

was not lit. Further, Detroit Edison contends it is not the one to transmit over the cable, so even if the fiber has been lit, it is not a telecommunications provider. Detroit Edison compares this to a truck lease; the lease of a truck does not make the dealer a common carrier, and the lease of cable does not make Detroit Edison a telecommunications provider. Finally, Detroit Edison states that the fiber is not offered to customers, but is only available to the companies that constructed the network under agreements signed years ago. Detroit Edison maintains that it receives consideration for the lease of cables, not compensation for telecommunications services. In fact, Detroit Edison states that it receives the same amount whether the fiber is lit or not.

Further, Detroit Edison replies that it merely leases strands of cable, which is different than providing services. Detroit Edison states that the Legislature could have, but did not, include leasing facilities in the definition of providing service.

The ALJ rejected the argument that Detroit Edison's leasing fiber to TCG, MFS, and MCI is a telecommunications service for purposes of the MTA. The ALJ found that the determination in Case No. U-12797, that the provider was a telecommunications provider, was not based on a finding that dark fiber is a telecommunications service but, rather, on additional services offered by the provider. The ALJ pointed out that the party in Case No. U-12797 provided many additional services, and further that the PFD in that case stated that the provision of dark fiber is not a telecommunications service under federal or state law. The ALJ found that Detroit Edison is only offering bare capacity on a limited scale to those that were involved in building the network and that Detroit Edison did not know whether the fiber has yet been lit.

Third, LOCS contends that the installation of fiber by Detroit Edison's affiliate, DTEES, makes Detroit Edison a telecommunications provider. LOCS states that the Commission decided in Case No. U-12797 that "the installation of fiber facilities is a service." *See*, August 16, 2001

order in Case No. U-12797, p. 10. LOCS also maintains that under MCL 484.2102(cc), a provider is any, “person or an affiliate of the person each of which for compensation provides 1 or more telecommunications services.” LOCS concludes that DTEES’s installation of fiber makes Detroit Edison subject to the MTA as an “affiliate of the person.”

Detroit Edison replies that the mere installation of cable on poles does not make the installer a telecommunications provider. Further, Detroit Edison states that even if DTEES were a telecommunications provider, a company cannot be held liable for the actions of its affiliates. Detroit Edison emphasizes that MCL 484.2102(cc) states, a provider is “a person or an affiliate of the person each of which for compensation provides 1 or more telecommunications services.” (emphasis added). Detroit Edison asserts that affiliates are included in the definition only if they provide telecommunications services. Detroit Edison states that under the plain statutory language, affiliates cannot be regulated simply because another entity in the corporate family is regulated. Further, Detroit Edison states that DTEES is not a party to this proceeding and would have to be to be subject to regulation.

The ALJ rejected the argument that Detroit Edison’s affiliate, DTEES, is a telecommunications provider. The ALJ found no evidence that DTEES provided any service to LOCS that meets the MTA’s definition of telecommunications services.

The Staff took the position that Detroit Edison may be regulated under the MTA because Section 101(2) of the MTA provides that one of its purposes is to “encourage the use of existing educational telecommunications networks and networks established by other commercial providers as building blocks for a cooperative and efficient statewide educational telecommunications system.” MCL 484.2101(2). The Staff argued that, as an educational telecommunications network, LOCS should be able to connect its WAN under the MTA. Also, the Staff insisted that

Detroit Edison violated Sections 101(2)(g), 307(1), and 361(2) and (3) of the MTA, which, read together, require a “just and reasonable” rate for pole attachments. The Staff was concerned by the gross discrepancies between estimates and final make-ready costs, total time to issue permits, and variance with Detroit Edison’s past practice and custom. The Staff pointed out the “night and day difference” between the treatments of Phase I and Phase II to illustrate its point. The Staff recommended that Detroit Edison pay LOCS around \$50,000 for the alternate connectivity that LOCS paid.

