

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

Appeal from the Michigan Court of Appeals  
Donald S. Owens, Jane E. Markey, Deborah A. Servitto

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*In re* APPLICATION OF MICHIGAN ELECTRIC  
TRANSMISSION COMPANY FOR  
TRANSMISSION LINE

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CHARTER TOWNSHIP OF OSHTEMO,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION  
and MICHIGAN ELECTRIC TRANSMISSION  
COMPANY, LCC,

Appellees.

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Supreme Court Case No. 150695

Court of Appeals Case No. 317893

MPSC Case No. U-17041

**AMICI CURIAE SUPPLEMENTAL BRIEF OF  
MICHIGAN TOWNSHIPS ASSOCIATION, MICHIGAN MUNICIPAL LEAGUE, AND  
PUBLIC CORPORATION LAW SECTION OF THE STATE BAR OF MICHIGAN IN  
SUPPORT OF APPELLANT CHARTER TOWNSHIP OF OSHTEMO**

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Dated: October 17, 2016

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**STATEMENT OF QUESTION PRESENTED**

WHETHER ELECTRIC TRANSMISSION FACILITIES LOCATED WITHIN PUBLIC RIGHTS OF WAYS ARE PUBLIC UTILITY FACILITIES UNDER THE PURVIEW OF A LOCAL MUNICIPALITY'S CONSTITUTIONAL CONSENT AUTHORITY AS PROVIDED FOR IN ARTICLE VII, SECTION 29 OF THE MICHIGAN CONSTITUTION OF 1963.

The Michigan Court of Appeals did not consider:

Appellees METC and MPSC answered at oral argument: "No".

Appellant Township answered at oral argument: "Yes".

Amici Curiae answer: "Yes".

## STATEMENT OF INTEREST OF AMICI CURIAE

The Michigan Townships Association is a Michigan nonprofit corporation whose membership consists of in excess of 1,235 townships within the State of Michigan joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws of the State of Michigan. The Michigan Townships Association, established in 1953, is widely recognized for its years of experience and knowledge with regard to municipal issues. Through its Legal Defense Fund, the Michigan Townships Association has participated on an amicus curiae basis in numerous state and federal cases presenting issues of statewide significance to Michigan townships.

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 521 Michigan local governments, of which 478 are also members of the Michigan Municipal League Legal Defense Fund (the “Legal Defense Fund”). The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance. This supplemental brief amicus curiae is authorized by the Legal Defense Fund’s Board of Directors.<sup>1</sup>

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<sup>1</sup> The Board of Directors’ membership includes: Rosalyn Bliss, President of the Michigan Municipal League and Grand Rapids Mayor; Daniel P. Gilmartin, MML CEO/Executive Director; and the officers and directors of the Michigan Association of Municipal Attorneys: Clyde J. Robinson, City Attorney, Kalamazoo; John C. Schrier, City Attorney, Muskegon; Lori Grigg Bluhm, City Attorney, Troy; Eric D. Williams, City Attorney, Big Rapids; James J. Murray, City Attorney, Boyne City and Petoskey; Robert J. Jamo, City Attorney, Menominee; Thomas R. Schultz, City Attorney, Farmington and Novi; Lauren Tribble-Laucht, City Attorney, Traverse City; Ebony Duff, City Attorney, Traverse City; Steven D. Mann, City Attorney, Milan; and William C. Mathewson, General Counsel, Michigan Municipal League.

The Public Corporation Law Section of the State Bar of Michigan is a voluntary membership section of the State Bar of Michigan, comprised of approximately 610 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. Although the Section is open to all members of the State Bar, its focus is centered on the laws, regulations, and procedures relating to public law. The Public Corporation Law Section provides education, information and analysis about issues of concern to its membership and the public through meetings, seminars, the State Bar of Michigan website, public service programs and publications. The Public Corporation Law Section is committed to promoting the fair and just administration of public law. In furtherance of this purpose, the Public Corporation Law Section participates in cases that are significant to governmental entities throughout the State of Michigan. The Section has filed numerous Amicus Curiae briefs in state and federal courts.

The Public Corporation Law Section Council, the decision-making body of the Section, is currently comprised of 21 members. The filing of this Amici Curiae Supplemental Brief was authorized at an October 11, 2016 special meeting of the Council held in accordance with Section 6.2.3 and Section 6.2.5 of the Council's Bylaws. A quorum of the Council was present at the meeting (15 members), and the motion passed unanimously, 13-0 (Ayes: C. Mish, S. Joppich, C. Rosati, M. Nettleton, D. Walling, J. Tamm, M. Fales, A. Forbush, J. Sluggett, K. So, C. McKone, G. Stremers, and E. Williams; Nays: None). Not voting: L. Bluhm, G. Fisher, B. Hollowell, C. Mullhaupt, S. Schultz, and K. Zeits. M. Watzka and M. McGee abstained from consideration of and voting on the motion.

The position expressed in this Amici Curiae Supplemental Brief is that of the Public Corporation Law Section only and is not the position of the State Bar of Michigan.

Proper resolution of this case is of major importance to municipalities across the State, their citizens and constitutional jurisprudence. The importance of this case cannot be understated as it involves core legal principles regarding interpretation and application of the Michigan Constitution. Specifically, the issue is the constitutional authority granted by the electorate to local municipalities requiring a public utility to get consent of the local municipality for use of the public rights of way therein.

Amici Curiae have participated in this case to date through the filing of Amici briefs. Following oral argument on October 5, 2016, this Honorable Court ordered supplemental briefs to be filed by the parties with regard to the meaning of “public utility” as used in Article VII Section 29 of the Michigan Constitution of 1963. This Amici Curiae Supplemental Brief is being offered to edify and assist this Honorable Court with regard to the determining whether electric transmission facilities are public utilities under said Article VII Section 29.



