

# 2012/2013 ANNUAL REPORT



## The Michigan Coalition to Protect Public Rights-Of-Way

### NEW MEMBER WELCOME

Clarkston, Daggett, Frankfort, Kalkaska, Millersburg, Pierson, Sparta,  
Meridian Township, Harrison, Leslie, Mason and St. Charles

Thank you for your support.

### I. MICHIGAN DEVELOPMENTS

#### A. Update on Litigation:

##### 1. *Detroit v Comcast*

PROTEC is supporting the *Detroit v Comcast* litigation presently pending before the U.S. District Court in Detroit challenging issues pertaining to PEG fees as well as renewal and modification of franchise agreements. This litigation relies largely upon the language of the Court's opinions and orders issued in the Dearborn/Meridian v Comcast case. Our support along with MML, MTA and the Public Corporation Law Section of the State Bar came in the form of Amicus briefing on motions for summary judgment which were decided in favor of Detroit. The Federal Court ruled July 10, 2012 that:

1. Municipalities have authority to challenge the Michigan Uniform Video Services Local Franchise Act, 2006 PA 480;
2. The modification language of the Michigan Act, which cable companies have said immediately altered your existing franchises in 2007, is wrong and preempted by federal law;
3. Based upon the well-reasoned position taken by the Michigan Attorney General, municipalities may refuse a renewal via a uniform agreement and negotiate mutually acceptable terms;
4. The Court also suggests in its opinion that PA 480's reduction of enforceable customer service standards and the severely watered down anti-discrimination provisions may violate the Federal Act as well.

A motion by Comcast to reconsider this opinion was swiftly denied. The case continues to progress, with an early appeal to the U.S. Court of Appeals for the Sixth Circuit looming.

On the basis of this ruling, certain Michigan communities are challenging existing uniform franchise agreements. One provider has filed a complaint at the Michigan Public Service Commission ("MPSC") alleging that as a result of these communities raising

questions about the impact of the Detroit v Comcast opinion, they are “imposing” unauthorized fees and requirements on the cable provider. There is a good deal more to follow on this issue and PROTEC will continue to support the municipal position in this case.



## 2. Oshtemo Twp. and Community v ITC

MPSC Administrative Law Judge Sharon Feldman issued a 69 page proposal for decision (“PFD”) on April 29, 2013, in MPSC Case No. 17041, recommending the MPSC deny Michigan Electric Transmission Company’s (“METC - a wholly owned subsidiary of ITC Holdings Corp.) application for a certificate of public convenience and necessity to route two sets of 100 to 150 foot tall electric transmission lines and towers over a 220 foot wide easement across private properties along seven miles of homes and businesses in Oshtemo Charter Township.

Judge Feldman concluded:

*“This PFD ... recommends that the Commission deny METC’s application for a certificate of public convenience and necessity based on the conclusion ... that METC has failed to show that the benefits of the project justify the financial, environmental, and social costs of the project as required by section 8(5)(a) of Act 30, MCL 460.568(5)(a).”*

Equally important, Judge Feldman also agreed with the Township’s request that a portion of the transmission line be constructed underground; recommending the MPSC:

*“...grant the request or allow METC an opportunity to demonstrate that the public convenience and necessity requires aboveground construction.”*

(See <http://efile.mpsc.state.mi.us/efile/docs/17041/0133.pdf> for a copy of the PFD)

**This decision - although only the first round in the process at the MPSC - represents a substantial win for local communities and private property owners across Michigan and perhaps the Midwest who we believe have been subjected to arbitrary**

**rewrites of their property rights and community zoning standards by ITC. Based upon recent statutory provisions, ITC argues it is allowed to condemn private property and rearrange local community planning based solely upon its own determination. We argue that they do so based solely on what new developments benefit ITC and its shareholders.**

## **B. Michigan Legislative Efforts**

### **1. Lame Duck 2012**

Although numerous bills were passed during the “lame duck” session, when PROTEC did an evaluation, we discovered that we were successful, in concert with MML and MTA, in stopping or successfully amending all five bills which threatened local governance on certain rights of way matters. **WOW! Protec and our partners were 5-0 regarding the following bills!**

**a. HB 5727 Energy Conservation Bill** – Unfunded Energy Audits required for public buildings - Passed – Originally applied to local government – amended by MML/PROTEC to apply to State agencies only.

**b. SB 1220 Sewer Liability and Mandatory Early Meditation etc.** Opposed by MML/PROTEC – Died in Committee.

**c. Amateur Radio Antenna Local Zoning SB 1244 Exemption up to 90 feet** – Opposed by MML/PROTEC – Died in Committee.

**d. SB 1083/1084 S-3 Underground Liability for Municipals** – Opposed by MML/PROTEC – Died in Committee.

**e. SB 1291 and 1292 AT&T Internet/Alarm Bill** – Original version potentially deregulated all internet protocol (IP) services including video etc. Opposed by MML/PROTEC – Amended to apply only to alarm systems. But see SB 743 filed as new legislation May 22, 2013, seeking to exempt alarm system electrical wiring from local regulation and permitting.