The Commission agrees with the ALJ and finds that Detroit Edison is not a telecommunications provider as defined under the MTA. Detroit Edison’s network between affiliates is a private network, and, as such, does not fall within the definition of “telecommunications provider” under the MTA, because there is no element of compensation involved. MCL 484.2102(cc). Detroit Edison’s private network is not available to the public, or used by Detroit Edison to communicate with the public. It is simply an internal network used by the Detroit Edison family of companies. As such, it is not a “telecommunications service” under the MTA, because it is not offered to customers. MCL 484.2102(dd).

The Commission also agrees with the ALJ’s finding that the lease of dark fiber is not a telecommunications service under the MTA. *See, Gulf Power Co v FCC*, 208 F.3d 1263, 1278 (CA11, 2000), *rev’d on other grounds*, 534 US 327 (2002) (holding that “[b]ecause dark fiber is bare capacity, it technically is neither a telecommunications service nor a cable service. In fact, it is not a service at all; it is simply an inactive fiber.”) Detroit Edison does not transmit over the fiber; it simply leases the fiber to the companies that constructed the network. In addition, the Commission adopts the ALJ’s finding that Detroit Edison cannot be regulated for the actions of DTEES. DTEES is not a telecommunications provider. LOCS has not provided convincing

evidence that installation of cable on poles, alone, makes the installer a telecommunications provider.

For the foregoing reasons, the Commission finds that Detroit Edison is not a telecommunications provider, and is not subject to regulation under the MTA. Because Detroit Edison is not subject to regulation under the MTA, LOCS is not entitled to an ERO, the case is not subject to a 180-day time frame, and LOCS is not entitled to remedies provided in the MTA.

Although rejecting as baseless LOCS' request to apply the remedies available under the MTA to this situation, the Commission understands why LOCS pursued this strategy. The ERO process, the strict case processing time frames, the ability to resort to mediation, and remedies such as hefty fines and the payment of attorney fees are important litigation and regulatory tools for encouraging recalcitrant utilities to act reasonably. The enactment of stiff enforcement and penalty provisions against telephone providers that engaged in slamming and cramming has brought about a marked decline in those troublesome activities. Unfortunately, attaching parties have no such enforcement or penalty provisions available to them under the pole attachment act.

B. Violation of MCL 460.6g(2)

The Commission regulates the rates, terms, and conditions of attachments by attaching parties pursuant to MCL 460.6g(2). Moreover, the Commission has authority to “ensure that the rates, terms and conditions are just and reasonable.” MCL 460.6g(2). The ALJ found that Detroit Edison violated MCL 460.6g(2). The ALJ stated that Detroit Edison's procedures were lengthy, involved inflated estimates, and were detrimental to LOCS and the students of Oakview Middle School. The ALJ pointed out that, although the two projects were similar in size, Phase I took approximately 4 months from start to finish, whereas, Phase II took approximately 16 months from start to finish. The ALJ stated that Detroit Edison explains the delay as a combination of

reorganization of the pole attachment permit process and staff shortages. However, the ALJ found that the delay was not directly attributable to either of these excuses. Rather, he found that Detroit Edison should have provided LOCS with approval much earlier.

The ALJ also found Detroit Edison's initial estimates were unjust and unreasonable. The ALJ concluded that it made no difference whether the estimates were in the form of an invoice, an e-mail, or a letter, and that the various estimates conveyed to LOCS were excessive. The ALJ observed that the first estimate was about \$202,000 in January 2003, the second estimate was for \$159,423.82 in March 2003, and Detroit Edison continuously demanded \$27,185 for the costs of ITRON's work. The ALJ also found that the original estimates delayed the permit process. The ALJ was persuaded to make this finding because a considerable amount of time was involved in negotiating make-ready costs and because the final amount of \$6,113.39 was significantly lower than any of the estimates.

