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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Complaint of WorldCom, Inc., AT&T Corp., KMC Telecom III, LLC, and LDMI Telecommunications, Inc.,	:	
Complainants,	:	
v.	:	Case No. 02-3207-AU-PWC
City of Toledo,	:	
Respondent.	:	
The Toledo Edison Company and American Transmission Systems, Inc.,	:	
Complainants,	:	
v.	:	Case No. 02-3210-EL-PWC
City of Toledo,	:	
Respondent.	:	

TELECOM COMPLAINANTS' REPLY BRIEF TO AMICUS BRIEF OF THE CITY OF CLEVELAND

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I. INTRODUCTION

The City of Cleveland filed an *amicus* brief in this matter in support of the initial post-hearing brief of respondent City of Toledo. In its brief, Cleveland advances two arguments. First, Cleveland argues that Chapter 4939, Revised Code, does not require a municipality to charge public way fees based on a specific accounting of the additional costs it incurs with respect to individual users. Second, Cleveland asserts that the Commission lacks jurisdiction to take any action with respect to Toledo's unlawful public way fee, other than allow rate-regulated utilities to pass the unlawful portion of the fee through to subscribers in Toledo. As explained below, neither of Cleveland's assertions is correct.

II. SECTION 4939.05 MANDATES THAT PUBLIC WAY FEES BE BASED ON A SPECIFIC ACCOUNTING OF THE COSTS ACTUALLY INCURED AND PROPERLY ALLOCATED TO THE COST CAUSER

A. Municipalities Must Establish More Than That Their Public Way Fees Are "Reasonable"

While Cleveland's first argument is styled as an attack on the concept of direct billing actually incurred and tracked costs, the heart of Cleveland's argument, and its fundamental flaw, is the assertion that the statute merely requires public way fees to be "reasonable." [*See, e.g.*, Cleveland Brief at 1 ("A municipality must only set its fees reasonably"); 3 ("The Commission should only require reasonableness of the City of Toledo as directed by the statute")]. The plain language of Section 4939.05(C) demonstrates that Cleveland is grossly misstating the requirements of the statute, and that the various "reasonable fee" cases cited by Cleveland are inapt.

Section 4939.05(C) clearly states that municipal public way fees "shall be based only on costs that the municipal corporation both has actually incurred and can clearly demonstrate are or can be properly allocated and assigned to the occupancy or use of a public way." There is no

"reasonableness" standard involved. The fee cannot exceed the costs both "actually incurred" and that can be "clearly demonstrate[d] are or can be properly allocated and assigned to the occupancy or use of the public way." Indeed, the plain language of the statute does require the mathematical accuracy that Cleveland decries. To have been "actually incurred," costs cannot be based on estimates of past costs. Mr. Pocalyko, an expert in municipal accounting, testified that to be recoverable as "actually incurred," the City must have tracked and accounted for the specific costs. (Pocalyko Direct, Telecom Ex. 3, at 15). Similarly, to qualify as "actually incurred," the costs cannot be forward looking or based on projections. By definition, they would not be "actually incurred" under such approaches.

The only element of "reasonableness" in Section 4939.05(C) is in the requirement that "The costs shall be *reasonably and competitively neutrally* allocated among all persons occupying or using public ways. . . ." (Emphasis added). And as the plain language shows, that reasonableness test applies only to the allocation, and even then, the allocation must go beyond being merely reasonable. It must also be competitively neutral.

The cases cited by Cleveland are completely misplaced and inapplicable to this case. It is of no consequence whether a court found a general municipal fee to be "reasonable" under general standards. In this case, the Ohio legislature has set a specific standard that is more stringent that mere reasonableness. The cases cited by Cleveland tell the Commission nothing about whether Toledo has accurately tracked and identified costs it actually incurred, nor

whether Toledo has clearly demonstrated that such costs are properly allocated to the cities management of the public rights-of-way.[1]

B. Direct Billing Of Cost Causers Clearly Complies With Chapter 4939, Revised Code

In telecom complainants' reply brief, they address in detail why the statute and the factual evidence both lead to the inevitable conclusion that to comply with Chapter 4939, Toledo should track its actual costs incurred, by project and by provider, and then directly bill the specific provider that caused the costs. Telecom complainants briefly summarize the discussion here.

Telecom complainants have explained that a direct bill mechanism is the best way to ensure that a reasonable allocation has been made of costs actually incurred, and in a manner that is competitively neutral. (Telecom Brief at 43). Contrary to the argument by Toledo and Cleveland, Chapter 4939 does contemplate direct billing. Section 4939.05(C) provides that "no public way fee shall include a return on or exceed the amount of costs reasonably allocated by the municipal corporation to ***such occupant or user***. . . ." (Emphasis added). The statute's use of the singular "occupant or user" demonstrates that billing of specific costs to a specific single user is consistent with Chapter 4939. Moreover, as telecom complainants explained previously, direct billing is not only consistent with, but logically dictated by, the mandate of Section 4939.05(C) that the fee be based only on costs that are both "actually incurred" and that can be "clearly demonstrated" to be "properly allocated or assigned." By specifically tracking costs and direct billing the statutory standard can be best satisfied. (*See, e.g.,* Pocalyko Direct, Telecom

[1] Cleveland recognizes that the statute limits municipalities to recovering costs they "incur[] in managing the rights of way." [(Cleveland Brief at 1; *see also* Cleveland Brief at 3 ("cost to the City of Toledo of managing the right-of-way. . . .")]

