

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of WorldCom,)
Inc.; AT&T Corp.; KMC Telecom III, LLC; ICG)
Telecom Group, Inc.; and LDMI Telecom-)
munications, Inc.,)

Complainants,)

v.)

Case No. 02-3207-AU-PWC

City of Toledo,)

Respondent.)

In the Matter of the Complaint of The Toledo)
Edison Company and American Transmission)
Systems, Inc.,)

Complainants,)

v.)

Case No. 02-3210-EL-PWC

City of Toledo,)

Respondent.)

ENTRY

The Commission finds:

- (1) On July 2, 2002, the governor of Ohio signed Amended Substitute Senate Bill 255. This bill, among other things, addresses the use of public ways by public utilities and the levying of public way fees by municipal corporations. Section 4939.01(F), Revised Code, enacted by this bill, defines a "public way fee" as "a fee levied to recover the costs incurred by a municipal corporation and associated with the occupancy or use of a public way."
- (2) Section 4939.05(E), Revised Code, provides that, at least 45 days prior to the date of enactment of a public way ordinance by a municipal corporation, the municipal corporation shall file with the Public Utilities Commission a notice that an ordinance is

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being considered. On July 22, 2002, the city of Toledo (Toledo or city) filed a notice, in Case No. 02-1859-AU-ORD, that it was considering a public way ordinance. Toledo did enact Ordinance No. 375-02 (ordinance 375-02) on October 8, 2002, establishing regulations in Toledo, Ohio, Municipal Code (TMC) Chapter 945, Management and Control of the Public Right of Way, governing the use of its right of way, and also amending certain other sections, including TMC Section 717.02(d), to exempt right-of-way permit holders from certain provisions of TMC Chapter 717.¹ Ordinance 375-02 became effective on November 9, 2002.

(3) Section 4939.06(A), Revised Code, provides that:

If a public utility does not accept a public way fee levied against it pursuant to the enactment of an ordinance by a municipal corporation, the public utility may appeal the public way fee to the public utilities commission. The appeal shall be made by filing a complaint that the amount of a public way fee, any related classification of public way occupants or users, or the assignment or allocation of costs to the public way fee is unreasonable, unjust, unjustly discriminatory, or unlawful. The complaint shall be filed not later than thirty days after the date the public utility first becomes subject to the ordinance. The complaint is subject to the same procedures as a complaint filed pursuant to section 4905.26 of the Revised Code. The commission shall act to resolve the complaint by issuance of a final order within one hundred twenty days after the date of the complaint's filing.

(4) On December 9, 2002, in Case No. 02-3207-AU-PWC, WorldCom, Inc. (on behalf of its Ohio operating subsidiaries Brooks Fiber Communications of Ohio, Inc. (Brooks Fiber), MCImetro Access Transmission Services, LLC (MCImetro Access), MCI WorldCom Communications, Inc. (MCI Communications), and MCI WorldCom Network Services, Inc. (MCI Network Services)); AT&T Corp. (on behalf of its Ohio

¹ In 1994, Toledo had enacted TMC Chapter 717, entitled Telecommunications Systems, which established a permitting process and regulations regarding the use of the right of way by telecommunication providers.

operating subsidiaries AT&T Communications of Ohio, Inc. (AT&T Communications) and TCG Ohio, Inc. (TCG Ohio)); KMC Telecom III, LLC (KMC Telecom); ICG Telecom Group, Inc. (ICG Telecom); and LDMI Telecommunications, Inc. (LDMI Telecommunications) (collectively, telecom complainants) filed a complaint with this Commission against Toledo concerning the ordinance. The telecom complainants allege that:

- (a) the public way fees set forth in ordinance 375-02 do not reflect the actual costs Toledo has incurred due to the occupancy or use of its rights of way, in violation of Section 4939.05(C), Revised Code (Count I);
- (b) the public way fees in ordinance 375-02 are based on costs that have not been properly allocated and assigned to the occupancy or use of Toledo's rights of way and Toledo cannot show that its method of allocating or assigning the costs complies with the statutory standard, in violation of Section 4939.05(C), Revised Code (Count II);
- (c) the fee structure in ordinance 375-02 is arbitrary and bears no relationship to the costs actually incurred by Toledo by virtue of the occupancy of the right of way by any permittee, in violation of Section 4939.05(C), Revised Code (Count III);
- (d) ordinance 375-02 does not allocate the costs on a competitively neutral basis, in violation of Section 4939.05(C), Revised Code (Count III);
- (e) the fee structure in ordinance 375-02 constitutes a barrier to competitive entry, in violation of Section 253 of the Telecommunications Act of 1996 (47 USC 151 et seq.) (Telecom Act) (Count III);
- (f) ordinance 375-02 fails to recognize that Toledo is already compensated for some of the costs upon which the public way fees are based, in violation of Section 4939.05(C), Revised Code (Count IV);
- (g) Toledo's reservation, in ordinance 375-02, of its prior rights to install its own facilities, free of charge, upon any poles or within the underground

pipes or conduits of a right-of-way permit holder, unless extinguished by a court of competent jurisdiction, results in Toledo receiving nonmonetary compensation or free service, and unreasonably places the burden on the permit holders to obtain a judicial determination, in violation of Section 4939.05(A), Revised Code, and Section 253 of the Telecom Act (Count V);

- (h) ordinance 375-02's establishment of specific underground districts in which all new overhead wires will be prohibited unless permission is obtained from Toledo to erect above-ground facilities discriminates against the competitive local exchange carriers (CLEC) who are still in the process of building telephone networks, in violation of Section 4939.04(A)(1), Revised Code, and Section 253 of the Telecom Act (Count VI);
 - (i) ordinance 375-02 unlawfully imposes public way fees on the revenues of resellers and lessees that merely utilize infrastructure owned or placed in the public way by a third party, in violation of Section 4939.05(B)(3), Revised Code, and Section 253 of the Telecom Act (Count VII);
 - (j) ordinance 375-02 imposes certain fees that are not based on the costs actually incurred by Toledo and reasonably allocated or assigned to the occupancy or use of the public way on a competitively neutral basis, in violation of Section 4939.05(C), Revised Code, and Section 253 of the Telecom Act (Count VIII); and
 - (k) the multiple fee structures contained in TMC Chapters 945 and 717 result in providers of telecommunications services paying widely differing fees, in violation of Section 4939.05(C), Revised Code (Count IX).
- (5) On the same day, in Case No. 02-3210-EL-PWC, The Toledo Edison Company (Toledo Edison) and American Transmission Systems, Inc. (American Transmission) (collectively, electric complainants) filed a complaint against Toledo regarding ordinance 375-02. The electric complainants allege that:

- (a) the right-of-way fees authorized by ordinance 375-02 are not cost-based and, therefore, they are unjust, unreasonable, and in violation of Section 4939.05(C), Revised Code (Count I);
- (b) to the extent that the right-of-way fees include costs related to accelerated deterioration of Toledo's streets and walks due to repeated pavement cuts and repairs that have not yet been incurred, the fees are unjust, unreasonable, and in violation of Section 4939.05(C), Revised Code (Count II);
- (c) because the majority of the costs upon which Toledo based its right-of-way fees are costs related to the repair and maintenance of underground utility facilities and because the majority of facilities of the electric complainants are above ground, the city's failure to classify utilities based upon whether their facilities are above or below ground for purposes of determining the applicable right-of-way use fees results in the electric complainants unreasonably and unlawfully subsidizing other utilities, in violation of Section 4939.05(C), Revised Code (Count III);
- (d) because ordinance 375-02 supersedes a utility's Commission-approved tariff when there is a conflict between the ordinance and the tariff, the ordinance is unjust, unreasonable, and in violation of Chapter 4939, Revised Code (Count IV);
- (e) ordinance 375-02 is unlawful because it requires owners and operators of facilities in the city's right of way to hold poles at the utility's expense in violation of Section 4939.05(A), Revised Code, which prohibits a municipality from requiring any free service or nonmonetary compensation for the right or privilege to occupy or use a public way (Count V);
- (f) ordinance 375-02 is unlawful because it requires owners and operators of facilities in the city's right of way to relocate facilities at their own expense when Toledo determines that it is reasonably

necessary in violation of Section 4939.05(A), Revised Code, which prohibits a municipality from requiring any free service or nonmonetary compensation for the right or privilege to occupy or use a public way (Count VI);