Additionally, the ALJ found the letter from Detroit Edison, stating that all Phase I violations had been corrected when NESC violations remained, to be reprehensible. Although Detroit Edison attempted to show that it believed that all Phase I violations had been corrected, the ALJ found nothing in the record to support this assertion. The ALJ found that if there was a legitimate determination that all Phase I violations had been corrected, there would be audit or survey data to support the determination.

The ALJ found that the Commission's authority under 460.6g(2) permits the Commission to regulate the terms and conditions of Detroit Edison's pole permit process to make sure they are just and reasonable. The ALJ recommended that the Commission order Detroit Edison to revise its pole attachment permit procedure to include:

1. Deadlines by which Detroit Edison is to meet certain criteria during the permit process;

2. A deadline for final issuance of approval of permits;
3. A provision that applicants are not responsible for costs of existing pole violations; and
4. That every effort is made to ensure that cost estimates reasonably relate to actual costs.

PFD, p. 24

Detroit Edison contends that it did not violate any portion of MCL 460.6g. Detroit Edison states that it usually issues a permit after payment is received and all NESC issues are corrected. Typically, the parties with the existing attachments on Detroit Edison's poles must correct the violations before Detroit Edison bills the proposed attacher. Detroit Edison states that when LOCS finally paid in August of 2003, Detroit Edison issued the permits.

Detroit Edison contends that it is unfair to compare Phase I to Phase II. Citing crowded utility poles, staff shortages, a change in the permit application process, and the use of service planners to do some of its work, Detroit Edison maintains that Phase II is distinguishable from Phase I. Also, Detroit Edison claims that unauthorized pole attachments contributed to delays. Moreover, Detroit Edison claims that litigation caused it to expend an unreasonable amount of resources and forced further delays. In fact, Detroit Edison maintains that LOCS is litigious and LOCS' attorneys are simply looking for attorney fees. Detroit Edison points out that LOCS' witnesses filed testimony in Case No. U-13522 – an investigation launched by the Commission regarding pole attachment violations – only one month after receiving the first estimate. Additionally, Detroit Edison argues that LOCS impeded the project by notifying Detroit Edison to “cease and desist” ITRON activities. Detroit Edison asserts that Fiber Link took six months to file a permit after being hired to construct Phase II. Finally, Detroit Edison states that it offered an additional crew at no cost to LOCS to assist in Phase II construction before the start of the 2003 school year, but LOCS did not accept Detroit Edison's offer.

Detroit Edison states that MCL 460.6g does not regulate abstract conduct. Detroit Edison contends that the Commission's authority is limited to the regulation of the rates, terms, and conditions of its pole attachment tariff. Additionally, Detroit Edison states that the ALJ did not cite any authority, rule, order, or standard that Detroit Edison did not follow.

Further, Detroit Edison states that an estimate is just an estimate, not an invoice or a charge. According to Detroit Edison, there is no tariff dealing with initial estimates. Detroit Edison also notes that in the settlement agreement in Case No. U-13522, it agreed to comprehensive procedures regarding pole attachments, which should be given time to be implemented. In fact, Detroit Edison states that LOCS' witness Davis acknowledged that the ALJ's proposed remedy is essentially moot due to the Commission's order in Case No. U-13522.

Regarding the letter to LOCS, Detroit Edison contends that the burden is on LOCS to prove that the Phase I issues were not corrected, and that LOCS failed to meet that burden. Further, Detroit Edison states that TLC Holdings Group, Inc., d/b/a DataServ was hired by LOCS to inspect and certify that Phase I was done correctly, which it did. Therefore, Detroit Edison states that the PFD wrongly concluded that LOCS relied on Detroit Edison's representations when authorizing payment. Also, Detroit Edison contends that because LOCS paid DTEES 16 months after Mr. LaDucer's letter, LOCS could not have been relying on that letter when it issued the payment. Detroit Edison contends that even if Detroit Edison's letter was wrong, there is no basis for relief because LOCS never sought damages for alleged Phase I issues. Detroit Edison contends that LOCS suffered no harm because corrections to Phase I were made at no expense to LOCS, and Detroit Edison made the corrections promptly after becoming aware of them.