## ARGUMENT

ELECTRIC TRANSMISSION FACILITIES LOCATED WITHIN PUBLIC RIGHTS OF WAYS ARE PUBLIC UTILITY FACILITIES UNDER THE PURVIEW OF A LOCAL MUNICIPALITY'S CONSTITUTIONAL CONSENT AUTHORITY AS PROVIDED FOR IN ARTICLE VII, SECTION 29 OF THE MICHIGAN CONSTITUTION OF 1963.

### A. STANDARD OF REVIEW

The issues addressed herein involve questions of constitutional interpretation and questions concerning a statute's constitutionality, which are reviewed *de novo*.<sup>2</sup>

### B. FRAMEWORK FOR ANALYSIS

The supplemental question raised during oral argument highlights the jurisprudential importance of this case regarding constitutional analysis. During oral argument there was much discussion regarding the separate definitions of electric utility and transmission company as set forth in the subject Electric Transmission Line Certification Act.<sup>3</sup> It was intimated that the distinctions in these definitions may suggest that transmission company facilities are not "public utility" facilities under Article VII, Section 29 of the Michigan Constitution of 1963. The confusion created by these definitions arising from the Legislature's choice to define electric utility separate from transmission company pursuant to a 2004 amendment to PA 30 is fully understandable. However, analysis of these definitions is the wrong starting point and may lead to false conclusions. Contrary to the tail wagging the dog, proper constitutional analysis starts with consideration of the intent of Article VII, Section 29 and the constitutional words "public utility" as used therein. The Legislature is bound by this intent regardless of whether they think a different policy or application is superior. It is the Court's responsibility to interpret the Constitution, not the Legislature's, and this Court's interpretation of "public utility" is binding.

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<sup>2</sup> *Toll Northville LTD v Township of Northville*, 480 Mich 6, 10-11; 743 NW2d 902 (2008).

<sup>3</sup> 1995 PA 30 (MCL 460.561 et seq; "PA 30").

The Legislature cannot change this constitutional intent and meaning by altering or creating new statutory definitions. These concepts are fundamental underpinnings of our form of government.

Before addressing the intent of Article VII, Section 29 and the judicial interpretation of the meaning of “public utility”, it is essential to address the proper framework for this consideration.

The case of *WPW Acquisition Company v City of Troy*, 466 Mich 117; 643 NW2d 564 (2002) provides guidance precisely on point. In *WPW*, this Honorable Court was considering the constitutionality of the legislative definition of one type of “additions” to taxable value. This Honorable Court held that MCL 211.34d(1)(b)(vii), defining a classification of “additions” as an increase in the taxable value of property because of increased occupancy by tenants, was unconstitutional because the legislative definition of the term “additions” was inconsistent with the established meaning of that term at the time the voters passed the 1994 constitutional amendment commonly referred to as Proposal A. Proposal A provided a cap on the annual increase in the taxable value of real and personal property until a transfer occurred and provided an exception for increases due to additions or omissions. The following constitutional analysis framework in *WPW* is analogous to the case at bar:

“If what the amendment had done was empower the Legislature, at its will, to define an increase in the value of property (such as an increase due to increased occupancy) to be classified as an “addition,” then the property tax limiting thrust of § 3 would be, or could soon be if the Legislature desired it, thwarted. To adopt Troy’s position regarding legislative power to amend the meaning of terms understood at the time of ratification, would be to assume the drafters and ratifiers of this amendment desired to place a convenient sabotaging clause within this tax limitation amendment that could be triggered whenever the Legislature chose. Such a skewed view of the intent, to say nothing of the capabilities, of the drafters and ratifiers, should be rejected. Moreover, to adopt such a mode of interpretation would, when applied in the future to other constitutional language, hollow out the people’s ability to place limits on legislative power. In short, to recognize such an expansive legislative power to redefine constitutional terms is inconsistent with

the constitution's supremacy over statutes. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed 60 (1803)."<sup>4</sup>

Clearly, as applied to the case at bar, this framework dictates that the intent of Article VII, Section 29 and the constitutional meaning of "public utility" as understood at the time it was adopted controls. The Legislature cannot summarily redefine the term in statute. To allow the Legislature to redefine "public utility" in such a manner that takes away a local municipality's constitutional consent authority thwarts the people's intent and allows the Legislature to render this authority nugatory.

Article VII, Section 29 is a constitutional limitation, placed by the electorate, on the otherwise plenary authority of the State.<sup>5</sup> No legislation can be enacted that is in conflict or inconsistent with Article VII, Section 29.<sup>6</sup> Once the constitutional meaning of "public utility" is established, the salient question is whether electric transmission facilities fall within this meaning, regardless of legislative definitions. This is further supported in *WPW* where this Honorable Court stated that:

"...the position that Troy urges upon us, that the ultimate definition of "additions" in § 3 was committed to the Legislature,<sup>6</sup> also runs counter to the principle that construing the meaning of constitutional language is a basic judicial function. See *Lewis v. Michigan*, 464 Mich. 781, 788-789, 629 N.W.2d 868 (2001) (reviewing a statute for its constitutionality is **\*\*569** "a core judicial function"); *House Speaker v. Governor*, 443 Mich. 560, 575, 506 N.W.2d 190 (1993), quoting *Baker v. Carr*, 369 U.S. 186, 211, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (describing this Court as the "ultimate interpreter **\*126** of the [Michigan] Constitution")."<sup>7</sup>

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<sup>4</sup> *WPW*, *supra*, 124-125 (Emphasis added).

