

2013/2014 ANNUAL REPORT



The Michigan Coalition to Protect Public Rights-Of-Way

NEW MEMBER WELCOME

Beverly Hills, Cement City, Durant, Fenton, Grant, Hersey, Hillman, Kalkaska, Maybee, Paw Paw, South Haven, Rockwood and South Rockwood

Thank you for your support!!

I.

MICHIGAN DEVELOPMENTS

A. Update on Litigation:

1. *Detroit v Comcast*

PROTEC is continuing support of the *Detroit v Comcast* litigation presently pending before the U.S. 6th Circuit Court of Appeals, on appeal from the 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) and most recently on the appeal at the 6th Circuit. The Federal District 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 District 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. This Trial Court opinion is now on appeal to the U.S. Court of Appeals for the Sixth Circuit. Oral Argument is expected this summer and a decision possible by year end.

On the basis of the District Court order, certain Michigan communities are challenging existing and pending uniform franchise agreements as current agreements expire. 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 (Electric Transmission Tower Citing)

PROTEC is supporting Oshtemo Township and several of its residents in an Amicus brief to be filed in the Michigan Court of Appeals on behalf of PROTEC, MML, MTA and the Public Corporation Law Section of the State Bar. Following a very favorable ruling by the trial judge, the MPSC ruled against Oshtemo Township and its residents with regard to the ability of the Township to govern its own zoning and rights of way.

Prior to the MPSC reversal, 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 Township and 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 - represented 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.

Subsequent to the ALJ's determination, the MPSC summarily reversed the trial judge. The matter is now on appeal to the Michigan Court of Appeals. Oral argument is expected this Fall and a decision is possible by this year end.

B. Michigan Legislative Efforts

Following a remarkably successful effort to **stop** numerous pieces of anti-municipal legislation in 2012 and early 2013, PROTEC and its Municipal partners were able to support some amendments to several pieces of legislation which passed in late 2013 and early 2014. Due to overwhelming effort by well financed industries, the following industry bills passed and even though amended, require attention and follow up:

1. **SB 636/2014 PA 52 AT&T Land Line Telephone Deregulation:** This new law attempts to deregulate AT&T's local exchange service. Many amendments were adopted which require substantial notice to affected consumers, approval of the FCC generally and the MPSC with respect to 911 issues.
2. **SB 539/540 Miss Dig Rewrite and Loss of Local Governmental Immunity:** This new law divests local government of immunity for any work related to Miss Dig, which in turn affects most underground work. In addition, penalties may be imposed by the MPSC for violations of the Act. It is critical that local governments comply with every aspect of the Miss Dig Statute and document that compliance in order to avoid substantial liability and penalties.

Other potentially harmful legislation that did not pass and which PROTEC worked on amending included:

3. **SB 336/677 Sewer Back Up Legislation:** PROTEC, MML, MMRMA and other communities spent considerable time addressing this proposed legislation which originally sought to impose a complex administrative process upon sewer back up claimants. As a result of our involvement, the administrative process is now set up as an opt-in process and the bill also now provides new definitions of a sewer event and also establishes a brightline test for immunity. Though still overly complex, the bill is now far better than originally conceived.
4. **Legislation Being Monitored Presently:**

SB 336/677 - Sewer Back Up Legislation. See above .

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.

SB 733 - Applying 2” rule to Highways



5. 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.

Meanwhile, the FCC is also examining the role of local government in cell tower siting and is expected to issue further national standards on the subject this year. PROTEC is monitoring those developments as well.

6. 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.

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.

Further, 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.

Most recently, the US Government Accounting Office (GAO) issued a study lauding not only the value of high speed internet access for residents and businesses, but also supporting municipal provisioning of same where the private sector has failed or refused. See this URL for a copy of the study: <http://www.gao.gov/assets/670/660734.pdf>

III.

COMCAST/TIMEWARNER TURNS INTO: COMCAST/CHARTER/SPINCO

While the original news of the Comcast Time Warner Deal was not particularly startling to PROTEC and our Members, as Time Warner does not have a significant presence in Michigan, the next news from Comcast and Charter was and is of great moment in Michigan. As of this writing, the news of Comcast’s related move involving its planned departure from Michigan in favor of “Spinco”, a pseudonym for a company to be named, representing joint ownership by Comcast and Charter shareholders, is little more than a few weeks old. PROTEC, along with MML, MiNATO and other organizations, is attempting to gather

information on the proposed deals as they uniquely affect Michigan municipalities and then identify issues and options to address concerns.

We will post news concerning this matter on the PROTEC website and forward relevant emails as it becomes available and relevant to Michigan communities.



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