

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of United)	
Telephone Company of Ohio d/b/a/)	
Embarq,)	
)	
Complainant,)	
)	
v.)	Case No. 08-616-TP-PWC
)	
The Village of Jefferson, Ohio,)	
)	
Respondent.)	

ENTRY

The Commission finds:

- (1) On December 17, 2007, the village of Jefferson, Ohio, (village) passed Ordinance 2007-O-2714, which enacted Chapter 1019 of the village's codified ordinance establishing various fees to be paid by users of the public way.
- (2) On May 22, 2008, United Telephone Company of Ohio d/b/a Embarq (Embarq) filed a complaint with the Commission against the village concerning certain aspects of Ordinance 2007-O-2714. According to the complaint, Embarq was notified of the implementation of the ordinance by a letter dated April 22, 2008. In part, Embarq alleges that:
 - (a) the General Right-of-Way Permit Application Fees (Application Fees) and the General Right-of-Way Annual Fees (Annual Fees) are not based on the actual costs incurred by Jefferson in processing Embarq's application and are, therefore, unjust, unreasonable, and unlawful pursuant to Section 4939.05(C), Revised Code;
 - (b) the Annual Fees and the Application Fees are not properly allocated among occupants and users of the public way and subsidize exempt cost causers such as the village in violation of Section 4939.05(C), Revised Code;

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- (c) the Annual Fees and the Application Fees are arbitrary, unreasonable, and bear no relationship to the costs actually incurred by the village by virtue of the occupancy of the right-of-way by a particular provider and are not competitively neutral;
 - (d) the ordinance is unreasonable, arbitrary, and discriminatory by requiring a permittee to rearrange, relocate, or remove the permittee's facilities at the sole cost of the permittee without the village paying the costs therefor and/or without the Commission's authorization and approval through appropriate abandonment proceedings; and
 - (e) the ordinance is unreasonable, arbitrary, and discriminatory because it purports to grant the village access to the books and records of permittees but does not provide permittees with equivalent access to the village's books and records.
- (3) On May 23, 2008, the examiner in this case issued an entry ordering the docketing division of the Commission to serve a copy of the complaint on the village and directed the village to file an answer. By entry issued on June 26, 2008, the village was granted an extension of time, until July 7, 2008, to file its answer to the complaint.
- (4) On July 7, 2008, the village filed an answer to the complaint which denied the material aspects of the complaint. Among the defenses asserted by the village are that Embarq failed to file its complaint within 30 days after the date that Embarq first became subject to Ordinance 07-O-2714, as required by Section 4939.06, Revised Code. As a result, the village requests that the complaint be dismissed with prejudice.
- (5) Section 4939.06(B), Revised Code, provides for the suspension of public way fees under certain circumstances:

Only upon a finding by the commission that reasonable grounds are stated for a complaint filed under division (A) of this section, the

commission by order shall suspend the public way fee provisions of the municipal ordinance for the duration of the commission's consideration of the complaint. For purposes of this division, if the commission so suspends an ordinance pursuant to a complaint filed not later than 30 days after the date that the ordinance first takes effect, the suspension shall apply to the public way fee for every occupancy or use of the public way to which the fee would otherwise apply. For any other complaint, the suspension shall apply only to the public utility filing the complaint. The municipal corporation may later collect, for the suspension period, any suspended public way fee only if the commission finds that the public way fee is not unreasonable, unjust, unjustly discriminatory, or unlawful.

- (6) In its pleading, Embarq has requested that the fees be suspended. The village has stated that its ordinance is reasonable and that the enforcement of the fees established therein should, therefore, not be suspended. Both parties agree that Ordinance No. 07-O-2714 was passed by Council of the Village of Jefferson and was signed by the mayor of Jefferson on December 17, 2007.