<sup>5</sup> In *Attorney General ex rel, O'Hara v Montgomery*, 275 Mich 504, 538; 267 NW2d 550 (1936) this Honorable Court stated that:

"The legislative authority of the state can do anything which it is not prohibited from doing by the people through the Constitution of the State or of the United States. The Constitution of the State is not a grant of power. It is a limitation upon authority." (Emphasis added)

<sup>6</sup> *People v Meconi*, 277 Mich App 651, 658-659; 746 NW2d 881 (2008).

<sup>7</sup> *WPW*, *supra* at 125,126.

Within this framework of analysis it is appropriate to next review the intent of Article VII, Section 29, and the established judicial interpretation of “public utility”.

**C. ELECTRIC TRANSMISSION FACILITIES ARE PUBLIC UTILITY FACILITIES.**

In the case at bar, Article VII, Section 29 of the Michigan Constitution of 1963 provides that:

“No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution, the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government”.<sup>8</sup>

Intentionally, there is no role for the Legislature in determining the meaning of “public utility” for municipal consent or franchising. Nothing in these specific grants of authority intimates that the Legislature may impair this local authority over “public utility” use of the public rights of way. As stated with example in *WPW*, supra at 126, the constitutional drafters know how to commit a definition to the purview of the Legislature and it is done by express language. Such language does not exist in the consent and franchise language of Article VII, Section 29.

As previously provided in the Amici Curiae Brief filed in this case, the predecessor to Article VII, Section 29 first appeared in Article VIII, Section 28, of the Michigan Constitution of 1908. Prior to this constitutionally delegated local authority, the state had given statewide franchises to use the public rights of way (i.e., Michigan Bell) regardless of local concerns. These abuses necessitated local consent and franchise control being placed in the hands of local

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<sup>8</sup> Article VII, Section 29, emphasis added.

government by the electorate through Article VIII, Section 28 of the 1908 Constitution and subsequently in 1963 through Article VII, Section 29.<sup>9</sup> With this intent in mind the term “public utility” must necessarily have been intended to be construed in 1908 to be broad enough so that the Legislature could not just supplant local authority over placement of utility facilities in the public rights of way. This broad meaning of “public utility” is even more apparent with adoption of the 1963 Constitution and the strong home rule notion of local government espoused therein through new Article VII, Section 34.<sup>10</sup>

In 1908 and 1963 electric transmission facilities were not divested from the electric utility providers operation and therefore, clearly would have been part of the “public utility” at the time that these constitutional provisions were ratified. It was not until the Customer Choice and Reliability Act (2000 PA 141) that the three elements of the electric utility business, being generation, transmission and distribution were to be unbundled. PA 141 required divestiture of transmission facilities by the energy monopolies in Michigan. Even with such divestiture, the transmission facilities still use the public rights of way to transmit electricity to be distributed in Michigan and are a necessary part of the electric utility business serving the public communities. METC operates to transmit electricity in Michigan providing self proclaimed “operational excellence and delivers superior value for customers, communities and other stakeholders”.<sup>11</sup>

No matter how Public Act 30 attempts to define an electric transmission company it is incontrovertible from the following judicial interpretation of “public utility” that such facilities in the public rights of way require municipal consent to be located therein under Article VII, Section 29. Pursuant to case law:

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<sup>9</sup> See *City of Lansing v Michigan Power Company*, 183 Mich 400, 409; 150 NW 250 (1914) and *Village of Constantine v Michigan Gas and Elec. Co.*, 296 Mich 719; 296 NW 847 (1941).

<sup>10</sup> Article VII, Section 34 providing for liberal construction in favor of the local municipality and implied powers. Addressed further in the prior Amici Brief filed in this matter.

<sup>11</sup> See Attachment A, METC fact sheet.

“[P]ublic utility” means every corporation ... that may own, control, or manage, except for private use, any equipment, plant or generating machinery in the operation of a public business or utility. Utility means the state or quality of being useful. Was this plant one useful to the public? If so, it was a public utility”<sup>12</sup>

Pursuant to this broad definition it is undeniable that electric transmission facilities are useful to the public (ie, part of the electrical system necessary to deliver energy from generators to be distributed to the public) and therefore a public utility requiring consent under Article VII, Section 29 for the location of facilities in the public rights of way.

It must further be stated that it is of no consequence that METC does not distribute the electricity to the end public user and therefore does not transact a local business in the municipality. METC facilities still require local consent. Consent and franchising (transacting a local business) under Article VII, Section 29 are two separate concepts. The consent requirement only requires that the public utility will make use of the public rights of way for its facilities. It is not unusual for a public utility to request to access a municipality’s public rights of way just to pass through the municipality but provide no service therein. Electric transmission lines are one example. Other more common requests come from telecommunication providers laying fiber optic cables which traverse the county, state or country. The Metropolitan Extension Telecommunications Rights Of Way Oversight Act, 2002 P.A. 48, (MCL 484.3101 et seq) created a statewide system regarding public rights of way access for telecommunication providers while preserving local municipal consent and certain regulatory authority.<sup>13</sup> Even gas pipeline companies such as Enbridge have acquiesced to local consent authority regarding their pipeline. A few years ago, when Enbridge was installing new pipeline through a number of

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<sup>12</sup> *Schurtz v Grand Rapids*, 208 Mich 510, 524; 175 NW 421 (1919). See also *Bruce Township v Gout*, 207 Mich App 554, 558; 526 NW2d 40 (1994) incorporating definition from *Schurtz*. Also in *Charter Township of Meridian v Roberts*, 114 Mich App 803, 807-810; 319 NW2d 678 (1982), the Court found that Article VII, Section 29 was broader in scope than Article VII, Section 25 and therefore covered cable television as a public utility.