- (g) ordinance 375-02 is in violation of Section 4939.05(A), Revised Code, which prohibits a municipality from requiring any free service or nonmonetary compensation for the right or privilege to occupy or use a public way, because it attempts to preserve the city's prior rights to install facilities on utility poles free of charge (Count VII);
- (h) ordinance 375-02 is in violation of Section 4939.05(A), Revised Code, which prohibits a municipality from requiring any free service or nonmonetary compensation for the right or privilege to occupy or use a public way, because it requires owners of utility poles to remove their facilities from a street or right of way vacated by the city, at their own expense (Count VIII);
- (i) ordinance 375-02 is in violation of Section 4939.05(A), Revised Code, which prohibits a municipality from requiring any free service or nonmonetary compensation for the right or privilege to occupy or use a public way, because it requires permit holders to furnish annual reports regarding certain facilities, a description of their economic development efforts within the city, and their plans and forecast pertaining to the future use of the public way, none of which is related to the use of the public way (Count IX);
- (j) because ordinance 375-02 establishes a priority of use for the right of way that is not based solely on safe travel, such as street widening or the installation of storm sewers, and because ordinance 375-02 automatically gives governmental entities and holders of city franchises priority over utilities, without regard to

the nature of use, it is unjust, unreasonable, and unlawful (Count X); and

- (k) ordinance 375-02 is unjust, unreasonable, and unlawful because it imposes fines and criminal penalties for anyone violating the ordinance, beyond the scope of its authority under Chapter 4939, Revised Code (Count XI).
- (6) On December 26, 2002, Toledo filed in Case Nos. 02-3207-AU-PWC and 02-3210-EL-PWC a motion for a one-day extension of time to file its answer to the complaints. Toledo's motion is granted.
- (7) On December 31, 2002, Toledo filed its answer in Case No. 02-3207-AU-PWC. Among other things, Toledo:
- (a) denies that its right-of-way fees are subject to the requirements of Sections 4939.04 and 4939.05, Revised Code, because the fees that enacted prior to the effective date of Chapter 4939, Revised Code;
 - (b) contends that Chapter 4939, Revised Code, may be an unconstitutional infringement upon the home rule authority of municipalities;
 - (c) denies that its right-of-way fees do not reflect actual costs it has incurred due to the occupancy of its right of way and are not based on costs properly allocated and assigned to the occupancy and use of its right of way, and that its method of allocating and assigning does not comply with the statutory standard (Count I and II);
 - (d) denies that mileage is not an appropriate basis for allocating costs (Count III);
 - (e) denies that its right-of-way fee structure is arbitrary and bears no relationship to the costs it incurs because of entities occupying its right of way (Count III);
 - (f) denies that its fee structure is discriminatory or that it provides a competitive advantage to

telecom companies subject to lower per mile costs (Count III);

- (g) denies that its fee structure constitutes a barrier to entry or violates Section 253 of the Telecom Act (Count III);
- (h) denies that its right-of-way fees fail to recognize compensation that it receives for certain costs upon which the fees are based (Count IV);
- (i) contends that, with regard to the issue of its installing its facilities on utility poles free of charge, it is merely preserving any rights that it had prior to the enactment of Chapter 4939, Revised Code, and denies that honoring prior commitments violates Section 253 of the Telecom Act (Count V);
- (j) contends that its establishment of underground districts by its ordinance is merely a codification of a previously existing section in TMC Chapter 945 (Count VI);
- (k) contends that its imposition of fees on resellers and lessees who merely utilize infrastructure owned by a third party is lawful and that that provision contained in TMC Chapter 717 predates Chapter 4939, Revised Code (Count VII);
- (l) admits that the fees referenced by the telecom complainants, which predate Chapter 4939, Revised Code, were not formulated based upon the requirements of Chapter 4939, Revised Code, but denies that its fees have the effect of impeding competitive entry in violation of the Telecom Act (Count VIII); and
- (m) denies that the fee structures contained in TMC Chapters 945 and 717 result in widely differing fees by telecommunications providers and contends that its fee structure in TMC Chapter 717 predates Chapter 4939, Revised Code, and, therefore, that the Commission lacks jurisdiction

to hear challenges to those fees (Count IX).

- (8) On December 31, 2002, Toledo filed its answer in Case No. 02-3210-EL-PWC. Among other things, Toledo:
- (a) admits that it enacted ordinance 375-02, repealing then existing TMC Chapter 945 and replacing it with a new Chapter 945, which became effective on November 9, 2002;
 - (b) denies the allegation that it cannot demonstrate that its right-of-way fees are designed to recover only the actual costs incurred by use of the right of way (Count I);
 - (c) denies that costs related to accelerated deterioration of its streets and walks are not properly categorized as public way fees (Count II);
 - (d) denies that above-ground facilities in the right of way do not contribute to the need for or costs of street resurfacing and maintenance (Count III);
 - (e) denies that its right-of-way fees subsidize utilities whose facilities are mostly underground or that its failure to classify rights of way allocated to utilities based upon whether their facilities are above ground or underground is unjust, unreasonable, and unlawful (Count III);
 - (f) denies the allegation that nothing in Chapter 4939, Revised Code, permits a utility to enact a right-of-way ordinance that supersedes a utility's approved tariff because Chapter 4939, Revised Code, is subservient to the Ohio Constitution which permits municipal control of public utilities (Count IV);
 - (g) denies the allegation that requiring a public utility to hold poles at their own expense is a free service or nonmonetary compensation in violation of Section 4939.05(A), Revised Code, and contends that costs related to pole holding and relocation

are already included in an electric company's distribution rates (Counts V and VI);

- (h) admits that its ordinance attempts to preserve rights that Toledo possessed before the enactment of Chapter 4939, Revised Code, to install and maintain facilities on utility poles free of charge and admits that there is a cost associated with providing space on a utility pole, but alleges that Chapter 4939, Revised Code, does not prohibit a party from honoring a prior commitment (Count VII);
 - (i) admits that there is a cost associated with requiring permit holders to remove, at their own expense, facilities from a vacated street or right of way, but denies that its ordinance requires electric complainants to provide it with free service or nonmonetary compensation because the ordinance is a valid exercise of local self-government pursuant to the Ohio Constitution (Count VIII);
 - (j) denies that the requirement that public utilities must file certain annual reports and forecasts is not related to the use of the public way (Count IX);
 - (k) denies that the only public uses that may take precedence over the use of the right of way to provide public utility service are those that are related to safe travel on streets (Count X); and
 - (l) denies that its imposition of fines or penalties is beyond its authority under Chapter 4939, Revised Code, because Section 4939.04(B), Revised Code, expressly permits the valid exercise of local self-government pursuant to Section 3, Article XVIII of the Ohio Constitution (Count XI)
- (9) On December 31, 2002, Toledo also filed motions to dismiss the complaints filed in Case Nos. 02-3207-AU-PWC and 02-3210-EL-PWC (telecom motion to dismiss and electric motion to dismiss, respectively).

- (10) On January 21, 2003, the telecom complainants and the electric complainants filed memoranda contra to Toledo's motions to dismiss.
- (11) On January 30, 2003, Toledo filed motions in both cases for extensions of time to file reply memoranda until February 7, 2003. These motions were granted by attorney examiner entry on January 31, 2003. On February 5, 2003, and February 7, 2003, Toledo filed reply memoranda to its motions to dismiss the telecom complaint and the electric complaint, respectively.
- (12) On February 10, 2003, the telecom complainants filed a motion to strike a portion of Toledo's reply memorandum in Case No. 02-3207-AU-PWC and an alternative motion for leave to file surreply instanter.
- (13) On February 11, 2003, ICG Telecom notified the Commission that it wishes to withdraw from Case No. 02-3207-AU-PWC.
- (14) In its telecom motion to dismiss, Toledo gave four reasons to justify its motion. Toledo first contends that the Commission does not have jurisdiction to hear the telecom complainants' challenge of Toledo's right-of-way ordinance under the Telecom Act.