Finally, Detroit Edison argues that the entire case was moot at the time of the hearing in November 2003 and should have been dismissed. According to Detroit Edison, LOCS primarily

sought to attach Phase II fiber to Detroit Edison's poles, and, at the time of the hearing, Phase II was completed.

LOCS replies that the plain language of MCL 460.6g(2) requires the Commission to regulate Detroit Edison's actions and procedures. LOCS contends that the regulatory scheme includes scrutiny not only of tariffs, but also of a utility's actual practices. LOCS argues that by requiring a tariff, the Legislature required a public offering of pole attachments, the denial of which is a violation of the statute. LOCS states that until 1985, when the Commission ordered utilities to file pole attachment tariffs, the Commission directly scrutinized a utility's conduct outside of interpreting and approving tariffs. LOCS contends that an obligation to provide services to any potential attaching party that meets the tariff's terms and conditions is fundamental to the concept of a tariff. Therefore, LOCS insists that Detroit Edison violated the tariff and MCL 460.6g(2). LOCS states that the federal delegation of pole attachment authority to the states requires active regulation of rates, terms, and conditions of service. 47 USC 224(c)(2)(B). LOCS states that Detroit Edison cannot be afforded unlimited time to issue permits. Also, LOCS states that, even if Detroit Edison had staffing problems, the utility was required to deal with the problem in a way that allowed reasonable access to its utility poles.

LOCS denies that it prematurely initiated litigation. According to LOCS, a month before permit applications were submitted (and thirteen months before this case was filed) Fiber Link met with Detroit Edison on LOCS' behalf and presented the issues in a pole-by-pole list. LOCS stresses that until 2002, pole attachment applications were processed within two months. LOCS contends that it could not delay litigation because, to have done so, would have meant that Phase II could not be completed before the new school year. The inability of LOCS to get the fiber

installed before the school year started caused LOCS to pay over \$50,000 for alternate voice and data connectivity.¹

LOCS states that it only refused to pay excessive and unlawful amounts that were many times actual make-ready costs. In fact, the original estimate was comprised almost entirely of costs to fix existing violations created by other attachers or Detroit Edison. Further, LOCS points out that when Detroit Edison sent an actual invoice for make-ready charges on July 31, 2003, LOCS immediately paid it in full. LOCS states that the “cease and desist” letter was a request for Detroit Edison to stop charging LOCS for ITRON fees and fees to remediate pre-existing violations. Even so, LOCS points out that ITRON kept working for three weeks, and Detroit Edison still billed LOCS for all the ITRON work. Further, LOCS states that Detroit Edison’s offer of extra construction help came after permits were issued, and too late to get the network installed before the start of school.

Finally, LOCS states that this case is not moot. LOCS maintains that, in addition to the main goal of completing Phase II installation, LOCS also asked for the Commission to make LOCS whole for the economic harm caused by Detroit Edison’s misdeeds. LOCS’ costs include attorney fees and the cost of leasing T-1 lines to temporarily replace the Phase II fiber.

The Staff recommended that the Commission require Detroit Edison to file a report with the Commission within 90 days of the date of this order setting forth specific steps and milestones by which Detroit Edison will improve its permitting and estimating processes. The Staff also recommended that the Commission require Detroit Edison to report at six-month intervals

¹LOCS asserts that the T-1 lines were not even an equivalent replacement because the school could not run certain programs including a card catalog for the library, and the T-1 lines take longer to process countless tasks. LOCS states that Detroit Edison must be given a strong disincentive to act the same way in the future.

regarding permit requests and permit issuances, and provide an ongoing update of Detroit Edison's make-ready estimates and final make-ready costs.

The Commission finds that it has authority under MCL 460.6g(2) to regulate the "rates, terms, and conditions of attachments." Although the statute never mentions the word "tariff," the Commission finds that the phrase used encompasses what is normally meant by the word "tariff" and that the Commission's authority is broader than simply deciding the reasonableness of tariff provisions and extends to a utility's performance. The Commission is also persuaded that this case is not moot.