<sup>13</sup> See Attachment B. (Right of Way Telecommunications Permit), for your reference as to how such consent is handled and the reasonable conditions placed on the consent.

townships, the undersigned through the Michigan Townships Association worked with Enbridge to resolve their differences and create a model right of way consent permit to be used by the townships. Such permit covered consent to Enbridge to occupy certain rights of way pursuant to reasonable conditions.

Contrary to the fear induced rhetoric of the Appellees, there is no reason to believe that local communities would attempt to cut off electric transmission routes and to do so categorically would be impermissible as unreasonable.<sup>14</sup> In the case at bar, Oshtemo Township was only reasonably requiring the undergrounding of the lines through its downtown area.

Aside from consent, a franchise is required under Article VII, Section 29, if the public utility is transacting a local business in the municipality. Quite often franchises exist to provide sewer and water into a neighboring community. It is also instructive to look at the Uniform Video Services Local Franchise Act, 2006 PA 480, (MCL 484.3301 et seq). This Act preserves local franchise approval with regard to cable television providers' use of the public rights of way, while establishing statewide uniform regulation. A franchise typically provides for fees from the "public utility" to be paid to the local municipality for use of the public rights of way to transact their local business (i.e., cable television annual fee is up to 5% of gross revenue). METC is not conducting a local business and therefore, in this case, a franchise is not required. However, that fact does not eliminate the need for METC to acquire the Township's consent herein. Consent and franchising are two different provisions of Article VII, Section 29.

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<sup>14</sup> A municipality's constitutional consent authority is not without limitation, as such decision must not be arbitrary and unreasonable. *City of South Haven v South Haven Charter Township*, 204 Mich App 49, 52; 514 NW2d 178 (1994).

**CONCLUSION**

For the reasons set forth above, METC, as an electric transmission company in Michigan, is undeniably a “public utility” for purpose of requiring Oshtemo Township’s consent to be located in the public rights of way as contained in Article VII, Section 29 of the Michigan Constitution of 1963.

Dated: October 17, 2016

Respectfully submitted,  
BAUCKHAM, SPARKS, THALL,  
SEEBER & KAUFMAN, PC

By:  \_\_\_\_\_

Robert E. Thall (P46421)

Attorney for Amici Curiae Michigan Townships  
Association, Michigan Municipal League, and  
Public Corporation Law Section of the State  
Bar of Michigan



# **ATTACHMENT A**

# Michigan Electric Transmission Company, LLC (METC)

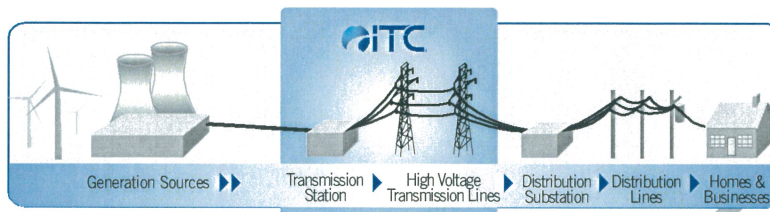


## ABOUT METC:

Michigan Electric Transmission Company, LLC (METC) is a wholly-owned subsidiary of ITC Holdings Corp. (ITC), the nation's largest independent electricity transmission company. Based in Novi, Michigan, METC owns, operates and maintains approximately 5,600 circuit miles of transmission lines serving most of Michigan's Lower Peninsula. ITC's focus on transmission and grid development drives operational excellence and delivers superior value for customers, communities and other stakeholders.

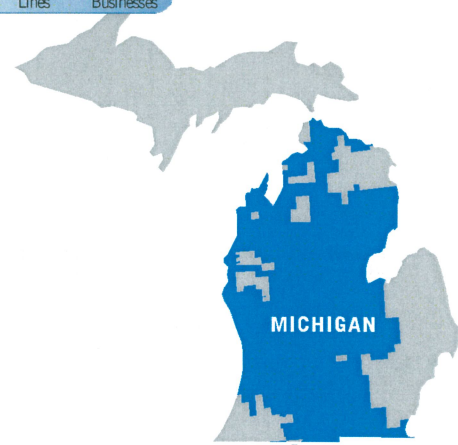
## WHAT IS TRANSMISSION?

Transmission is the bulk delivery of electrical energy from power generating plants along high voltage lines to the local distribution systems of utilities serving communities.



## QUICK FACTS:

- Established 2006
- Headquartered in Novi, Michigan
- Business unit lead: Linda Blair, President, METC
- Square miles of service territory: ~28,850
- Transmission circuit miles: ~5,600
- Transmission towers and poles: ~36,900
- Voltage Levels: 138 kV to 345 kV
- System peak load: 9,469 MW
- Stations and substations with ITC assets: 100
- Capital Investments: ~\$1.2 billion since 2006
- Member, Midcontinent Independent System Operator (MISO)
- ITC's transmission systems in Michigan routinely perform among the top 25% – and often the top 10% – of utilities nationally for service reliability as measured by the average number of sustained outages per circuit and momentary outages. This is according to the annual SGS Statistical Services Transmission Reliability Benchmarking Study, a national benchmark.
- Percent of spending in support of Michigan firms for construction, service and maintenance activities across the company in 2014: 84%
- METC is a strong performing transmission system, roughly midway through investment cycle



METC service area

## KEY PROJECTS:

- **Delhi-Tompkins** – Reconstruction and upgrade of a 20-mile line in south-central Michigan to improve service reliability. Expected completion: fourth quarter 2015.
- **Morocco Substation** – A new substation that will provide a more stable and reliable source of energy in southeast Michigan upon the suspension of the Whiting coal-fired generation station. Expected completion: fourth quarter 2015.
- **North Belding-Marquette** – Reconstruction of a 13-mile line in western Michigan to improve reliability. Expected completion: first quarter 2016.
- **Marshall-Blackstone** – Reconstruction of a 34.5 mile line in southern Michigan to improve its reliability. Expected completion: fourth quarter 2016.