**\*MML led all legislative efforts – PROTEC provided technical support.**



### **2. Wireless Towers Michigan: 2012 PA 143**

The wireless industry supported a bill in the Michigan Legislature in May of 2012 which sought to sweep local government completely out of the regulation of cell towers. PROTEC joined with MML in seeking changes to the proposed legislation. Although the bill did progress to passage in only a matter of a few weeks, it did not ultimately contain all the language the industry desired. Still, it is a point of concern for local government

and must be addressed carefully. It is important to distinguish the impact of this legislation on local government's two cellular tower roles. While subject to this new law as a regulator, to the extent local government is also a landlord, the law has far less, if any impact. Locals must avoid industry lease amendments which attempt to confuse these roles.

### **3. House Broadband Overview Hearing**

With less than one business day notice, the Michigan House convened a hearing in February, 2013 for an overview of industry and consumer broadband issues. Concerned that this hearing on a very important and technical subject would be slanted in favor of the industry and against consumers and local communities, PROTEC quickly prepared and offered testimony to rebut the industry position. PROTEC's written testimony was accepted and circulated among the committee members. This area of law together with its impact on the access of all community residents to the internet, today's information super highway, is rapidly changing and yet the U.S. lags behind at least 20 competitor nations on internet access, speed and capacity. Americans also pay 2-3 times the price paid by residents of our global competitors.

### **4. Legislation being monitored:**

**SB 7 and 8** – Public Notice – This legislation amends the requirements for public notices but unlike similar proposed legislation of earlier sessions, there is no mention of using PEG channels as an alternative.

**HB 4237** – Calls for the access of private industry antennas on State Public Safety Wireless (MSP) Towers with only 30 days notice to local communities who must either respond in the affirmative or offer another equivalent site or the request is deemed granted.

**SB 9** – Subjects Municipal Water and Sewer Rates to MPSC jurisdiction.

**HB 4086** – Amends MCL 691.1402 – Requiring that highways be made safe for “vehicular” traffic instead of “public” travel.

### **C. Michigan Regulatory Issues**

At least one group of Michigan communities has been involved in an informal hearing at the MPSC this past year. This proceeding is based upon an industry complaint filed in the wake of a letter sent to the cable company suggesting the Federal Court order in the *Detroit v Comcast* case warrants a serious look at the impact on existing uniform franchise agreements in other communities in addition to the City of Detroit. See discussion of the *Detroit v Comcast* case above.

### **D. Pipelines: Leaks and New Lines/PROTEC joins up with the Pipeline Safety Trust in Washington**

PROTEC continues to monitor developments concerning the July 27, 2010 Kalamazoo river disaster related to the 1 million gallon crude oil leak from an Enbridge-owned pipeline as well as several recent requests for new pipelines in southeast Michigan. As part of its partnering with the Pipeline Safety Trust, a national pipeline watchdog group which assisted PROTEC with the Wolverine Pipeline issue in Lansing several years ago,

PROTEC is exploring federal funding for the purpose of providing or coordinating first responder training related to pipeline accidents.

## **II. FEDERAL DEVELOPMENTS**

### **A. FCC Cell Tower Rules Appealed: PROTEC assists gathering support**

When the FCC determined that it had the jurisdiction to regulate local zoning procedures at the local level, and imposed shot clock approval periods as well as other industry generous rules, a number of communities across the country objected. This “objection” found its way to the U.S. Supreme Court in *City of Arlington et al v FCC #11-1545*. PROTEC helped secure funding from the MML and Michigan State Bar Public Corporations Section to assist with the very expensive process of preparing and filing the necessary briefs. Oral argument was heard on January 16, 2013. A decision was handed down May 20, 2013. Regrettably, the Supreme Court supported the FCC authority to determine the extent of its jurisdiction, which includes the setting of local shot clocks on cell tower applications. While we were hoping for a different outcome, the Court’s opinion does set up an interesting argument for permitting the FCC to regulate the internet, a very hot topic in Washington D.C. legal circles these days. PROTEC is monitoring these developments and will keep you informed.

### **B. Municipal Broadband and Connect ED**

A couple bright spots occurred in the broadband world recently. The FCC on February 15, 2013 issued a strong endorsement of high speed, low cost local community or municipal broadband, particularly where the industry fails to provide it. PROTEC counsel is currently engaged in creating one of the few new municipal broadband systems in Michigan and there is hope that this will be an impetus for the start of true high speed, low cost internet access across the State.

Most recently, on June 6, 2013, the Administration announced its “Connect ED” initiative, calling for linking 99% of all school children with high speed fiber within the next 5 years. This is a welcome development for our children and it should encourage even broader deployment of fiber to homes and businesses.



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