In Counts III, V, VI, VII, and VIII, the telecom complainants ask the Commission to find that TMC Chapter 945, relating to management and control of the public right of way, and TMC Chapter 717, relating to telecommunications systems, violate Section 253 of the Telecom Act. Sections 253(a), (b), (c), and (d) of the Telecom Act state:

(a) In General.

No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority.

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 [47 USCS § 254],

requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and Local Government Authority.

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption.

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

Toledo contends that the Commission has no jurisdiction with regard to Section 253 of the Telecom Act and that challenges to municipal right-of-way provisions pursuant to Section 253 may only be brought in federal court. The telecom complainants assert that the Commission has already issued several decisions ruling upon federal statutes and, specifically, Section 253 issues (Complainants' Memorandum Contra Motion to Dismiss of the City of Toledo at 3-4).

The Commission finds that it is unnecessary to determine whether or not it has jurisdiction to hear a claim under Section 253(c) of the Telecom Act. Under that section, if it were considered in this action, the Commission would have to determine whether or not ordinance 375-02 would require the payment of unfair or unreasonable compensation, and whether

it would apply on a nondiscriminatory and competitively neutral basis. Under Section 4939.06(A), Revised Code, the Commission will be considering the same issues, since the statute requires consideration of whether the amount of a fee, the related classification of occupants or the assignment or allocation of costs is unreasonable, unjust, unjustly discriminatory or unlawful. Considering each of the counts of the telecom complaint in which a violation of the Telecom Act is alleged, the Commission finds as follows:

In Count III, the telecom complainants allege that, to the extent that the fee structure in ordinance 375-02 imposes higher costs per mile on CLECs than it does on incumbent local exchange companies (ILECs), the ordinance constitutes a barrier to entry in violation of the Telecom Act. While, under the Telecom Act, this claim is phrased in terms of a barrier to entry, the essence of the issue is the alleged discrimination between CLECs and ILECs. Section 4939.06(A) specifically covers discrimination. This issue will therefore be heard under state law barring fees that are unreasonable, unjust, unjustly discriminatory, or unlawful. The claim relates to the amount of a public way fee and the related classification of public way occupants or users. Therefore, the Commission has jurisdiction to hear it under state law. This portion of the telecom motion to dismiss shall be denied.

In Count V, the telecom complainants allege that Toledo's reservation of rights to install its facilities free of charge on any poles or within underground pipes or conduits constitutes a nonmonetary compensation or free service. This claim does not relate to the amount of a public way fee, the related classification of occupants or users, or the assignment or allocation of costs to the fee. The Commission therefore has no jurisdiction to hear this claim under Section 4939.06(A), Revised Code.

As to the Telecom Act's application to Count V, it must first be noted that the Commission has no jurisdiction except that which is specifically granted to it. The Telecom Act does in some sections grant authority to state commissions² and, under Section 4905.04(B), Revised Code, the Commission is specifically

² For example, in Section 252 of the Telecom Act, "State commissions" are given the authority to hear arbitration proceedings.

granted the power to act as a "state commission" under the Telecom Act. The parties have not referred the Commission to any source of specific authority pursuant to which it could hear complaints arising out of Section 253 of the Telecom Act. If it were to hear such a complaint, the Commission would be acting under Section 4939.06(A), Revised Code, which allows it to hear complaints alleging that the amount of a public way fee, the related classification of occupants or users or the assignment or allocation of costs to that fee is unlawful. Even if the term "unlawful" in that section includes legality under federal law within its purview, a question which the Commission is not now deciding, the Commission would still only have the authority to consider issues relating to the amount of the fee, the related classification of occupants or users or the assignment or allocation of costs to the fee. As the Commission has already determined that the issue brought up in Count V does not fall within any of those categories, the Commission would not have jurisdiction to decide whether ordinance 375-02 violates the Telecom Act any more than it could decide whether it violates state law. Therefore, Toledo's motion to dismiss Count V of the telecom complaint shall be granted.

In Count VI, the telecom complainants allege that the establishment of underground districts discriminates against CLECs. This claim relates to the classification of public way occupants or users. The Commission therefore has jurisdiction to hear the claim. The aspect of the claim which alleges that the ordinance is not competitively neutral and therefore violates the Telecom Act will be heard under state law barring fees that are unreasonable, unjust, unjustly discriminatory, or unlawful. This portion of the telecom motion to dismiss shall be denied.

In Count VII, the telecom complainants allege that ordinance 375-02 imposes public way fees on the revenues of resellers and lessees of third parties. This claim relates to the amount of a public way fee and the classification of occupants or users. The Commission therefore has jurisdiction to hear the claim. To the extent that the claim alleges a violation of the Telecom Act based on the imposition of fees on carriers not occupying the public way, this will be heard under the provision of Section 4939.06(A) barring fees that are unreasonable, unjust, unjustly discriminatory, or unlawful. This portion of the telecom motion to dismiss shall be denied.

In Count VIII, the telecom complainants allege that ordinance 375-02 imposes fees which are not based on costs actually incurred by the city and which are not allocated to the public way on a competitively neutral basis. This claim relates to the amount of the fee and the assignment or allocation of costs to the fee. The Commission therefore has jurisdiction to hear the claim. The aspect of the claim which refers to impeding competitive entry in violation of the Telecom Act is covered by state law, as unreasonable, unjust, unjustly discriminatory, or unlawful. This portion of the telecom motion to dismiss shall be denied.

- (15) Toledo next argues that the Commission does not have jurisdiction under Chapter 4939, Revised Code, to hear the telecom complainants' challenge of Toledo's Telecommunications Ordinance codified in TMC Chapter 717.
- (a) First, Toledo contends that TMC Chapter 717 was enacted in 1994 and amended in 1997. Section 4939.08(B), Revised Code, states:

Except as otherwise provided in division (A) of section 4939.06 of the Revised Code, nothing in sections 4939.01 to 4939.07 of the Revised Code applies to an ordinance both governing public ways and enacted by a municipal corporation prior to September 29, 1999, unless, on or after that date, the ordinance is materially modified.

(Emphasis added.)

Toledo contends that the ordinance has not been materially modified on or after September 29, 1999, and, therefore, Counts VII, VIII, and IX of the telecom complainants must be dismissed.

The telecom complainants argue that the public way fees being challenged are subject to the Commission's jurisdiction based on both the initial phrase and the final phrase of Section 4939.08(B), Revised Code. The initial phrase refers to the permission given to utilities by Section 4939.06(A), Revised Code, for the appeal of public way fees to the Commission. The telecom complainants argue that this initial phrase means that,

regardless of when adopted, TMC Chapter 717 is subject to challenge to the extent that the challenge relates to public way fees imposed therein.

With regard to the final phrase, the telecom complainants state that TMC Chapter 717 was materially modified after September 29, 1999. Ordinance 375-02 was enacted in October 2002. The title of the ordinance reads, in part, that it is "amending Toledo Municipal Code sections 717.02(d) and 947.06 to exempt right of way permit holders from certain provisions of Chapters 717 and 947" With regard to Section 717.02(d), the ordinance states, in part:

No permit shall be required for any telecommunication service being provided under a general right of way permit granted under Chapter 945. Any holder of a Chapter 717 telecommunications permit and any company for whom issuance of a permit has been duly authorized by City Council, excluding cable television service providers, wishing to be subject to the provisions of Chapter 945 shall have until June 30, 2003 to apply for a right of way permit under Chapter 945. A Chapter 945 general right of way permit shall be required for any holder of a telecommunications permit to install. Upon the issuance of a right of way permit under Chapter 945, the Chapter 717 telecommunications permit shall be terminated and the permittee shall be subject only to the requirements of Chapter 945 for as long as it holds a valid permit under Chapter 945.