877.ITC.ITC9  
(877.482.4829)  
itc-holdings.com

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# **ATTACHMENT B**

**METRO Act Permit  
Bilateral Form  
Revised 12/06/02**

**RIGHT-OF-WAY  
TELECOMMUNICATIONS PERMIT**

TERMS AND CONDITIONS

1 Definitions

- 1.1 Company shall mean \_\_\_\_\_ [type of entity] organized under the laws of the State of \_\_\_\_\_ whose address is \_\_\_\_\_.
- 1.2 Effective Date shall mean the date set forth in Part 13.
- 1.3 Manager shall mean Municipality's [Mayor/Manager/Supervisor/Village President] or his or her designee.
- 1.4 METRO Act shall mean the Metropolitan Extension Telecommunications Rights-of-Way Oversight Act, Act No. 48 of the Public Acts of 2002, as amended.
- 1.5 Municipality shall mean \_\_\_\_\_, a Michigan municipal corporation.
- 1.6 Permit shall mean this document.
- 1.7 Public Right-of-Way shall mean the area on, below, or above a public roadway, highway, street, alley, easement, or waterway, to the extent Municipality has the ability to grant the rights set forth herein. Public right-of-way does not include a federal, state, or private right-of-way.
- 1.8 Telecommunication Facilities or Facilities shall mean the Company's equipment or personal property, such as copper and fiber cables, lines, wires, switches, conduits, pipes, and sheaths, which are used to or can generate, receive, transmit, carry, amplify, or provide telecommunication services or signals. Telecommunication Facilities or Facilities do not include antennas, supporting structures for antennas, equipment shelters or houses, and any ancillary equipment and miscellaneous hardware used to provide federally licensed commercial mobile service as defined in Section 332(d) of Part I of Title III of the Communications Act of 1934, Chapter 652, 48 Stat. 1064, 47 U.S.C. 332 and further defined as commercial mobile radio service in 47 CFR 20.3, and service provided by any wireless, 2-way communications device.
- 1.9 Term shall have the meaning set forth in Part 7.

2 Grant

- 2.1 Municipality hereby grants a permit under the METRO Act to Company for access to and ongoing use of the Public Right-of-Way to construct, install and maintain Telecommunication Facilities in those portions of the Public Right-of-Way identified on Exhibit A on the terms set forth herein.
- 2.1.1 Exhibit A may be modified by written request by Company and approval by Manager.
- 2.1.2 Manager shall not unreasonably condition or deny any request for a modification of Exhibit A. Any decision of Manager on a request for a modification may be appealed by Company to Municipality's legislative body.
- 2.2 Overlashing. Company shall not allow the wires or any other facilities of a third party to be overlashed to the Telecommunication Facilities without Municipality's prior written consent. Municipality's right to withhold written consent is subject to the authority of the Michigan Public Service Commission under Section 361 of the Michigan Telecommunications Act, MCL § 484.2361.
- 2.3 Nonexclusive. The rights granted by this Permit are nonexclusive. Municipality reserves the right to approve, at any time, additional permits for access to and ongoing usage of the Public Right-of-Way by telecommunications providers and to enter into agreements for use of the Public Right-of-Way with and grant franchises for use of the Public Right-of-Way to telecommunications providers, cable companies, utilities and other providers.

3 Contacts, Maps and Plans

- 3.1 Company Contacts. The names, addresses and the like for engineering and construction related information for Company and its Telecommunication Facilities are as follows:
- 3.1.1 The address, e-mail address, phone number and contact person (title or name) at Company's local office (in or near Municipality) is \_\_\_\_\_.
- 3.1.2 If Company's engineering drawings, as-built plans and related records for the Telecommunication Facilities will not be located at the preceding local office, the location address, phone number and contact person (title or department) for them is \_\_\_\_\_.
- 3.1.3 The name, title, address, e-mail address and telephone numbers of Company's engineering contact person(s) with responsibility for the

design, plans and construction of the Telecommunication Facilities is

3.1.4 The address, phone number and contact person (title or department) at Company's home office/regional office with responsibility for engineering and construction related aspects of the Telecommunication Facilities is

3.1.5 Company shall at all times provide Manager with the phone number at which a live representative of Company (not voice mail) can be reached 24 hours a day, seven (7) days a week, in the event of a public emergency.

3.1.6 The preceding information is accurate as of the Effective Date. Company shall notify Municipality in writing as set forth in Part 12 of any changes in the preceding information.

3.2 Route Maps. Within ninety (90) days after the substantial completion of construction of new Facilities in a Municipality, a provider shall submit route maps showing the location of the Telecommunication Facilities to both the Michigan Public Service Commission and to the Municipality, as required under Section 6(7) of the METRO Act, MCLA 484.3106(7).

3.3 As-Built Records. Company, without expense to Municipality, shall, upon forty-eight (48) hours notice, give Municipality access to all "as-built" maps, records, plans and specifications showing the Telecommunication Facilities or portions thereof in the Public Right-of-Way. Upon request by Municipality, Company shall inform Municipality as soon as reasonably possible of any changes from previously supplied maps, records, or plans and shall mark up maps provided by Municipality so as to show the location of the Telecommunication Facilities.