The Commission agrees with the ALJ's finding that Detroit Edison violated MCL 460.6g(2). Detroit Edison took 16 months to issue LOCS a permit and only did so after LOCS initiated litigation. Such conduct is patently unreasonable in light of MCL 460.6g(2) and the Legislature's direction to the Commission to strike a balance between "the interests of the attaching parties' customers as well as the utility and its customers" in determining if the utility's conduct is "just and reasonable." The Commission finds that the delay was mostly caused by inflated estimates for make-ready costs combined with Detroit Edison's policy to approve permits only after the make-ready costs have been paid. Therefore, even if Detroit Edison's correspondences were not invoices *per se*, the non-payment of the estimated costs prevented permits from being issued in a timely manner. In Phase I, permits were issued in two months. The Commission rejects Detroit Edison's claim that it acted in good faith when taking 16 months to issue Phase II permits, doing so only after LOCS initiated litigation. In this regard, the Commission is particularly persuaded by the fact that Detroit Edison's original estimate was 30 times the actual make-ready costs. The Commission adopts the ALJ's finding that Detroit Edison sent a letter stating that Phase I

violations were corrected (when in fact they were not corrected), in order to induce LOCS' final payment.

The Commission further adopts the ALJ's recommendation that Detroit Edison should revise its pole attachment permit process. The Commission is aware that Detroit Edison has other pending disputes regarding how NESC and pole attachment issues should be resolved. The public, including Michigan's school children, suffer by lengthy delays in service. The Commission finds that the initiation of this complaint did not delay the application process because it was filed a year after LOCS filed its pole attachment application. The Commission commends Detroit Edison for reaching a settlement in Case No. U-13522; however, the settlement does not address all of the Commission's concerns.

The Commission finds that Detroit Edison should be directed to make its decision on a pole attachment application within 90 days of the submission of the application. Also, Detroit Edison should make every effort to ensure that make-ready cost estimates reasonably relate to actual costs and do not include costs to remedy existing pole violations. Further, the Commission finds that the Staff's proposal to closely monitor Detroit Edison's treatment of new pole attachment applications for educational telecommunications facilities should be adopted. In so doing, the Commission finds that a new docket should be created and Detroit Edison should be directed to file a report in Case No. U-14445 within 90 days of this order setting forth steps by which Detroit Edison will improve its permitting and cost estimating processes.

Finally, the Commission is persuaded that Detroit Edison should be required to file reports by June 30 and December 31 of every year setting forth the following information regarding new pole attachment applications for educational telecommunications facilities:

1. The number of permit requests and the identity of the attaching party.

2. The number of permit issuances and the total time taken to process each application.
3. An itemized comparison of all make-ready estimates and the actual make-ready costs.
4. An update of Detroit Edison's progress in adhering to its plan for improving its permitting and cost estimating processes.

To avoid having the monitoring of Detroit Edison's treatment of new pole attachment applications for educational telecommunications facilities run on indefinitely, the Commission directs the Staff to file a report in Case No. U-14445 by June 1, 2007 describing Detroit Edison's progress and making a recommendation regarding whether the docket may be closed.

C. Violation of MCL 460.558

LOCS contends that Detroit Edison violated MCL 460.558. LOCS states that Detroit Edison was on notice of its MCL 460.558 violations because Detroit Edison has been regulated under MCL 460.558 for a number of years. LOCS also contends that its complaint was sufficient to put Detroit Edison on notice of the relief and penalties LOCS was seeking. Also, LOCS states that the section cited by Detroit Edison, MCL 24.271, which states that specific notice must be given, does not apply in pleadings, but applies to action by the agency.