The Commission finds no merit to Toledo's argument. The first sentence of Section 4939.06(B), Revised Code, states that "[i]f a public utility does not accept a public way fee levied against it pursuant to the enactment of an ordinance by a municipal corporation, the public utility may appeal the public way fee to the public utilities commission." The initial phrase of Section 4939.08(B),

Revised Code, and the first sentence of Section 4939.06(A), Revised Code, when read together, appear to leave open to challenge any public way fee levied against a public utility that is not accepted by a public utility, regardless of the date of adoption. In addition, Toledo's modification of TMC Chapter 717 in October 2002 to establish a procedure for a holder of a Chapter 717 telecommunications permit to operate to become subject to the provisions of TMC Chapter 945 and to terminate the Chapter 717 permit, and to require that a Chapter 945 general right-of-way permit shall be required for any holder of a telecommunications permit to install (which was granted pursuant to Chapter 717), constitutes a material modification of that ordinance, as referenced in Section 4939.08(B), Revised Code. Therefore, this portion of Toledo's motion to dismiss shall be denied.

- (b) Toledo next argues that WorldCom (through its Brooks Fiber operating subsidiary) and KMC Telecom have been granted permits to operate a telecommunications system pursuant to TMC Chapter 717. Toledo believes that Section 4939.08(A), Revised Code, exempts those agreements from Commission review. Section 4939.08(A), Revised Code, provides:

Nothing in sections 4939.01 to 4939.07 of the Revised Code applies to a franchise or to any agreement with a public utility or cable operator, for the balance of its term, if the franchise or agreement meets all of the following:

- (1) The franchise was granted, or the agreement was authorized by ordinance or otherwise and was entered into, by a municipal corporation prior to the effective date of this section.
- (2) The franchise or agreement authorizes the occupation or use of public ways.
- (3) The public utility agrees with the applicable public way fees, or nonmonetary compensation, if any, or the cable operator

pays the applicable fee or utilizes the credit, offset, or deduction specified in division (B)(4) of section 4939.05 of the Revised Code.

Toledo contends that Brooks Fiber has a TMC Chapter 717 permit to operate that was authorized by Toledo Ordinance No. 23-95 on January 17, 1995, for a term of ten years. Toledo states that the KMC Telecom permit to operate was authorized by Toledo Ordinance No. 173-99 on March 30, 1999, for a total term of ten years (a two-year initial term and eight automatic one-year extensions). Toledo argues that, by signing the permits, both companies agreed with the applicable public way fees and that, because both permits incorporate TMC Chapter 717, Section 4939.08(A), Revised Code, prohibits WorldCom and KMC Telecom from challenging that chapter in this proceeding.

The telecom complainants contend that, even though Brooks Fiber and KMC Telecom signed the permits issued pursuant to TMC Chapter 717, that does not mean that they agreed with the applicable public way fees, as referenced in Section 4939.08(A)(3), Revised Code. According to the telecom complainants, the Chapter 717 permits are neither "franchises" nor "agreements." The telecom complainants argue that the permits are "unilaterally imposed administrative authorizations," lacking any arm's length negotiations regarding the assessment of, and "agreement" to, the reasonableness of the fees imposed. TMC Section 717.02(c) states, in part, that the permit shall contain such terms "as are acceptable to the Mayor and the Director of Law, shall be approved by the City Council, and shall be signed by the Mayor on behalf of the City before issuance to the permittee." According to the telecom complainants, Brooks Fiber and KMC Telecom had no choice but to accept the terms and conditions imposed by Toledo.

The Commission finds no merit to this argument of Toledo. Section 4939.08(A), Revised Code, excludes a franchise or agreement, for the "balance of its term," from the provisions of Sections 4939.01 to 4939.07, Revised Code, only if, among other things, the "public

utility agrees with the applicable public way fees." Apparently, this is the first opportunity for Brooks Fiber and KMC Telecom to disagree effectively with the fees and they are opposing them. Because the three provisions in division A of Section 4939.08, Revised Code, are all inclusive (the "agreement meets all of the following"), Toledo's argument lacks the required statutory support.

- (c) In its final argument with regard to the Commission's jurisdiction to hear challenges to TMC Chapter 717, Toledo argues that Section 4939.04(B), Revised Code, explicitly declares that municipal regulation of the right of way is within a city's home rule authority. Section 4939.04(B), Revised Code, states:

The management, regulation, and administration of a public way by a municipal corporation with regard to matters of local concern shall be presumed to be a valid exercise of the power of local self-government granted by Section 3 of Article XVIII of the Ohio Constitution.

Toledo argues that its enactment of TMC Chapter 717 was a valid exercise of municipal self-government under Section 3, Article XVIII of the Ohio Constitution and that the Commission lacks authority to hear a challenge to Section 3 authority. Toledo also contends that, in enacting TMC Chapter 717, it exercised its powers of local self-government through a Charter provision approved by the Toledo electorate, which Charter gives the city the right to control the placement, relocation, and operation of utility facilities in the right of way.

The telecom complainants contend that Section 4939.04, Revised Code, merely restates the obvious, i.e., that Ohio municipalities have the right to manage their public ways. According to the telecom complainants, the Federal Communications Commission and various courts have determined that "management" of a public way concerns issues having to do with physical construction. The telecom complainants contend that they are not challenging Toledo's right to manage its

public ways; rather, they have limited their issues to those issues explicitly referenced in sections 4939.04 and 4939.05, Revised Code, and over which, by the passage of Section 4939.06, Revised Code, the General Assembly expressly granted review authority to the Commission.

The Commission finds no merit in Toledo's argument. While the city has the authority to control numerous aspects of right-of-way use, those aspects within its home rule authority are ones that are directly related to the physical occupation of the rights of way. Issues relating to public way fees are, by their very nature, ones impacting the business activities of the affected utilities on a statewide basis, since costs incurred by utilities are ordinarily borne either by all rate payers or by shareholders. Public way fees, therefore, are not matters of local concern. Therefore, this portion of the telecom motion to dismiss shall be denied.

- (16) Toledo argues in its third ground for dismissal that none of the telecom complainants is currently subject to Toledo's right-of-way fees and, therefore, each telecom complainant lacks standing to challenge the fees at this time. Section 4939.06(A), Revised Code, states in part:

If a public utility does not accept a public way fee levied against it pursuant to the enactment of an ordinance by a municipal corporation, the public utility may appeal the public way fee to the public utilities commission. . . . The complaint shall be filed not later than thirty days after the date the public utility first becomes subject to the ordinance.

Toledo discusses the complainants in three groups.

- (a) The first group is comprised of Brooks Fiber and KMC Telecom. According to Toledo, Brooks Fiber and KMC Telecom have permits to operate, allowing them to provide telecommunications service under TMC Chapter 717. Ordinance 375-02 gave holders of TMC Chapter 717 permits to operate the choice either to remain subject to the Chapter 717 permit or to obtain a Chapter 945 permit and terminate the Chapter 717 permit to operate. The election to obtain a Chapter 945 permit must be made by

June 30, 2003. A permit holder that elects to remain subject to the Chapter 717 permit will be required to obtain a Chapter 945 permit upon the expiration of the Chapter 717 permit. Under Toledo's interpretation, a public utility would first have to exercise its option "to obtain a Chapter 945 permit and terminate the Chapter 717 permit to operate" before it would have standing to appeal the public way fee to the Commission. Because neither Brooks Fiber nor KMC Telecom has made an application for a Chapter 945 permit, Toledo contends that they are not subject to the city's right-of-way ordinance and therefore lack standing to bring the complaint.

The telecom complainants argue that Toledo has misinterpreted the clause in Section 4939.06(A), Revised Code, which requires that a "complaint shall be filed not later than thirty days after the date the public utility first becomes subject to the ordinance." They contend that this clause does not mean that a utility may only file a complaint with the Commission after it is subject to an ordinance. Rather, it merely sets a deadline for when such a complaint must be filed.

The Commission disagrees with the telecom complainants' assertion that the thirty-day provision is only a deadline and that, therefore, a utility need not be subject to Chapter 4939, Revised Code, in order to file a complaint with the Commission. The first sentence in Section 4939.06(A), Revised Code, also states that a public way user may complain if it "does not accept a public way fee *levied against it pursuant to the enactment of an ordinance . . .*" That sentence makes it clear that the public way user must be affected in some way by the ordinance in question. The enactment of that ordinance must cause the utility, on the basis of its current business activity, to be legally obligated to pay a public way fee levied by the ordinance.

