

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the petition of the
City of Taylor, Michigan,
for allocation of cost as to the
Detroit Edison Company.

Case No. **U-15234**
(Efile Paperless)

**MICHIGAN PUBLIC SERVICE COMMISSION STAFF'S
RESPONSE TO THE DETROIT EDISON COMPANY'S
MOTION AND BRIEF FOR PARTIAL SUMMARY DISPOSITION**

The Michigan Public Service Commission Staff (Staff) files the following Response to the Detroit Edison Company's Motion and Brief for Partial Summary Disposition.

I. Introduction

On May 17, 2007, the Detroit Edison Company (Detroit Edison) filed a Motion for Partial Summary Disposition pursuant to Rule 460.17323, Rule 460.516, Tariff 9, and the *City of Taylor v the Detroit Edison Company*.¹ Detroit Edison requested that "the Commission (1) dismiss the City of Taylor's (City) Petition for Allocation of Cost, and; (2) grant relief on Count I and II of Detroit Edison's counterclaim since Rule 460.516 and Tariff 9 require the City to reimburse Detroit Edison for the removal of Detroit Edison's preexisting overhead facilities from Telegraph Road and their replacement with underground facilities."²

Staff supports Detroit Edison's Motion and recommends that the Commission find that the City of Taylor's Ordinance No. 59 conflicts with the Commission's Underground Electric Lines Rules and conflicts with Detroit Edison's Tariff 9. Further, Staff recommends that the Commission dismiss the City of Taylor's Petition for Costs, grant relief on Detroit Edison's Counterclaim Counts I and II and hold hearings to determine the total amount of underground replacement costs are due to Detroit Edison from the City of Taylor.

¹ *City of Taylor v The Detroit Edison Company*, 475 Mich 109, 715 NW2d 28 (2006).

² Detroit Edison's Motion, p 1.

II. Background

A. City of Taylor’s Complaint and the Detroit Edison Company’s Counterclaim.

The City of Taylor’s complaint alleges that Detroit Edison owes the City the entire cost of relocating four miles of overhead utility facilities underground.³ Detroit Edison filed a Counterclaim alleging that the City of Taylor owes Detroit Edison “all expenses, plus interest, that the City required Edison to incur to remove its preexisting facilities and to replace them with underground facilities.”⁴

B. City of Taylor v The Detroit Edison Company.

The Michigan Supreme Court described the facts of the controversy between the City of Taylor and the Detroit Edison Company as follows⁵:

The project called for major infrastructure improvements, including the underground relocation of all utility wires along Telegraph Road. Under the proposal, the Detroit Edison Company’s (defendant) utility poles along Telegraph Road would be removed and their wires relocated underground. In early 2000, officials from plaintiff and defendant met several times to discuss the project and its implementation.

Defendant agreed to relocate the lines underground, but would not agree to bear the costs of that effort. When the parties’ negotiations failed, plaintiff enacted Taylor Ordinance 00-344, the “Telegraph Road Improvement and Underground Relocation of Overhead Lines Ordinance.” Section 3 of that ordinance requires all public utilities with lines or poles adjacent to Telegraph Road “to relocate underground all of their overhead lines and wires and remove all poles and related overhead facilities equipment at their sole cost and expense and at no cost or expense to the City.” n1 After plaintiff enacted the ordinance, the parties continued to discuss the dispute, but could not come to an amicable resolution. Ultimately, plaintiff agreed to advance the cost of relocating the wires underground, but reserved its rights to enforce the ordinance against defendant and seek reimbursement.

³ City of Taylor’s Complaint, pp 13-14.

⁴ The Detroit Edison Company’s Motion and Brief for Partial Summary Disposition pursuant to Rule 460.516 and Tariff 9.

⁵ *City of Taylor v The Detroit Edison Company*, 475 Mich 109, 122; 715 NW2d 28 (2006).

This case is pending before the Commission under the primary jurisdiction doctrine “concerning the costs of relocating Detroit Edison’s electric utility lines underground⁶:

Today, we reaffirm this Court’s decision in *McGraw*. Under *Const 1963, art 7, §§ 22 and 29*, a local unit of government may exercise reasonable control over its “highways, streets, alleys, and public places” as long as that regulation does not conflict with state law. Here, because plaintiff’s ordinance may be incongruent with the MPSC’s regulations governing underground relocation of wires, and the regulation of defendant utility, the ordinance may be invalid. *MCL 460.6* vests the MPSC with broad authority to regulate public utilities, and the MPSC has promulgated rules on this subject. Accordingly, we conclude that the MPSC has primary jurisdiction over the issue of cost allocation.

We reverse the judgment of the Court of Appeals and remand to the Wayne Circuit Court to grant summary disposition to defendant. Plaintiff may seek a remedy concerning the costs of relocating defendant’s wires underground from the MPSC.