LOCS states that Detroit Edison violated its tariff by essentially denying LOCS service in violation of the inherent requirement that it provide service. Further, LOCS states that Detroit Edison violated its tariff when it tried to collect supposed make-ready costs that were outside the tariff's definition of such costs and more than 30 times the correct amount. LOCS asserts that even if Detroit Edison never sent an "invoice," it did try to collect the money. Indeed, LOCS was on notice that payment of make-ready costs was a prerequisite to pole attachment.

Also, LOCS states that Detroit Edison violated its tariff when it invoiced feasibility services that were supposed to be included in the application fee. Under MPSC Tariff No. 1, the "make-

ready survey required to determine the feasibility of the requested attachment(s),” is to be recovered only as part of the \$13.00 per pole application fee. LOCS states that Detroit Edison invoiced LOCS \$27,185 for ITRON services that were “to determine the feasibility of the requested attachments.” LOCS insists that under MCL 460.558, the Commission can fine Detroit Edison for violating the tariff. Under MCL 460.558, a utility, “furnishing electricity . . . who willfully or knowingly fails or neglects to obey or comply with such order or any provision of this act shall forfeit to the state of Michigan not to exceed the sum of 300 hundred dollars for each offense.” LOCS suggests that the Commission could make forgiveness of a portion of Detroit Edison’s fine contingent upon Detroit Edison making LOCS whole.

Detroit Edison replies that LOCS never mentioned MCL 460.558 until its brief; therefore, the Commission should not consider the application of the statute to this matter because it was not pled by LOCS. Detroit Edison relies on MCL 24.271(2)(c), which requires that notice include “a reference to the particular sections of the statutes and rules involved.”

The ALJ dismissed Detroit Edison’s objection that it did not have due process notice of alleged MCL 460.558 violations. The ALJ found that the statute itself provides reasonable notice. Also, although MCL 460.558 was not cited until LOCS’ initial brief, Detroit Edison adequately addressed the MCL 460.558 allegations in its reply brief. Additionally, Detroit Edison has been regulated under MCL 460.558 for a number of years.

The ALJ rejected LOCS’ allegations that Detroit Edison violated MCL 460.558. The ALJ stated that MCL 460.558, first enacted in 1909, does not have any provisions regarding pole attachments. The ALJ found that MCL 460.558 did not convey statutory authority for the regulation of the pole-permit process because MCL 460.558 was enacted to regulate the charges, rules, and conditions of electricity service. Also, the ALJ found that in order for the NESC

violations to trigger MCL 460.558 jurisdiction, the violations must affect the transmission of electricity in a regulated area, and there has been no showing that the NESC violations had any bearing on any of the regulatory aspects involving the transmission of electricity.

Additionally, MCL 460.558 provides for the imposition of sanctions for violations of Commission orders. The ALJ found no evidence that Detroit Edison violated a prior Commission order. The Commission established rates and certain terms and conditions concerning pole attachments in Case No. U-10816, but there is nothing in that case regarding the pole-permit process or cost estimates. The ALJ found that there has been no showing that Detroit Edison violated a Commission order, and the Commission lacks authority to impose sanctions or penalties without a violation. Therefore, the ALJ concluded that LOCS' request for relief under MCL 460.558 must be denied.

Although MCL 460.558 does not have any provision regulating pole attachments, it does provide for the imposition of sanctions for violations of Commission orders. The Commission finds that Detroit Edison is not subject to sanctions under MCL 460.558, as the Commission agrees with the ALJ and adopts his finding that Detroit Edison did not violate any Commission orders. Further, the Commission is not persuaded that the circumstances of this case merit the imposition of a penalty under MCL 460.558 for the violation of MCL 460.6g(2).

The Commission is sympathetic to the fact that LOCS had to pay \$50,000 for alternative connectivity while its pole attachment permit application was pending and over \$200,000 in attorney fees. However, the Commission finds there is no statutory authority for the Commission to award LOCS damages or attorney fees in this situation.