In the case of Brooks Fiber and KMC Telecom, the Commission finds that they are subject to the ordinance. While neither one is currently obligated to obtain a right-of-way permit under TMC Chapter 945, each currently holds a permit to operate under TMC Chapter 717. This

permit requires the payment of fees to Toledo. TMC Section 717.02(e) specifically states that it is the policy of Chapter 717 "to [protect] the public right-of-way and [ensure] adequate compensation for its use." A "public way fee", under Section 4939.01(F) is a fee that is "levied to recover the costs incurred by a municipal corporation and associated with the occupancy or use of a public way." Thus, the Commission finds that the payments required by TMC Chapter 717 are "public way fees" under Chapter 4939, Revised Code.

The next question is whether or not TMC Chapter 717 is regulated by Chapter 4939, Revised Code. Section 4939.08(B), Revised Code, provides that the chapter does not apply to certain previously existing laws:

Except as otherwise provided in division (A) of section 4939.06 of the Revised Code, nothing in sections 4939.01 to 4939.07 of the Revised Code applies to an ordinance both governing public ways and enacted by a municipal corporation prior to September 29, 1999, unless, on or after that date, the ordinance is materially modified.

(Emphasis added.) Thus, there are two ways that Chapter 4939, Revised Code, can apply to TMC Chapter 717. It either can fall within the 4939.06(A) exception, or can have been materially modified. The Commission finds that both exceptions apply here. Section 4939.06(A), as discussed previously, applies to complaints by affected utilities regarding public way fees. This clearly is such a situation, as Brooks Fiber and KMC Telecom are complaining to the Commission and the fees in question are public way fees. In addition, the Commission finds that TMC Chapter 717 was materially modified by ordinance 375-02. While not very many provisions were altered, the most basic aspects of the chapter were changed. Now, the Chapter 717 permit to install has been entirely replaced, as a Chapter 945 general right-of-way permit is required. In addition, the holders of permits to operate under Chapter 717 can avoid Chapter 717 entirely by converting to the new Chapter 945. These are not minor alterations of

unimportant aspects of the law. They are wholesale revisions to its basic impact. Thus, Chapter 4939, Revised Code applies. Because Brooks Fiber and KMC Telecom hold permits to operate which require them to pay public way fees according to the terms of a municipal ordinance covered by Chapter 4939, Revised Code, they have standing to bring this complaint to the Commission. The motion to dismiss these two entities will be denied.

- (b) The second group is comprised of ICG Telecom and LDMI Telecommunications. Toledo contends that neither company has alleged that it has had a Toledo right-of-way fee levied against it or that it has become subject to the ordinance. Toledo is not aware of either company having facilities in Toledo's right of way or having plans to install facilities in the right of way, or possessing a permit to install from Toledo or filing an application for a right-of-way permit.

In their response, the telecom complainants argue that ICG Telecom and LDMI Telecommunications currently provide local exchange service in Toledo, but do not own facilities in the public way. The telecom complainants point out that Toledo, in its telecom motion to dismiss at page 11, states that "Toledo's telecommunications ordinance (TMC Chapter 717) requires a long-term permit to operate for any company planning to provide local exchange service in Toledo, or a permit to install for any company offering any telecommunications service other than local exchange service." One of the telecom complainants' issues in the case is that the application by Toledo of TMC Chapter 717 to telecommunications carriers not using the public way is a violation of Section 4939.05(B)(3), Revised Code, which states that, "[a] municipal corporation shall not require any person, including a reseller, that does not occupy or use a public way owned or controlled by the municipal corporation to pay it a public way fee."

By Toledo's own admission, ICG Telecom and LDMI Telecommunications are subject to TMC Chapter 717. Chapter 4939, Revised Code, applies to TMC Chapter 717, as discussed above. Therefore, the Commission finds that ICG Telecom and LDMI Telecommunications

have standing to participate. The motion to dismiss these two entities will be denied.

- (c) The third group includes MCImetro Access, MCI Communications, MCI Network Services, AT&T Communications, and TCG Ohio. Toledo believes that none of these companies is providing local exchange service in Toledo and none has applied for a permit to provide such service. The city contends that, if the companies are providing local exchange service in Toledo, they are doing so in violation of TMC Chapter 717 and, therefore, have no standing to challenge Toledo's right-of-way ordinance. Toledo also argues that, if these companies are not providing local exchange service in Toledo at the present time, then they are not yet subject to the ordinance as required by Section 4939.06(A), Revised Code, and must be dismissed from this case.

In their memorandum contra, the telecom complainants state that Toledo has issued a permit to install to AT&T Communications³ pursuant to TMC Chapter 717, which grants it authority to construct facilities in the public way and, in addition, that it has right-of-way agreements with Toledo. Similarly, MCI Network Services was issued a Chapter 717 permit to install facilities in the right of way and to provide telecommunications services over those facilities. The telecom complainants provided copies of the agreements and permits. The permits authorize the companies to "Construct and operate a fiber optic telecommunication system cable in the right-of-way." AT&T Communications is authorized to provide only interexchange long distance service over its cable and MCI Network Services is authorized to provide intra and interLATA services over its cable. In addition, Toledo has advised WorldCom that the provider of its Neighborhood Program for local phone service must obtain a TMC Chapter 717 permit to operate in order to provide the service in Toledo. The telecom complainants contend that MCImetro Access provides this service. The

³ The complainants are unclear about precisely which corporate entity they believe holds the permit to install under TMC Chapter 717. Although they use the term AT&T (not defined), this appears in a section in which the only AT&T entity they are discussing is AT&T Communications. The Commission notes that the permit in question was actually issued to AT&T Corporation.

telecom complainants argue that AT&T Corp. and MCI Network Services have standing to appeal the fees imposed by TMC Chapter 945 because holders of TMC Chapter 717 permits to install are required to obtain a TMC Chapter 945 general right-of-way permit and give up their TMC Chapter 717 permit. The telecom complainants also repeat their previous argument relating to utilities which operate using leased facilities. They argue that, to the extent that any public utility may now provide service using the facilities of others, or plan to do so, it has standing to challenge the lawfulness of Toledo's fee. Finally, the telecom complainants remind the Commission that a basis of their complaint is that Toledo has, or will be, assessing public way fees established by Toledo Ordinance No. 375-02 against the complainants as a result of their telecommunications activities within Toledo and that they do not accept the fees.

The Commission will discuss these remaining complainants in smaller groups. AT&T Corp. and MCI Network Services⁴ possess permits to install issued by the city of Toledo. Amended TMC Section 717.02(d) provides, in part, that:

A Chapter 945 general right of way permit shall be required for any holder of a telecommunications permit to install. Upon the issuance of a right of way permit under Chapter 945, the Chapter 717 telecommunications permit shall be terminated and the permittee shall be subject only to the requirements of Chapter 945 for as long as it holds a valid permit under Chapter 945.

⁴ There is some question as to which WorldCom, Inc. entity actually holds the permit to install. The actual permit was issued in the name of MCI WorldCom. No entity by that name is a party to this action. The telecom complainants state in one place that this permit to install is held by MCI Communications (page 21 of Memorandum Contra Motion to Dismiss of the city of Toledo). However, both the telecom complainants (on page 18 of their Memorandum Contra Motion to Dismiss of the city of Toledo) and the city (on page 32 of its Reply Memorandum on the Motion to Dismiss of the City of Toledo) confirm that the permit to install is held by MCI Network Services. The Commission is assuming that the one reference to MCI Communications was an error and that either the permit was originally issued in the wrong entity name or it was subsequently transferred.

(Emphasis added.) The Commission finds that AT&T Corp. and MCI Network Services have standing to appeal the ordinance because Toledo requires them to obtain Chapter 945 general right-of-way permits on the basis of their current possession of permits to install. The motion to dismiss these two entities will be denied.

MCImetro Access is the provider of MCI WorldCom's Neighborhood Program for local phone service. Toledo wrote a letter advising that the provider of this service is required to obtain a permit to operate under TMC Chapter 717. Subsequent to that letter, ordinance 375-02 was passed. Thus, MCImetro Access is obliged to obtain either a permit to operate under Chapter 717 or a right-of-way permit under Chapter 945. In either case, Chapter 4939, Revised Code is applicable (as discussed above, with regard to Chapter 717). MCImetro Access therefore has standing to bring this complaint. The motion to dismiss this complainant will be denied.