#### 4 Use of Public Right-of-Way

4.1 No Burden on Public Right-of-Way. Company, its contractors, subcontractors, and the Telecommunication Facilities shall not unduly burden or interfere with the present or future use of any of the Public Right-of-Way. Company's aerial cables and wires shall be suspended so as to not endanger or injure persons or property in or about the Public Right-of-Way. If Municipality reasonably determines that any portion of the Telecommunication Facilities constitutes an undue burden or interference, due to changed circumstances, Company, at its sole expense, shall modify the Telecommunication Facilities or take such other actions as Municipality may determine is in the public interest to remove or alleviate the burden, and Company shall do so within a reasonable time period. Municipality shall attempt to require all occupants of a pole or conduit whose facilities are a burden to remove or alleviate the burden concurrently.

- 4.2 No Priority. This Permit does not establish any priority of use of the Public Right-of-Way by Company over any present or future permittees or parties having agreements with Municipality or franchises for such use. In the event of any dispute as to the priority of use of the Public Right-of-Way, the first priority shall be to the public generally, the second priority to Municipality, the third priority to the State of Michigan and its political subdivisions in the performance of their various functions, and thereafter as between other permit, agreement or franchise holders, as determined by Municipality in the exercise of its powers, including the police power and other powers reserved to and conferred on it by the State of Michigan.
- 4.3 Restoration of Property. Company, its contractors and subcontractors shall immediately (subject to seasonal work restrictions) restore, at Company's sole expense, in a manner approved by Municipality, any portion of the Public Right-of-Way that is in any way disturbed, damaged, or injured by the construction, installation, operation, maintenance or removal of the Telecommunication Facilities to a reasonably equivalent (or, at Company's option, better) condition as that which existed prior to the disturbance. In the event that Company, its contractors or subcontractors fail to make such repair within a reasonable time, Municipality may make the repair and Company shall pay the costs Municipality incurred for such repair.
- 4.4 Marking. Company shall mark the Telecommunication Facilities as follows: Aerial portions of the Telecommunication Facilities shall be marked with a marker on Company's lines on alternate poles which shall state Company's name and provide a toll-free number to call for assistance. Direct buried underground portions of the Telecommunication Facilities shall have (1) a conducting wire placed in the ground at least several inches above Company's cable (if such cable is nonconductive); (2) at least several inches above that, a continuous colored tape with a statement to the effect that there is buried cable beneath; and (3) stakes or other appropriate above ground markers with Company's name and a toll-free number indicating that there is buried telephone cable below. Bored underground portions of the Telecommunication Facilities shall have a conducting wire at the same depth as the cable and shall not be required to provide the continuous colored tape. Portions of the Telecommunication Facilities located in conduit, including conduit of others used by Company, shall be marked at its entrance into and exit from each manhole and handhole with Company's name and a toll-free telephone number.
- 4.5 Tree Trimming. Company may trim trees upon and overhanging the Public Right-of-Way so as to prevent the branches of such trees from coming into contact with the Telecommunication Facilities, consistent with any standards adopted by Municipality. Company shall dispose of all trimmed materials. Company shall minimize the trimming of trees to that essential to maintain the integrity of the Telecommunication Facilities. Except in emergencies, all

trimming of trees in the Public Right-of-Way shall have the advance approval of Manager.

- 4.6 Installation and Maintenance. The construction and installation of the Telecommunication Facilities shall be performed pursuant to plans approved by Municipality. The open cut of any Public Right-of-Way shall be coordinated with the Manager or his designee. Company shall install and maintain the Telecommunication Facilities in a reasonably safe condition. If the existing poles in the Public Right-of-Way are overburdened or unavailable for Company's use, or the facilities of all users of the poles are required to go underground then Company shall, at its expense, place such portion of its Telecommunication Facilities underground, unless Municipality approves an alternate location. Company may perform maintenance on the Telecommunication Facilities without prior approval of Municipality, provided that Company shall obtain any and all permits required by Municipality in the event that any maintenance will disturb or block vehicular traffic or are otherwise required by Municipality.
- 4.7 Pavement Cut Coordination. Company shall coordinate its construction and all other work in the Public Right-of-Way with Municipality's program for street construction and rebuilding (collectively "Street Construction") and its program for street repaving and resurfacing (except seal coating and patching) (collectively, "Street Resurfacing").
- 4.7.1 The goals of such coordination shall be to encourage Company to conduct all work in the Public Right-of-Way in conjunction with or immediately prior to any Street Construction or Street Resurfacing planned by Municipality.
- 4.8 Compliance with Laws. Company shall comply with all laws, statutes, ordinances, rules and regulations regarding the construction, installation, and maintenance of its Telecommunication Facilities, whether federal, state or local, now in force or which hereafter may be promulgated. Before any installation is commenced, Company shall secure all necessary permits, licenses and approvals from Municipality or other governmental entity as may be required by law, including, without limitation, all utility line permits and highway permits. Municipality shall not unreasonably delay or deny issuance of any such permits, licenses or approvals. Company shall comply in all respects with applicable codes and industry standards, including but not limited to the National Electrical Safety Code (latest edition adopted by Michigan Public Service Commission) and the National Electric Code (latest edition). Company shall comply with all zoning and land use ordinances and historic preservation ordinances as may exist or may hereafter be amended. This section does not constitute a waiver of Company's right to challenge laws, statutes, ordinances, rules or regulations now in force or established in the future.