Ex. 3, at 47). Non-specific costs, like those alleged by Toledo, cannot be "clearly demonstrated" to be "properly allocated" to a user or occupant.

III. THE COMMISSION HAS JURISDICTION TO DECLARE TOLEDO'S FEES UNLAWFUL AND UNENFORCEABLE, AND TO DETERMINE THE LAWFUL FEE

In their Rebuttal Brief, telecom complainants respond in detail to the arguments advanced by Cleveland, as well as Toledo, and the Ohio Municipal League ("OML") that the Commission may not and must not invalidate Toledo's fees or in any way dictate the maximum lawful fee that Toledo may collect. The telecom complainants reiterate that discussion here.

According to the municipal interests, Section 4939.07, which creates a mechanism for pass through to customers by certain utilities is the exclusive remedy available, and indeed, that Chapter 4939, in total, is little more than a mechanism for recovery of public way fees by rate regulated utilities. The position of Cleveland, Toledo and the other municipal interests is clearly wrong.

Chapter 4939, Revised Code, has several specific provisions limiting public way fees. An expressed purpose of Chapter 4939 is to allow cities "to receive *cost recovery* of the occupancy or use of public ways in accordance with law," Section 4939.02(A)(4), Revised Code, (emphasis added), and "to facilitate the resolution of disputes regarding public way fees." Section 4939.02(A)(7), Revised Code. In order to effectuate those goals, the legislature enacted an explicit ***prohibition*** on municipal fees that exceed the cost formula set forth in 4939.05: "A municipal corporation ***shall not*** require any nonmonetary compensation or free service, or levy an tax, for the right to privilege to occupy or use a public way, ***and shall not levy a public way fee except in accordance with this section***." Section 4939.05(A), Revised Code (emphasis added). In addition, in Section 4939.05(C) specifies that "public way fees levied by a municipal

corporation ***shall be based only on costs*** that the municipal corporation both has actually incurred and can clearly demonstrate are or can be properly allocated and assigned to the occupancy or use of a public way." (Emphasis added). The provision further states that "***No public way fee shall include a return*** on or exceed the amount of costs reasonably allocated by the municipal corporation to such occupant or user. . . ." O.R.C. § 4939.05(C) (emphasis added).

Thus, with three separate, specific prohibitions, the Ohio legislature made plain that the general rule is that municipalities, like Toledo, are prohibited from levying the types of fees sought by Toledo through its ordinance.

The legislature also provided aggrieved providers an opportunity to "appeal" the imposition of unlawful public way fees to this Commission. Section 4939.06(A), Revised Code. As part of that process, the legislature empowered the Commission to suspend the fee, even before it is ultimately adjudicated unlawful. O.R.C. § 4939.06(B). Moreover, Section 4939.06(B) permits the municipal corporation to "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.*" (Emphasis added). The legislature would not have adopted specific, prohibitive language, a right of "appeal," provided the Commission power to suspend fees, and permitted the municipality to collect the suspended fee only if it is found lawful, if the legislature intended to ultimately allow municipalities to recover fees regardless of whether they were lawful.

The interpretation advanced by Toledo, OML and Cleveland would utterly nullify the plain language and stated purpose of Chapter 4939, Revised Code. They assert that the entirety of Chapter 4939 was intended solely as a mechanism to allow pass through of unreasonable

public way fees.[2] They rely for their argument entirely on Section 4939.07(B)(2)(a), Revised Code.[3] Section 4939.07, however, is not, as Toledo suggests, the exclusive remedy for unlawful municipal fees.[4] Rather, it provides protection for rate of return rate-regulated entities by allowing them to recover from subscribers in the relevant municipality any unlawful fees that may have been paid prior to the lawful fee being set by the Commission. Indeed, it is an option that need not be used – "a public utility subject the rate-making jurisdiction of the Commission ***may file*** an application. . . ." Section 4939.07(B)(1), Revised Code (emphasis added).

Moreover, Section 4939.07 clearly would be of no assistance to utilities, like telecom complainants. Section 4939.07 applies, on one level, to utilities that are "subject to the rate-making jurisdiction of the Commission," but the details of the Section clarify that it is only meaningful to utilities, such as Toledo Edison, that are subject to rate of return rate-making limitations.[5] For example, Section 4939.07(B)(1) permits recovery of a public way fee levied

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[2] Cleveland again focuses on "reasonableness" as the standard. In so doing, it is consciously ignoring the fact that a public way fee that exceeds a city's costs actually incurred is not "unreasonable," it is "*unlawful*."