AT&T Communications is a party to two twenty-year agreements with Toledo, entered into in 1985, each of which grants the company the right to construct and operate its facilities along certain rights of way in the city, in consideration of one-time payments and certain additional continuing obligations. Section 4939.08(A) covers this situation:

Nothing in sections 4939.01 to 4939.07 of the Revised Code applies to . . . any agreement with a public utility . . ., for the balance of its term, if the . . . agreement meets all of the following:

- (1) The . . . agreement was authorized by ordinance or otherwise and was entered into, by a municipal corporation prior to the effective date of this section.
- (2) The . . . agreement authorizes the occupation or use of public ways.
- (3) The public utility agrees with the applicable public way fees . . .

Although AT&T Communications is now complaining about the public way fees that may be applicable to it, the Commission does not believe that the company can be disagreeing with the one-time fees that it paid under these two agreements almost 20 years ago. Thus, this provision requires the Commission to find that Chapter 4939 is not applicable to the agreements between AT&T Communications and Toledo. However, the Commission believes that AT&T Communications may be currently providing local exchange service in Toledo even though it does not own facilities in the public way⁵ or may be the assignee of AT&T Corp.'s permit to install. It is the Commission's hope that the parties can mutually determine whether AT&T Communications should be a party to this action on the basis of this discussion. If they cannot, then, unless the telecom complainants provide to the Commission evidence showing that either of these situations is true, within five business days following the date of this entry, the motion to dismiss this complainant will be granted.

The Commission's records show that TCG Ohio is currently authorized to provide local telephone service in Toledo. However, the telecom complainants have not alleged that it is doing so. The Commission does not believe that the telecom complainants have provided any argument that is sufficient to show that TCG Ohio is currently affected by the passage of the ordinance or will be affected by the passage of the ordinance. There is no claim that this company has any permit issued by Toledo, that it is using the facilities of others to provide service in Toledo, or that it intends to provide service in Toledo. It is the Commission's hope that the parties can mutually determine whether TCG Ohio should be a party to this action on the basis of this discussion. If they cannot then, unless the telecom complainants provide to the Commission evidence showing that TCG Ohio is doing business in the city of Toledo, within five business days following the date of this entry, the motion to dismiss this complainant will be granted.

⁵ On page 17 of Complainants' Memorandum Contra Motion to Dismiss of the City of Toledo, the telecom complainants make reference to one of the AT&T complainants providing local exchange service without owning facilities. They do not specify which entity is so operating.

The Commission does not believe that the telecom complainants have provided any argument that is sufficient to show that MCI Communications is currently affected by the passage of the ordinance or will be affected by the passage of the ordinance. There is no claim that this company has any permit issued by Toledo, that it is using the facilities of others to provide service in Toledo, or it intends to provide service in Toledo. Therefore, Toledo's motion to dismiss MCI Communications will be granted.

WorldCom, Inc. will be allowed to remain as a party to this action as it filed its complaint on behalf of its subsidiaries. Therefore, Toledo's motion to dismiss WorldCom, Inc. will be denied.⁶

- (17) Toledo contends in its final ground for dismissal of the complaint filed by the telecom complainants that, pursuant to TMC Section 945.06(A), any company (other than those that have obtained a telecommunications permit to operate under TMC Chapter 717 who are not required to obtain a permit at this time) "that seeks to occupy or use the public right of way for the installation, operation or maintenance of facilities shall apply for and obtain a right of way permit from the Director of Public Utilities." Toledo argues that all of the complainants, other than Brooks Fiber and KMC Telecom who possess telecommunications permits to operate under Chapter 717, should be dismissed from this proceeding because they have failed to file applications for right-of-way permits. The city believes that any person illegally occupying its right of way has no standing to challenge the ordinance that it is violating.

The telecom complainants argue that Toledo provides no legal precedent or support for its position. The telecom complainants contend that a party does not have to come into compliance with an unlawful ordinance before it can have standing to challenge it.

The Commission finds no merit to Toledo's argument. The telecom complainants are merely exercising their rights granted by Chapter 4939, Revised Code, in appealing the ordinance to

⁶ Similarly, even if the telecom complainants show that the permit to install which was granted to AT&T Corp. was actually assigned to AT&T Communications, AT&T Corp. will not be dismissed because it filed its complaint on behalf of its subsidiaries.

the Commission. This portion of the telecom motion to dismiss shall be denied.

- (18) Toledo raised six grounds for dismissal in its electric motion to dismiss. The electric complainants filed their complaint pursuant to Sections 4939.06, 4905.26, and 4909.34, Revised Code, and requested, among other things, that the Commission find, pursuant to Sections 4939.06(B) and 4905.26, Revised Code, that reasonable grounds for complaint have been stated and suspend the public way fee provisions of the Toledo ordinance for the duration of the Commission's consideration of the complaint.

In its first ground for dismissal, Toledo contends that no basis exists for the electric complainants to challenge the Toledo ordinance under Section 4905.26, Revised Code. The city argues that Section 4905.26, Revised Code, sets forth only two instances under which jurisdiction can be vested in the Commission: (1) a complaint against a public utility or (2) a complaint by a public utility as to any matter affecting its product or service. Clearly, the first instance does not apply because Toledo is not a public utility. Toledo contends that the second instance is not applicable because the complaint does not mention any product or service that is affected by the right-of-way ordinance.

Section 4939.06(A), Revised Code, states that a complaint filed pursuant to Section 4939.06, Revised Code, is subject to the same procedures as a complaint filed pursuant to Section 4905.26, Revised Code. The electric complainants contend that that alone is a sufficient basis for bringing the case under Section 4905.26, Revised Code. The electric complainants also argue that ordinances that affect how much it will cost a public utility to keep its facilities in the public right of way and under what circumstances the utility must remove its facilities from the right of way unquestionably affect the utility's service and justify bringing this complaint under Section 4905.26, Revised Code. According to the electric complainants, there are limits on a municipality's authority under Section 3, Article XVIII of the Ohio Constitution, and Toledo's view of its authority is too broad and is inconsistent with legislative enactments and case law. Finally, the electric complainants contend that where a municipality attempts to dictate the manner and cost of service to be provided by a public utility, the Commission has

jurisdiction to hear the case under Section 4905.26, Revised Code.

The Commission notes that the electric complainants fail to reference Section 4905.26, Revised Code, in any of the 11 counts of their complaint. The Commission disagrees with the electric complainants that the mere fact that a complaint filed pursuant to Section 4939.06, Revised Code, is subject to the same procedures as a complaint filed pursuant to Section 4905.26, Revised Code, is a sufficient basis for bringing its complaint under Section 4905.26, Revised Code. Issues related to the costs of a utility to keep its facilities in the public right of way that are created by an ordinance are related to the filing of a complaint pursuant to Section 4939.06, Revised Code, and do not, as argued by the electric complainants, justify a filing a complaint pursuant to Section 4905.26, Revised Code. With regard to issues concerning under what circumstances the utility must remove its facilities from the right of way, the electric complainants have provided no examples of language in the ordinance that would indicate that Toledo would not comply with the statutes and case law related to abandonment of facilities. Regardless, these are matters related to Sections 4905.20 and 4905.21, Revised Code, and not Section 4905.26, Revised Code. Based upon the arguments presented, the Commission agrees with Toledo that the electric complainants have presented no basis to justify a challenge of ordinance 375-02 under Section 4905.26, Revised Code.

- (19) Toledo next argues that the electric complainants may not challenge the right-of-way ordinance under Section 4909.34, Revised Code. The electric complainants have requested that the Commission find that, pursuant to Section 4939.06(C), Revised Code, and, where applicable, Section 4909.34, Revised Code, that the provisions of ordinance 375-02 discussed in its complaint are unreasonable, unjust, unjustly discriminatory, and unlawful. Section 4909.34, Revised Code, authorizes a municipal corporation, by passing an ordinance, to fix the price or rate that a public utility may charge for any commodity, utility, or service. The same section authorizes a public utility to file a complaint with the Commission concerning the ordinance. Toledo argues that ordinance 375-02 does not fix any rates that the electric complainants may charge for their services.