- 4.9 Street Vacation. If Municipality vacates or consents to the vacation of Public Right-of-Way within its jurisdiction, and such vacation necessitates the removal and relocation of Company's Facilities in the vacated Public Right-of-Way, Company shall, as a condition of this Permit, consent to the vacation and remove its Facilities at its sole cost and expense when ordered to do so by Municipality or a court of competent jurisdiction. Company shall relocate its Facilities to such alternate route as Municipality and Company mutually agree, applying reasonable engineering standards.
- 4.10 Relocation. If Municipality requests Company to relocate, protect, support, disconnect, or remove its Facilities because of street or utility work, or other public projects, Company shall relocate, protect, support, disconnect, or remove its Facilities, at its sole cost and expense, including where necessary to such alternate route as Municipality and Company mutually agree, applying reasonable engineering standards. The work shall be completed within a reasonable time period.
- 4.11 Public Emergency. Municipality shall have the right to sever, disrupt, dig-up or otherwise destroy Facilities of Company if such action is necessary because of a public emergency. If reasonable to do so under the circumstances, Municipality shall attempt to provide notice to Company. Public emergency shall be any condition which poses an immediate threat to life, health, or property caused by any natural or man-made disaster, including, but not limited to, storms, floods, fire, accidents, explosions, water main breaks, hazardous material spills, etc. Company shall be responsible for repair at its sole cost and expense of any of its Facilities damaged pursuant to any such action taken by Municipality.
- 4.12 Miss Dig. If eligible to join, Company shall subscribe to and be a member of "MISS DIG," the association of utilities formed pursuant to Act 53 of the Public Acts of 1974, as amended, MCL § 460.701 et seq., and shall conduct its business in conformance with the statutory provisions and regulations promulgated thereunder.
- 4.13 Underground Relocation. If Company has its Facilities on poles of Consumers Energy, Detroit Edison or another electric or telecommunications provider and Consumers Energy, Detroit Edison or such other electric or telecommunications provider relocates its system underground, then Company shall relocate its Facilities underground in the same location at Company's sole cost and expense.
- 4.14 Identification. All personnel of Company and its contractors or subcontractors who have as part of their normal duties contact with the general public shall wear on their clothing a clearly visible identification card bearing Company's name, their name and photograph. Company shall account for all identification cards at all times. Every service vehicle of Company and its contractors or subcontractors

shall be clearly identified as such to the public, such as by a magnetic sign with Company's name and telephone number.

## 5 Indemnification

- 5.1 Indemnity. Company shall defend, indemnify, protect, and hold harmless Municipality, its officers, agents, employees, elected and appointed officials, departments, boards, and commissions from any and all claims, losses, liabilities, causes of action, demands, judgments, decrees, proceedings, and expenses of any nature (collectively "claim" for this Part 5) (including, without limitation, attorneys' fees) arising out of or resulting from the acts or omissions of Company, its officers, agents, employees, contractors, successors, or assigns, but only to the extent such acts or omissions are related to the Company's use of or installation of facilities in the Public Right-of-Way and only to the extent of the fault or responsibility of Company, its officers, agents, employees, contractors, successors and assigns.
- 5.2 Notice, Cooperation. Municipality shall notify Company promptly in writing of any such claim and the method and means proposed by Municipality for defending or satisfying such claim. Municipality shall cooperate with Company in every reasonable way to facilitate the defense of any such claim. Municipality shall consult with Company respecting the defense and satisfaction of such claim, including the selection and direction of legal counsel.
- 5.3 Settlement. Municipality shall not settle any claim subject to indemnification under this Part 5 without the advance written consent of Company, which consent shall not be unreasonably withheld. Company shall have the right to defend or settle, at its own expense, any claim against Municipality for which Company is responsible hereunder.

## 6 Insurance

- 6.1 Coverage Required. Prior to beginning any construction in or installation of the Telecommunication Facilities in the Public Right-of-Way, Company shall obtain insurance as set forth below and file certificates evidencing same with Municipality. Such insurance shall be maintained in full force and effect until the end of the Term. In the alternative, Company may satisfy this requirement through a program of self-insurance, acceptable to Municipality, by providing reasonable evidence of its financial resources to Municipality. Municipality's acceptance of such self-insurance shall not be unreasonably withheld.
- 6.1.1 Commercial general liability insurance, including Completed Operations Liability, Independent Contractors Liability, Contractual Liability coverage, railroad protective coverage and coverage for property damage from perils of explosion, collapse or damage to underground utilities,

commonly known as XCU coverage, in an amount not less than Five Million Dollars (\$5,000,000).

- 6.1.2 Liability insurance for sudden and accidental environmental contamination with minimum limits of Five Hundred Thousand Dollars (\$500,000) and providing coverage for claims discovered within three (3) years after the term of the policy.
  - 6.1.3 Automobile liability insurance in an amount not less than One Million Dollars (\$1,000,000).
  - 6.1.4 Workers' compensation and employer's liability insurance with statutory limits, and any applicable Federal insurance of a similar nature.
  - 6.1.5 The coverage amounts set forth above may be met by a combination of underlying (primary) and umbrella policies so long as in combination the limits equal or exceed those stated. If more than one insurance policy is purchased to provide the coverage amounts set forth above, then all policies providing coverage limits excess to the primary policy shall provide drop down coverage to the first dollar of coverage and other contractual obligations of the primary policy, should the primary policy carrier not be able to perform any of its contractual obligations or not be collectible for any of its coverages for any reason during the Term, or (when longer) for as long as coverage could have been available pursuant to the terms and conditions of the primary policy.
- 6.2 Additional Insured. Municipality shall be named as an additional insured on all policies (other than worker's compensation and employer's liability). All insurance policies shall provide that they shall not be canceled, modified or not renewed unless the insurance carrier provides thirty (30) days prior written notice to Municipality. Company shall annually provide Municipality with a certificate of insurance evidencing such coverage. All insurance policies (other than environmental contamination, workers' compensation and employer's liability insurance) shall be written on an occurrence basis and not on a claims made basis.
- 6.3 Qualified Insurers. All insurance shall be issued by insurance carriers licensed to do business by the State of Michigan or by surplus line carriers on the Michigan Insurance Commission approved list of companies qualified to do business in Michigan. All insurance and surplus line carriers shall be rated A+ or better by A.M. Best Company.
- 6.4 Deductibles. If the insurance policies required by this Part 6 are written with retainages or deductibles in excess of \$50,000, they shall be approved by Manager in advance in writing. Company shall indemnify and save harmless Municipality