The Commission has selected Case No. U-14445 for participation in its Electronic Filings Program. The Commission recognizes that all filers may not have the computer equipment or

access to the Internet necessary to submit documents electronically. Therefore, filers may submit documents in the traditional paper format and mail them to the: Executive Secretary, Michigan Public Service Commission, 6545 Mercantile Way, P.O. Box 30221, Lansing, Michigan 48909. Otherwise, all documents filed in this case must be submitted in both paper and electronic versions. An original and four paper copies and an electronic copy in the portable document format (PDF) should be filed with the Commission. Requirements and instructions for filing electronic documents can be found in the Electronic Filings Users Manual at: <http://efile.mpsc.cis.state.mi.us/efile/usersmanual.pdf>. The application for account and letter of assurance are located at <http://efile.mpsc.cis.state.mi.us/efile/help>. You may contact the Commission Staff at (517) 241-6170 or by e-mail at mpscfilecases@michigan.gov with questions and to obtain access privileges prior to filing.

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, 1999 AC, R 460.17101 et seq.
- b. Detroit Edison violated the Michigan Pole Attachment Act, MCL 460.6g(2), by unreasonably delaying the issuance of permits to LOCS.
- c. Detroit Edison should be ordered to make a decision on pole attachment applications within 90 days of the submission of an application.
- d. Detroit Edison should be ordered to make every effort to ensure that make-ready cost estimates reasonably relate to actual costs and do not include costs to remedy existing pole violations.

e. Detroit Edison is not a “telecommunications provider” as that term is defined in the Michigan Telecommunications Act under the facts of this pole attachment case, and is not subject to the remedies provided under that Act.

f. Detroit Edison should be ordered to file a report in Case No. U-14445 within 90 days of this order setting forth steps by which the utility will improve its permitting and cost estimating processes.

g. Detroit Edison should be ordered to file reports by June 30 and December 31 of every year setting forth the information required by this order.

h. The Staff should be ordered to file a report in Case No. U-14445 by June 1, 2007 describing Detroit Edison’s progress and making a recommendation regarding whether the docket may be closed.

THEREFORE, IT IS ORDERED that:

A. The Detroit Edison Company shall make a decision on pole attachment applications within 90 days of the submission of an application.

B. The Detroit Edison Company shall make every effort to ensure that make-ready cost estimates reasonably relate to actual costs and do not include costs to remedy existing pole violations.

C. The Detroit Edison Company shall file a report in Case No. U-14445 within 90 days of this order setting forth steps by which the utility will improve its permitting and cost estimating processes.

D. The Detroit Edison Company shall file reports by June 30 and December 31 of every year setting forth the information required by this order.

E. The Commission Staff shall file a report in Case No. U-14445 by June 1, 2007 describing Detroit Edison's progress and making a recommendation regarding whether the docket may be closed.

F. The Detroit Edison Company shall cease and desist from any further violations of MCL 460.6g.

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
Chair

(S E A L)

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of February 24, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

E. The Commission Staff shall file a report in Case No. U-14445 by June 1, 2007 describing Detroit Edison's progress and making a recommendation regarding whether the docket may be closed.

F. The Detroit Edison Company shall cease and desist from any further violations of MCL 460.6g.

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

Chair

Commissioner

Commissioner

By its action of February 24, 2005.

Its Executive Secretary

In the matter of the complaint of)
LAKE ORION COMMUNITY SCHOOLS against)
THE DETROIT EDISON COMPANY regarding)
terms and conditions of attachments of the)
educational telecommunications facilities to)
utility poles.)
_____)

Case No. U-13767

In the matter, on the Commission's own motion,)
to monitor **THE DETROIT EDISON COMPANY's**)
treatment of new pole attachment applications for)
educational telecommunications facilities.)
_____)

Case No. U-14445

Suggested Minute:

“Adopt and issue order dated February 24, 2005 ordering The Detroit Edison Company to change its pole attachment permit process, declining to grant other forms of relief requested by Lake Orion Community Schools, and commencing a new proceeding to monitor The Detroit Edison Company's treatment of new pole attachment applications for educational telecommunications facilities, as set forth in the order.”