Toledo contends that, even if the electric complainants have jurisdiction to file an appeal under Section 4909.34, Revised Code, they have failed to comply with the applicable statutes and Commission rule. Section 4909.38, Revised Code, provides, in relevant part, that any complaint or appeal to the Commission under division (A) of Section 4909.34, Revised Code, shall meet the requirements of and be governed by Sections 4909.17 through 4909.19, Revised Code. Section 4909.18, Revised Code, provides, among other things, that certain financial and plant records be filed with an application for an increase in rates, unless otherwise ordered by the Commission. Rule 4901-7-01, Ohio Administrative Code (O.A.C.), requires that all complaints filed by a public utility under Section 4909.34, Revised Code, shall conform to the Commission's Standard Filing Requirements for applications to increase rates. Toledo contends that the electric complainants have failed to comply with either the statutes or the Commission's rule, or to request a waiver, and that therefore they have no basis for appeal under Section 4909.34, Revised Code.

The electric complainants contend that the Toledo ordinance addresses the amount that the electric complainants may charge Toledo for various services, such as pole holding and removal and relocation of facilities. The electric complainants state that the charge permitted by the ordinance for those services is zero, whereas the tariff of Toledo Edison Company provides that pole holding and removing or relocating facilities are special services that shall be paid by the customer for whom such services are furnished. Consequently, the electric complainants argue that the Commission does have jurisdiction to hear their complaint pursuant to Section 4909.34, Revised Code.

The electric complainants state that their failure to file the standard filing requirements is not fatal to their request. Because the issue only involves charges for utility service to a single customer, the Commission could waive the filing requirement. Even though Rule 4901-7-01, O.A.C., requires that the waivers must be obtained before the complaint is filed, the electric complainants state that the Commission is not required to reject a filing that does not comply with the requirements.

The Commission will grant this portion of Toledo's motion. The electric complainants have greatly oversimplified the process.

A complaint filed pursuant to Section 4909.34, Revised Code, requires that the Commission, pursuant to Sections 4909.19 and 4909.38, Revised Code, cause an investigation to be made of the facts set forth in the complaint and a written report of the investigation to be made. The electric complainants have provided no information, i.e., the standard filing requirements or a reasonable alternative, that could serve as the starting point for such an investigation. While the electric complainants have argued that the Commission could grant a waiver of the filing requirements, they acknowledge that they failed to timely request such a waiver and, even today, there has been no waiver request filed. In addition, because of the time constraints imposed by Section 4939.06(A), Revised Code, it would be extremely difficult for the Commission to consider fully a complaint proceeding brought pursuant to Section 4909.34, Revised Code, concurrently with a complaint brought pursuant to Section 4939.06, Revised Code.

- (20) In the third ground of its electric motion to dismiss, Toledo argues that Chapter 4939, Revised Code, does not authorize the Commission to hear a challenge to the city's management, regulation, and administration of its right of way. Section 4939.04(B), Revised Code, provides:

The management, regulation, and administration of a public way by a municipal corporation with regard to matters of local concern shall be presumed to be a valid exercise of the power of local self-government granted by Section 3 of Article XVIII of the Ohio Constitution.

The city argues that several issues raised by the electric complainants exceed the scope of the Commission's authorized review which the city contends is limited by Section 4939.06(A), Revised Code, to challenges of (a) the amount of a public way fee, (b) any related classification of public way occupants or users, or (c) the assignment or allocation of costs to the public way fee. Toledo contends that the following issues raised by the electric complainants involve matters related to Toledo's management, regulation, and administration of its right of way and that the Commission lacks statutory authority to decide the disputes. We will address each of the issues separately.

- (a) Conflict between ordinance and tariff (Count IV of the electric complainants' complaint)

TMC Section 945.04(a) requires permit holders to conform to the requirements of the ordinance and right-of-way permit "and, where applicable and not in conflict with this chapter, according to approved tariffs, filings, or regulations of any other regulatory agency having jurisdiction over the facilities." Toledo contends that Section 4939.04, Revised Code, authorizes a municipality to manage, regulate, and administer its right of way pursuant to its home rule powers. The only exceptions are those carved out in Section 4939.06, Revised Code, relating to right-of-way fees and the classification of right-of-way users. The electric complainants argue that the Commission has an interest in seeing that Toledo Edison's Commission-approved tariffs are applied consistently throughout Toledo Edison's service territory and, therefore, in case of a conflict between Toledo's ordinance and the Commission-approved tariffs, the tariffs would control.

The Commission agrees with Toledo that this issue is not related to the amount of a public way fee, the classification of public way occupants, or the allocation of costs to the public way fee and is, therefore, not a proper subject of a Section 4939.06, Revised Code, complaint. We will grant this portion of the city's electric motion to dismiss. However, we would note that the Commission has, where required, approved the tariffs of each public utility, that the tariffs include all rates and charges for service of every kind furnished by it (Section 4905.30, Revised Code), that the approved tariffs are on file at the Commission (Section 4905.30, Revised Code), and that no public utility shall charge a different rate or charge for any service rendered (Section 4905.32). We are also mindful that Section 4905.34, Revised Code, does not prohibit a public utility from granting reduced rates or free service to any political subdivision of the state. Thus, while we are willing to grant Toledo's motion to dismiss on this issue, we are not conceding that in the event of a conflict between a Toledo ordinance and a public utility's tariff that the Toledo ordinance is always controlling. One need only look to the Commission's

authority to establish rates in opposition to a municipally approved ordinance if the ordinance is found to have established rates that are unjust or unreasonable (Section 4909.39, Revised Code). Nor are we conceding that an ordinance that requires a public utility to incur excessive costs would not result in our approval of a request from a public utility in a rate case proceeding to collect such costs from the customers within the municipality rather than from all customers of the utility.

- (b) The requirement that public utilities relocate, hold, or remove facilities at their own expense (Count V, VI, and VIII)

TMC Section 945.10 requires that owners and operators of facilities in the city's right of way shall relocate, hold, or remove such facilities, at their own expense, when the city determines it reasonably necessary. Toledo contends that relocating, holding, or removing facilities is not a utility product or service. In addition, Toledo claims that the electric complainants are already subject to the 1999 ordinance which approved TMC Section 947.07, that also requires electric companies to temporarily or permanently remove, relocate, change, or alter the position of any utility facility at no cost to the city. Because that section predates Chapter 4939, Revised Code, Toledo contends that it is not subject to Commission review. Finally, Toledo contends that requiring the relocation, holding, or removal of facilities is a function of local self-government that is beyond the Commission's jurisdiction.

The electric complainants argue that the requirement that they must hold their poles or relocate or remove their facilities, without compensation, at Toledo's direction falls within the scope of Section 4939.05(A), Revised Code, which provides, in relevant part, that "[a] municipal corporation shall not require any nonmonetary compensation or free service, or levy any tax, for the right or privilege to occupy or use a public way" Because these issues are within the scope of Section 4939.05(A), Revised Code, the electric complainants contend that the Commission may review.

The Commission again agrees with Toledo that this issue is not related to the amount of a public way fee, the classification of public way occupants, or the allocation of costs to the public way fee and is, therefore, not a proper subject of a Section 4939.06, Revised Code, complaint. The Commission is not determining that Toledo is not requiring nonmonetary compensation or free service, only that the issue is beyond the Commission's jurisdiction.

- (c) The requirement that any right that Toledo had prior to the enactment of Chapter 4939, Revised Code, to install and maintain its facilities on utility poles free of charge shall continue in effect unless extinguished by a court of competent jurisdiction (Count VII)

Toledo initially states that the electric complainants do not disclose that Toledo even has any right to install facilities on their poles. In the absence of such a claim, there is no controversy for the Commission to decide. The city also states that any such rights that pre-date the enactment of Section 4939, Revised Code, are beyond the Commission's jurisdiction. The electric complainants only argued that any attempt by Toledo to preserve any right that it had prior to the enactment of Chapter 4939, Revised Code, to install and maintain facilities on their poles raises compensation and subsidization issues which are within the scope of the Commission's review.

The Commission agrees with Toledo. To the extent that such rights pre-date the enactment of Chapter 4939, Revised Code, they are beyond the Commission's jurisdiction.