The standard under Section 4939.06, Revised Code, is not whether an ordinance is reasonable but, rather, whether reasonable grounds are stated for a complaint under Section 4939.06(A), Revised Code. Embarq brought this action based on the amount of the public way fees imposed by the ordinance, the related classification of public way occupants or users, and the assignment or allocation of costs to the public way fee, all issues which are covered by Section 4939.06(A), Revised Code. Embarq has raised substantial arguments with regard to those issues. The Commission therefore finds that reasonable grounds for the complaint have been stated. Based on those findings, Section 4939.06(B), Revised Code, requires that the Commission suspend the public way fee provisions established by the ordinance as applied to Embarq for the duration of the Commission's consideration of the complaint. The public way fees established by the ordinance as applied to Embarq shall therefore be suspended and this matter should

proceed to hearing. The public way fees under the ordinance will not be suspended as to any other occupancy of the public ways, as the complaint was not filed within 30 days after the ordinance first took effect.

- (7) As noted above, at issue in this proceeding is whether Embarq's complaint was timely filed within 30 days after the date Embarq first became subject to Ordinance 07-O-2714. To support a finding of timely filing, Embarq relies upon the April 22, 2008, implementation notice sent by the village. The village does not deny that such a notice was sent on that date.

We faced a similar issue in *In the Matter of the Complaint of XO Ohio, Inc. v. City of Upper Arlington*, Case No. 03-870-AU-PWC. In that case, we reviewed the pleadings and initially found that the complainant was not subject to the ordinance in question until after Upper Arlington notified it that compliance was expected by a given date, after having previously taken actions to allow the complainant to operate without complying. (Entry, May 14, 2003, at finding 23.) On rehearing, we agreed that the precedent on which we had relied was based on a situation in which the city had taken affirmative acts to prevent compliance and we pointed out that it had been reported that Upper Arlington officials had affirmatively allowed compliance to be delayed. However, we recognized that additional facts might be proved at hearing which would show that the complainant was subject to the ordinance prior to the letter requesting compliance by the stated date and agreed that we would therefore determine the timeliness of the complaint subsequent to the hearing. (Entry on rehearing, July 1, 2003, at finding 9.)

The situation is similar here. Although the pleadings allege that an implementation letter was sent on April 22, 2008, we do not know the content of that letter or the nature or existence of any previous actions or communications by the village that might have impacted the date on which Embarq became subject to the ordinance. We would also note that our conclusion in *Upper Arlington* did not determine whether or not affirmative acts by a municipality are necessary in order to reach a decision that an occupier of the public way was not subject to an effective ordinance.

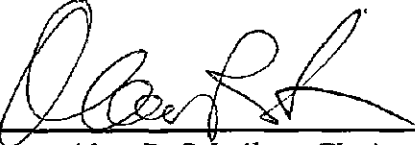
Accordingly, we are not now determining whether this complaint is timely filed. One of the issues in the case will therefore be the date on which Embarq was first subject to the ordinance. If we conclude, based on evidence presented, that the complaint was not timely filed, then this matter may be dismissed.

It is, therefore,

ORDERED, That the fee provisions of Chapter 1019 of Village of Jefferson's codified ordinances be suspended in accordance with finding 6 until otherwise ordered by the Commission. It is, further,

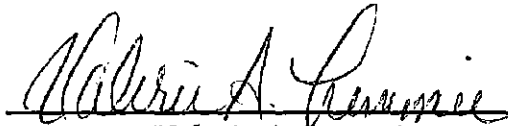
ORDERED, That a copy of this entry be served upon all parties of record.

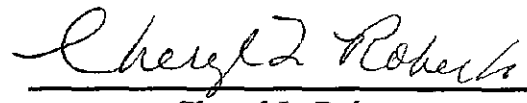
THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Paul A. Centolella


Ronda Hartman Fergus

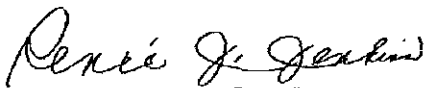

Valerie A. Lemmie


Cheryl L. Roberto

JRJ/vrm

Entered in the Journal

JUL 16 2008



Renee J. Jenkins
Secretary