

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of **Sprint Communications Company L.P.**'s petition for de novo review pursuant to MCL 484.3117 of Determination No. 5 made by the METRO Authority.

Case No. **U-14878**
(e-file/paperless)

INITIAL BRIEF
OF THE MICHIGAN PUBLIC SERVICE COMMISSION STAFF

The Michigan Public Service Commission Staff ("Staff"), by its counsel, Patricia S. Barone, Assistant Attorney General, files the following brief in the above-entitled case.

This case involves a petition for *de novo* review of a determination by the METRO Authority ("METRO") that Sprint Communications Company L.P. ("Sprint") is responsible to pay fees pursuant to the Metropolitan Extension Telecommunications Rights-of-Way Oversight Act ("METRO Act") for both its owned and leased fiber facilities in public rights of way.¹ Staff supports Sprint's position that under the Act Sprint is only responsible to pay fees on its owned facilities.

Statement of Facts

Sprint owns both fiber facilities in the public right of way and leases facilities from other providers. On July 19, 2005, the METRO Authority issued Determination No. 5 that found that providers owe fees for fiber facilities in the public right-of-way regardless whether the facilities are leased or owned. Sprint objects to this finding and has requested that the Commission conduct a *de novo* review as permitted by the METRO Act and reverse METRO's Determination No. 5 and find that Sprint must only pay for facilities that it owns.²

¹ 2002 PA 48; MCL 484.3101 to 484.3120.

² MCL 484.3117.

On May 25, 2006, the Commission issued its Order and Notice of Hearing. The Commission stated that because Sprint's petition presents a question of first impression that involves a previously untested *de novo* review procedure and will likely affect numerous interested persons, the Commission found that this matter should be set for a prehearing conference.³ At the prehearing conference on July 18, 2006, the Administrative Law Judge ("ALJ") admitted the following entities as parties to the case: Talk America Inc. and LDMI Telecommunications, Inc.; XO Communications Services, Inc.; TDS Metrocom, LLC; the Attorney General; the Michigan Municipal League, the Michigan Townships Association and the Michigan Coalition to Protect Public Rights of Way (collectively); Michigan Bell Telephone Company, d/b/a AT&T Michigan, AT&T Communications of Michigan, Inc. and TCG Detroit (collectively AT&T); and the METRO Authority. The ALJ also set a briefing schedule. Staff files this brief pursuant to the ALJ's direction that parties in support of Sprint's position may file their briefs on August 15, 2006.

Argument

I. The plain language of the METRO Act supports the conclusion that only owners of facilities must pay fees.

Staff's position in this appeal is that the fees that the METRO Act requires that only owners of facilities must pay fees pursuant to the requirements of the METRO Act. The plain language of the METRO Act supports this conclusion. Section 5 of the METRO Act states that a provider using or seeking to use public rights-of-way must pay all fees required under the Act.⁴

It provides in relevant part:

³ Case No. U-14878, May 25, 2006, Order and Notice of Hearing, page 2. The prehearing conference was later rescheduled to July 18, 2006.

⁴ MCL 484.3105.

(1) A provider using or seeking to use public rights-of-way in a metropolitan area for its telecommunication facilities shall obtain a permit under section 15 from the municipality and pay all fees required under this act. Authorizations or permits previously obtained from a municipality under section 251 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2251, satisfy the permit requirement of this section.

(2) A provider asserting rights under 1883 PA 129, MCL 484.1 to 484.10, is subject to the permit and fee requirements of this act.

* * *

Section 8 of the METRO Act sets forth the requirements for payment of the annual maintenance fees that are the subject of the dispute in this petition for review of the METRO's Authority Determination No. 5.⁵ This section requires that, except as otherwise provided for in the Act, a provider shall pay to the authority an annual maintenance fee.⁶ Subsections (2)-(5) of Section 8 provide⁷:

(2) The authority shall determine for each provider the amount of fees required under this section. April 1 to March 31 shall be the annual period covered by each assessment and April 29 the date due for payment. The authority shall prescribe the schedule for the allocation and disbursement of the fees under this act. The authority shall disburse the annual maintenance fee to each municipality as provided under sections 10, 11, and 12 on or before the last day of the month following the month of receipt of the fees by the authority. The authority may authorize the department of treasury to collect and make the allocations and disbursements of fees required under this act. Any interest accrued on the revenue collected under this act shall be used only as provided by this act.

(3) Except as otherwise provided under subsection (6), for the period of November 1, 2002 to March 31, 2003, a provider shall pay an initial annual maintenance fee to the authority on April 29, 2003 of 2 cents per each linear foot of public right-of-way occupied by the provider's facilities within a metropolitan area, prorated for the period specified in this subsection.

(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 MCL 484.3108.

⁶ MCL 484.3108(1).

⁷ MCL 484.3108(2)-(5).

(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.