- (d) The requirement that public utilities file annual reports with Toledo (Count IX)

Toledo requires that each permit holder shall submit an annual report that provides (a) a description of facilities with a value of \$10,000 or more that have been installed or removed, (b) a description of the economic development efforts within the city made by the permit holder, and (c) the permit holder's plans pertaining to future use of the right or way. The electric complainants contend that the reporting requirement will be costly,

which should be a matter of general concern, and is outside the scope of the fees that may be imposed pursuant to Chapter 4939, Revised Code. Toledo contends that reports relating to the use of the right of way are beyond the scope of Commission review. We agree.

- (e) Toledo's ability to impose penalties and fines for violations of its right-of-way provisions (Count XI)

Toledo has established fines and criminal penalties to be imposed on those who violate the right-of-way ordinance. The electric complainants contend that the penalties are outside the scope of the fees that may be imposed pursuant to Chapter 4939, Revised Code. Toledo contends that the penalties are related to its authority to manage, regulate, and administer its right of way. We agree.

- (21) Toledo's fourth ground for dismissal relates to the electric complainants' IV, V, VI, VII, VIII, IX, and XI counts in their complaint based upon arguments related to home rule authority. Inasmuch as we have already agreed with Toledo that those counts should be dismissed, there is no need to discuss this ground.
- (22) Toledo's fifth ground for dismissal is based upon an agreement between Toledo and Toledo Edison in which Toledo Edison allegedly agreed to the passage of an ordinance that enacted TMC Chapter 947, which governs the use of the right of way in a manner similar to ordinance 375-02. Toledo contends that the electric complainants are asking the Commission to issue a ruling on certain provisions in TMC Chapter 945 knowing that, regardless of the outcome, they will still be subject to similar provisions in Chapter 947.

The electric complainants contend that what Toledo Edison may have agreed to, as part of an overall agreement, is irrelevant to what Toledo may lawfully impose in an ordinance. The electric complainants point out that "pole holding" (Count V) was not addressed in TMC Chapter 947 and that, regardless of the effect of TMC Chapter 947 on Toledo Edison as a result of the agreement with Toledo, the chapter is not applicable to American Transmission.

Toledo contends that only Counts V, VI, VIII, and IX are included in this portion of its electric motion to dismiss. The electric complainants did not disagree. The Commission has already agreed with Toledo that such counts should be dismissed.

- (23) In its sixth ground for dismissal, Toledo argues that the Commission does not have jurisdiction to hear the challenge of American Transmission to the right-of-way ordinance. Toledo contends that Section 4939.06, Revised Code, permits public utilities to file appeals with the Commission challenging a public way fee created by a municipal ordinance. A public utility is defined in Section 4939.01(D), Revised Code, as follows:

"Public utility" means any company described in section 4905.03 of the Revised Code except in divisions (A)(3) and (10) of that section, which company also is a public utility as defined in section 4905.02 of the Revised Code; and includes any electric supplier as defined in section 4933.81 of the Revised Code.

Toledo admits that for purposes of its motion, the only question is whether American Transmission falls under the definition of "electric light company" set out in Section 4905.03, Revised Code. Section 4905.03(A)(4), Revised Code, provides:

An electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission.

The Commission has already determined that American Transmission is a public utility subject to its jurisdiction and has required that the company have a tariff on file with the Commission. See *In the Matter of the Application of The FirstEnergy Operating Companies for Approval of the Transfer of Their Transmission Assets to American Transmission Systems, Inc.*, Case No. 98-1633-EL-UNC (February 17, 2000). Because American Transmission is a public utility as defined by Section

4905.03, Revised Code, this portion of Toledo's electric motion to dismiss will be denied.

- (24) Toledo's final argument in both of its motions to dismiss is that the Commission should not suspend Toledo's public way fee at this time. Division (B) of Section 4939.06, Revised Code, provides:

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 complaint filed not later than thirty 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.

In support of its argument, Toledo references many of the same arguments made in its motions to dismiss and references information allegedly provided by Toledo to the complainants while the city was considering the ordinance. The telecom complainants and the electric complainants contend that they have provided sufficient allegations in their complaints for the Commission to find reasonable grounds for complaint.

The Commission agrees with the complainants that reasonable grounds for complaint have been stated. Therefore, this matter shall proceed to hearing. At the request of the telecom complainants, the Commission's attorney examiner has already issued an entry establishing a procedural schedule for the two complaint cases, which have been combined for hearing. Because reasonable grounds for complaint have been found,

division (B) of Section 4939.06, Revised Code, requires that the Commission suspend the public way fee provisions established by ordinance 375-02 for the duration of its consideration of the complaints.

- (25) Toledo, in its reply memorandum in Case No. 02-3207-AU-PWC, argued that Chapter 4939, Revised Code, cannot apply retroactively to TMC Chapter 717. In the memorandum in support of their motion to strike and alternative surreply, the telecom complainants argue that this is a new ground for dismissal and that, therefore, either it should be stricken from the reply or they should be allowed an opportunity to respond to the argument. The Commission is finding that TMC Chapter 717 was materially modified by ordinance 375-02 and that therefore Chapter 4939, Revised Code, applies. As a result, the argument regarding retroactivity and this motion by the telecom complainants are both moot.
- (26) On January 16, 2003, Benita A. Kahn, an attorney licensed to practice law in the State of Ohio, representing AT&T Corp. and its subsidiaries in this matter, filed a motion for the admission pro hac vice of T. Scott Thompson, Esq. and James W. Tomlinson, Esq., both of whom are attorneys in good standing and are licensed to practice in the District of Columbia. The motion requests permission from the Commission for such attorneys to appear and participate as counsel in Case No. 02-3207-AU-PWC on behalf of AT&T Corp. and its operating subsidiaries. There is no opposition to this motion and the Commission sees no reason not grant it. The motion will be granted.

It is, therefore,

ORDERED, That Toledo's motion for an extension to file its answers to the complaints filed by the telecom complainants and the electric complainants be granted. It is, further,

ORDERED, That Toledo's motion to dismiss MCI Communications as a complainant in Case No. 02-3207-AU-PWC be granted. It is, further,

ORDERED, That no action be taken at this time with regard to Toledo's motion to dismiss AT&T Communications or TCG Ohio as complainants in Case No. 02-3207-AU-PWC. It is, further,

ORDERED, That Toledo's motion to dismiss Count V in Case No. 02-3207-AU-PWC be granted. It is, further,

ORDERED, That Toledo's request to dismiss the claims brought pursuant to Sections 4905.26 and 4909.34, Revised Code, in Case No. 02-3210-EL-PWC be granted. It is, further,

ORDERED, That Toledo's request to dismiss Counts IV, V, VI, VII, VIII, IX, and XI in Case No. 02-3210-EL-PWC be granted. It is, further,

ORDERED, That the remainder of Toledo's telecom motion to dismiss and electric motion to dismiss be denied. It is, further,

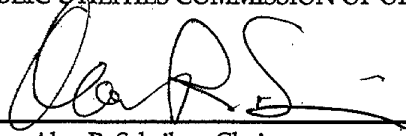
ORDERED, That the fee provisions of Toledo Ordinance 375-02 are suspended until otherwise ordered by the Commission. It is, further,

ORDERED, That the Motion for Admission Pro Hac Vice of T. Scott Thompson and James W. Tomlinson in Case No 02-3207-AU-PWC be granted. It is, further,

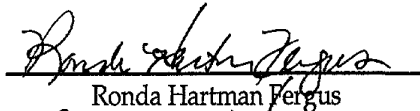
ORDERED, That ICG Telecom be dismissed as a party to Case No. 02-3207-AU-PWC, pursuant to its request.

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

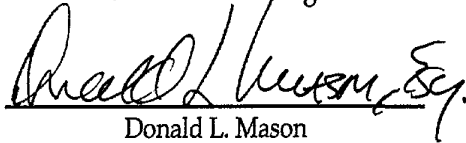


Alan R. Schriber, Chairman



Ronda Hartman Fergus

Judith A. Jones



Donald L. Mason

Clarence D. Rogers, Jr.

PJD/JWK;geb

Entered in the Journal

FEB 13 2003



Renee J. Jenkins
Secretary