The Supreme Court suggests that the City of Taylor’s ordinance may be incongruent with the Commission’s regulations governing underground relocation of wires and thus invalid. A closer look at the City of Taylor’s Ordinance No. 59 and the Commission’s regulations governing the underground relocation of wires leads to the conclusion that the City of Taylor’s Ordinance No. 59 is invalid.

C. The City of Taylor’s ordinance is in direct conflict with the state statutory scheme providing for state control and supervision of the business of transmitting and supplying electricity, the fixing of rates therefore, and the rules promulgated by the state administrative agency legislatively authorized to regulate utilities in this state.

The City of Taylor’s ordinance requires Detroit Edison to relocate underground “all electric utility, cable, television, telecommunications, traffic signal and other overhead lines, wires and the removal of poles and other related overhead equipment and facilities along Telegraph Road in the City of Taylor, Michigan.” Section 3 of the ordinance requires Detroit

⁶ *City of Taylor v Detroit Edison Company*, 475 Mich 109, 124; 715 NW2d 28 (2006).

Edison to pay for all costs of relocating overhead utility lines underground upon order from the City to relocate the lines underground⁷:

Relocation Directed. Upon the adoption of this Ordinance and upon written notice from the City, all public utilities, telecommunication providers, cable television providers (collectively the “Companies”), state and county agencies (“Agencies”) and all other individuals, firms, partnerships, associations, companies, corporations, or entities who own, lease, operate and/or maintain overhead lines and wires, poles and/or related overhead facilities equipment located along, across over and/or adjacent to Telegraph, Telegraph intersections and to private property adjacent to Telegraph, are hereby directed and ordered to begin immediately to relocate underground all of their overhead lines and wires and remove all poles and related overhead facilities equipment at their sole cost and expense and at no cost or expense to the City.

In this case, the City of Taylor ordinance is in direct conflict with the state statutory scheme related to the regulation of electric utilities and the rules promulgated there under, specifically: the Electric Transmission Act⁸ and Commission to the act creating the public service commission;⁹ statutes that authorize the MPSC to fix electric rates;¹⁰ in statutes providing for customer choice in electricity;¹¹ and statutes providing for the promulgation of rules by the Commission.¹²

Pursuant to this statutory authority, the Commission established, through the rulemaking procedures of the Administrative Procedures Act, a uniform electric underground extension policy for public utilities subject to Commission jurisdiction.¹³ “The adoption of a rule by an

⁷ *City of Taylor*, Michigan Code of Ordinances, Chapter 28, Streets, Sidewalks, and Other Public Places, Article VII, Telegraph Road Improvement and Underground Relocation of Overhead Lines, Section 3, Relocation Directed. (Ordinance No. 00-334).

⁸ 1909 PA 106, MCL 460.551 *et seq.*

⁹ 1939 PA 3, MCL 460.1 *et seq.*

¹⁰ 1982 PA 212, MCL 460.6a.

¹¹ 2000 PA 141, 142, MCL 460.10 *et seq.*

¹² 1981 PA 8, MCL 460.551(6).

¹³ Electric Rules Order.

agency has the force and effect of law”.¹⁴ The Commission sent an official notice of its proposed rulemaking to “all municipalities within the state, to all electric and telephone utilities, and to all other parties who had evidenced an interest in the matter.”¹⁵ The Commission found, after presentation of testimony and evidence, that it was in the public interest to establish a uniform statewide policy regarding underground electric facilities based on the following considerations¹⁶:

- A. There is wide public interest in, and public support for, a compulsory policy of undergrounding electric utility facilities in the state of Michigan.
- B. The present technology and the economies involved with the burial of electric transmission lines would limit any compulsory burial of electric facilities to distribution lines and service laterals.
- C. The burial of electric facilities increases the utility’s rate base and its cost of rendering service to its customers.
- D. Overhead electric construction is the standard method of serving electric customers at the present time and it would not be reasonable to charge higher rates to the vast majority of customers served from overhead systems in order to provide underground electric facilities for the relatively few customers to be served through underground facilities in the immediate future.
- E. Those who benefit directly from the burial of electric facilities should make a contribution in aid of construction to the utility in an amount equal to the estimated difference in cost between the standard overhead facilities and the generally more aesthetic underground facilities.
- F. All electric distribution facilities constructed in the new residential subdivisions in the mainland lower peninsula of Michigan and all electric distribution facilities constructed to serve commercial customers in the mainland lower peninsula of Michigan should be placed underground.
- G. All distribution facilities in the balance of the state of Michigan could be placed underground at the option of the customer.

¹⁴ *Danse Corp v City of Madison Heights*, 466 Mich 175, 183; 644 NW2d 721 (2002), quoting *Coalition for Human Rights v DSS*, 421 Mich 172, 177; 364 NW2d 609 (1988).

¹⁵ Electric Rules Order.

¹⁶ Electric Rules Order.

- H. The Rules and Regulation Governing the Extension of Underground Electric Distribution Lines, attached hereto as Exhibit A, is in agreement with the above findings.
- I. It is in the public interest to approve the Rules and Regulations Governing the Extension of Underground Electric Distribution Lines, attached hereto as Exhibit A.