Therefore, the plain language of the statute provides that fees must be paid by “a provider.” The word “provider” is defined in Section 2 of the METRO Act as follows⁸:

(k) “Telecommunication provider”, “provider”, and “telecommunication services” mean those terms as defined in section 102 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2102. Telecommunication provider does not include a person or an affiliate of that person when providing a federally licensed commercial mobile radio service as defined in section 332(d) of part I of the communications act of 1934, chapter 652, 48 Stat. 1064, 47 U.S.C. 332 and further defined as commercial mobile radio service in 47 C.F.R. 20.3, or service provided by any wireless, 2-way communication device. For the purposes of this act only, a provider also includes all of the following:

- (i) A cable television operator that provides a telecommunication service.
- (ii) Except as otherwise provided by this act, a person who owns telecommunication facilities located within a public right-of-way.
- (iii) A person providing broadband internet transport access service.

Section 102 of the Michigan Telecommunications Act referenced in MCL 484.3102(k) above defines telecommunications provider, provider and telecommunication services as follows⁹:

As used in this act:

(ff) "Telecommunication provider" or "provider" means a person that for compensation provides 1 or more telecommunication services. Telecommunication provider does not include a provider of commercial mobile service as defined in section 332(d)(1) of the telecommunications act of 1996, 47 USC 332.

(gg) "Telecommunication services" or "services" includes regulated and unregulated services offered to customers for the transmission of 2-way interactive communication and associated usage. A telecommunication service is not a public utility service.

⁸ MCL 484.3102(k).

⁹ MCL 484.2102(ff)(gg).

Consequently, a provider is a person that for compensation provides one or more telecommunication services, and, except as otherwise provided by the METRO Act, a person who owns telecommunication facilities within a public right-of-way. Therefore, since under the METRO Act a provider must pay fees, and since a provider is a person who owns telecommunication facilities, only a provider who owns telecommunication facilities must pay the fees.

II. The purposes set forth in the METRO Act supports the conclusion that only owner of facilities must pay fees.

Section 1 of the METRO Act provides in part that one purpose of the Act is to “Encourage competition in the availability, prices, terms, and other conditions of providing telecommunications services,”¹⁰ and to “Encourage the introduction of new services, the entry of new providers, the development of new technologies, and increase investment in the telecommunication infrastructure in the is state.”¹¹ If the Act is construed as the METRO Authority has proposed, competition in providing telecommunications services would not be encouraged because the cost of providing services would go up because facilities would be assessed twice, once on the owner of the facility and once on the lessee of the same facility in instances in which facilities are leased to others. Such an interpretation would also discourage the introduction of new services because of the increased costs associated with double charging of fees for one facility. Therefore, even if the Commission were to determine that the plain language of the Act is not clear that the Act does not permit charging a fee both to the owner of a facility and the lessee of the same facility, the Commission should reject the METRO Authority’s interpretation of the Act because it is contrary to the purposes of the Act.

¹⁰ MCL 484.3101(2)(a).

¹¹ MCL 484.3101(2)(b).

Conclusion

The Staff urges the Commission to find that the METRO Authority incorrectly interpreted the METRO Act when it found that both the owner and lessee of facilities must pay fees pursuant to the requirements of the METRO Act. Staff further urges the Commission to find that the billing assessed to Sprint be modified to reflect this finding, and that the Commission indicate that the Act should not be interpreted in this way in the future.

Respectfully submitted,

**MICHIGAN PUBLIC SERVICE COMMISSION
STAFF**

Patricia S. Barone (P29560)
Assistant Attorney General
Public Service Division
6545 Mercantile Way, Suite 15
Lansing, MI 48911
Telephone: (517) 241-6680

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14878/Initial Brief

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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

TINA L. BIBBS, being first duly sworn, deposes and says that on **August 15, 2006**, she served a true copy of the **INITIAL BRIEF OF THE MICHIGAN PUBLIC SERVICE COMMISSION STAFF** upon the following parties by depositing the same in a United States postal depository enclosed in an envelope bearing postage fully prepaid, plainly addressed as follows:

Roderick S. Coy
Haran C. Rashes
Clark Hill PLC
212 East Grand River Avenue
Lansing, MI 48906

Michael S. Ashton
Fraser Trebilcock Davis & Dunlap, PC
124 W. Allegan, Suite 1000
Lansing, MI 48933

John R. Liskey
Assistant Attorney General
Tobacco & Special Litigation Division
P.O. Box 30212
Lansing, MI 48909

Michael J. Watza
Rebecca E. Chavez
Kitch Drutchas Wagner
One Woodward Avenue, Suite 2400
Detroit, MI 48226-5485

John J. Reidy III
AT&T Enterprise Services, Inc.
225 West Randolph Street, Floor 25D
Chicago, IL 60606

Lisa M. Bruno
AT&T Michigan
444 Michigan Avenue, Room 1750
Detroit, MI 48226

Michael J. Moody
Assistant Attorney General
Tobacco & Special Litigation Division
P.O. Box 30212
Lansing, MI 48909

TINA L. BIBBS

Subscribed and sworn to before me
this 15th day of August, 2006.

Pamela A. Walters, Notary Public
State of Michigan, County of Ionia
Acting in the County of Ingham
My Commission Expires: 02/04/2007