[3] OML spends several pages advancing its version of the history of Chapter 4939 as a mechanism to fix a previous statute that was held to violate Home Rule by the Court of Common Pleas. According to OML, only by reading Section 4939.07 as the sole operable provision of Chapter 4939 can the statute avoid violating municipal Home Rule authority. However, none of OML's version of the purpose and intent of Section 4939.07 is supported by any citable sources, and as a result must be ignored. As discussed elsewhere in this brief, the Commission does not have jurisdiction to pass on the question of whether Chapter 4939 conflicts with Home Rule powers, as Toledo and the other municipal interests suggest.

[4] Toledo's citation to and quote of the Legislative Service Commission analysis of S.B. 255 is not persuasive. (Toledo Brief at 54). The analysis quoted by Toledo merely paraphrases the statutory language, and provides no meaningful insight into the legislative intent. The analysis could just as easily be cited and quoted in the places where it emphasizes that public way fees that are not limited to the costs actually incurred are prohibited. (Am. Sub. S.B. 255 Legislative Service Comm'n at 6).

[5] It is not surprising that Toledo Edison would accede to the theory that Section 4939.07 is the exclusive remedy for violation of the Chapter, as noted by Toledo. (Toledo Brief at 54). Section

"after the test year of the public utility's most recent rate proceeding. . . ." And Section 4939.07(D)(1) permits classification of a cost as "a regulatory asset for purposes of recovering that cost." Test years, rate proceedings, and recovery of regulatory assets are not issues applicable to utilities, like AT&T and WorldCom. Thus, Section 4939.07 clearly is not the exclusive remedy available to the Commission.

It would twist the statute beyond meaning to suggest that a provision addressing subscriber rate setting for monopoly rate of return utilities can effectively eliminate the general prohibition on municipal fees in excess of costs set forth in Section 4939.05, Revised Code. Indeed, that appears to be their point. The argument made by Cleveland, Toledo and OML appears to be "as long as utilities get to pass it through to customers, who cares if cities break the law." In that argument, they seek to make a mockery of the legislature's authority, and of the authority of the Commission.

While the statute may not be the model of legislative clarity, the Commission must read the statute in a manner that gives meaning and effect to every provision, and avoids eliminating a provision – particularly a key substantive provision. *Caldwell v. State of Ohio*, 115 Ohio St. 458, 461-62; 154 N.E. 792, 793 (Ohio 1926); *Brooks v. Ohio State Univ.*, 111 Ohio App.3d 342, 249; 676 N.E.2d 162, 166 (10th Dist. Franklin Co. 1996); Norman J. Singer, SUTHERLAND ON STATUTORY CONSTRUCTION (6th Ed. 2000) § 46.05 ("each part or section [of a statute] should be

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4939.07 was advanced by the monopoly utilities to protect their sole interest—pass through to the rate base. As monopolies, they are ultimately unconcerned if their rates increase as a result of a municipal fee, just so long as they are able to recover it from the rate payers. Competitive providers, however, like telecom complainants, do not have such luxury. Their smaller subscriber base makes it impossible for them to simply pass through to subscribers tens of thousands of dollars of extra cost imposed by the municipality, as their subscribers in the city might simply leave them for another company (for example a reseller that is not subject to the fee).

construed in connection with every other part or section so as to product a harmonious whole.") (Footnotes omitted.). The theory advanced by Toledo, OML, and Cleveland would turn this axiom on its head, giving expansive meaning to one section in order to nullify the substantive bulk of the statute. Accordingly, this theory must be rejected.

Contrary to the assertions by Toledo, OML, and Cleveland, Section 4939.06 clearly gives the Commission authority to declare that Toledo's public way fee is unlawful under the standards of Section 4939.05(C). And it not only permits, but mandates that the Commission then determine the lawful public way fee. O.R.C. § 4939.06(C). Accordingly, the remedies sought by telecom complainants are all fully within the Commission's specific, statutory jurisdiction.

IV. CONCLUSION

The arguments advanced by Cleveland should come as no surprise. As viewed by Cleveland and other municipalities, public way fees are a potential cash cow. As Toledo Edison's witness, Dr. Aron, testified, municipalities have monopoly power over access to the public rights-of-way, and absent legislative restraint, they could impose unbridled, burdensome fees. (Aron Direct, TE Ex. 39, 11). The same point has been made by the United States Court of Appeals for the Second Circuit. *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 79 (2d Cir. 2002), *cert denied*, No. 02-1062, Order List: 538 U.S. __, (Monday, March 24, 2003) (available online at www.supremecourtus.gov/orders/courtorders/032403pzor.pdf). That is precisely why the Ohio legislature has made a point of adopting legislation to restrict municipal public way fees, and to prevent municipalities from looking at companies building out modern telecommunications and electric infrastructures as captive rate payers to be loaded down with excessive, revenue-generating fees.

The arguments advanced by Cleveland are self-serving and unsupported, and for the reasons set forth above and in telecom complainants' initial and rebuttal briefs, they should be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following parties by regular mail, postage prepaid, by fax, by overnight courier, by electronic mail, or by a combination of these methods, this 1st day of April 2003.

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