Specifically, MPSC R 450.516 provides that the cost differential between replacing overhead utility lines with overhead lines and replacing overhead utility lines with underground facilities shall be paid for by the customer or customers opting to relocate overhead utility lines underground¹⁷:

R 460.516 Replacement of existing overhead lines.

Rule 6. (1) Existing overhead residential, commercial and industrial electric distribution and service lines anywhere in the state shall be replaced with underground facilities at the option of the affected customer or customers.

(2) Before construction is started, the customer shall be required to pay the utility the depreciated cost (net cost) of the existing overhead facilities plus the cost of removal less the salvage value thereof and, also, make a contribution in aid of construction in an amount equal to the estimated difference in cost between new underground and new overhead facilities including, but not limited to, the costs of breaking and repairing streets, walks, parking lots and driveways, and of repairing lawns and replacing grass, shrubs and flowers.

The City of Taylor's ordinance directly conflicts with Rule 460.516 because it directs the utility to bear the entire cost of converting existing overhead facilities to underground facilities in contravention of the MPSC rule. Consequently, the City of Taylor's ordinance is invalid as it applies to electric utilities.

In addition, Detroit Edison's Tariff No. 9, First Revised Sheet No. B3-8, R B-3.4(f) was filed in compliance with the Commission's directive in its Order dated April 12, 1990 in MPSC Case No. U-9498, and the Commission accepted the filing on May 10, 1990. Tariff No. 9, First

¹⁷ Electric Rules Order.

Revised Sheet No. B3-8, R B-3.4(f) requires that modifications to utility facilities must be done in accordance with the requirements of Rule 460.516¹⁸:

The company will not undertake the replacement of existing overhead lines and above-surface equipment with underground installations or provide underground installations for transmission lines, sub transmission lines, distribution feeders and above-surface electrical equipment associated with switching stations except where agreements for reimbursement are made in accordance with MPSC R-460.516, "Replacement of Existing Overhead Facilities," Rule 6.

The tariff provision demonstrates that compliance with the Commission's rule is an integral part of the regulating scheme developed and administered by the Commission. Therefore, a conflict also exists between the City of Taylor's Ordinance and Detroit Edison's Tariff No. 9.

III. Underground Electric Line Rule R 460.516 Replacement of existing overhead electric facilities.

It is Staff's opinion that the Commission should apply R 460.516 to the facts of this case. Existing overhead lines were replaced with underground facilities at the option of the City of Taylor. R 460.516 requires the customer to pay, before construction is started, for an amount set forth in R 460.516(2). Staff recommends that the Commission conduct proceedings to determine that amount.

IV. Underground Electric line Rule R 460.517. Underground facilities for the convenience of the utility or where required by ordinance.

It is Staff's opinion that R 460.517 does not apply to the facts of this case. R 460.517 specifically states that the utility shall bear the cost of construction not replacement¹⁹:

Rule 7. The utility shall bear the cost of construction where electric facilities are placed underground at the option of the utility for its own convenience or where underground construction is required by ordinance in heavily congested business districts.

¹⁸ Detroit Edison Tariff No. 9, Revised Sheet No. B3-8, R B-3.4(f).

¹⁹ 1979 AC, R 460.517.

It is already well established from the pleadings and the Supreme Court's opinion that this case is about replacing existing overhead electric facilities with underground facilities. Commission Rule R 460.516 is directly on point, replacement. The language used in R 460.517 is construction. The Third Edition of the *American Heritage Dictionary* defines construction as the act, process, or business of building. Staff recommends that the Commission determine that there is a unique difference between replacing existing overhead facilities with underground facilities and constructing facilities underground. In this case, Staff recommends that the Commission apply the "replacement" provisions of R 460.416 to this case.

V. Conclusion

Staff recommends that the Commission determine that Underground Electric Line Rule R 460.516 Replacement of existing overhead facilities and Detroit Edison's Tariff 9 apply to the facts of the controversy between the City of Taylor and the Detroit Edison Company.

Staff further recommends that the Commission hold hearings to determine the total amount of removal and replacement costs due from the City of Taylor to the Detroit Edison Company.

Respectfully submitted,

**MICHIGAN PUBLIC SERVICE
COMMISSION STAFF**

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Dated: June 14, 2007

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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

Pamela A. Walters, being first duly sworn, deposes and says that on June 14, 2007, she served a true copy of the Michigan Public Service Commission Staff's Response to the Detroit Edison Company's Motion and Brief for Partial Summary Disposition upon the following parties via e-mail and by depositing the same in a United States postal depository enclosed in an envelope bearing postage fully prepaid, plainly addressed as follows:

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Pamela A. Walters

Subscribed and sworn to before me
this 14th day of June, 2007.

Carol Ann Dane, Notary Public
State of Michigan, County of Eaton
Acting in the County of Ingham
My Commission Expires: 07/23/2011