from and against the payment of any deductible and from the payment of any premium on any insurance policy required to be furnished hereunder.

- 6.5 Contractors. Company's contractors and subcontractors working in the Public Right-of-Way shall carry in full force and effect commercial general liability, environmental contamination liability, automobile liability and workers' compensation and employer liability insurance which complies with all terms of this Part 6. In the alternative, Company, at its expense, may provide such coverages for any or all its contractors or subcontractors (such as by adding them to Company's policies).
- 6.6 Insurance Primary. Company's insurance coverage shall be primary insurance with respect to Municipality, its officers, agents, employees, elected and appointed officials, departments, boards, and commissions (collectively "them"). Any insurance or self-insurance maintained by any of them shall be in excess of Company's insurance and shall not contribute to it (where "insurance or self-insurance maintained by any of them" includes any contract or agreement providing any type of indemnification or defense obligation provided to, or for the benefit of them, from any source, and includes any self-insurance program or policy, or self-insured retention or deductible by, for or on behalf of them).

## 7 Term

- 7.1 Term. The term ("Term") of this Permit shall be until the earlier of:
- 7.1.1 Fifteen years (15) from the Effective Date; provided, however, that following such initial term there shall be three subsequent renewal terms of five (5) years. Each renewal term shall be automatic unless Municipality notifies Company in writing, at least twelve (12) months prior to the end of any term then in effect, that due to changed circumstances a need exists to negotiate the subsequent renewal with Company. Municipality shall not unreasonably deny a renewal term; or
- 7.1.2 When the Telecommunication Facilities have not been used to provide telecommunications services for a period of one hundred and eighty (180) days by the Company or a successor of an assign of the Company; or
- 7.1.3 When Company, at its election and with or without cause, delivers written notice of termination to Municipality at least one-hundred and eighty (180) days prior to the date of such termination; or
- 7.1.4 Upon either Company or Municipality giving written notice to the other of the occurrence or existence of a default by the other party under Sections 4.8, 6, 8 or 9 of this Permit and such defaulting party failing to cure, or commence good faith efforts to cure, such default within sixty (60) days

(or such shorter period of time provided elsewhere in this Permit) after delivery of such notice; or

7.1.5 Unless Manager grants a written extension, one year from the Effective Date if prior thereto Company has not started the construction and installation of the Telecommunication Facilities within the Public Right-of-Way and two years from the Effective Date if by such time construction and installation of the Telecommunication Facilities is not complete.

8 Performance Bond or Letter of Credit

8.1 Municipal Requirement. Municipality may require Company to post a bond (or letter of credit) as provided in Section 15(3) of the METRO Act, as amended [MCL § 484.3115(3)].

9 Fees

9.1 Establishment; Reservation. The METRO Act shall control the establishment of right-of-way fees. The parties reserve their respective rights regarding the nature and amount of any fees which may be charged by Municipality in connection with the Public Right-of-Way.

10 Removal

10.1 Removal; Underground. As soon as practicable after the Term, Company or its successors and assigns shall remove any underground cable or other portions of the Telecommunication Facilities from the Public Right-of-Way which has been installed in such a manner that it can be removed without trenching or other opening of the Public Right-of-Way. Company shall not remove any underground cable or other portions of the Telecommunication Facilities which requires trenching or other opening of the Public Right-of-Way except with the prior written approval of Manager. All removals shall be at Company's sole cost and expense.

10.1.1 For purposes of this Part 10, "cable" means any wire, coaxial cable, fiber optic cable, feed wire or pull wire.

10.2 Removal; Above Ground. As soon as practicable after the Term, Company, or its successor or assigns at its sole cost and expense, shall, unless waived in writing by Manager, remove from the Public Right-of-Way all above ground elements of its Telecommunication Facilities, including but not limited to poles, pedestal mounted terminal boxes, and lines attached to or suspended from poles.

10.3 Schedule. The schedule and timing of removal shall be subject to approval by Manager. Unless extended by Manager, removal shall be completed not later than

twelve (12) months following the Term. Portions of the Telecommunication Facilities in the Public Right-of-Way which are not removed within such time period shall be deemed abandoned and, at the option of Municipality exercised by written notice to Company as set forth in Part 12, title to the portions described in such notice shall vest in Municipality.

11 Assignment. Company may assign or transfer its rights under this Permit, or the persons or entities controlling Company may change, in whole or in part, voluntarily, involuntarily, or by operation of law, including by merger or consolidation, change in the ownership or control of Company's business, or by other means, subject to the following:

11.1 No such transfer or assignment or change in the control of Company shall be effective under this Permit, without Municipality's prior approval (not to be unreasonably withheld), during the time period from the Effective Date until the completion of the construction of the Telecommunication Facilities in those portions of the Public Right-of-Way identified on Exhibit A.

11.2 After the completion of such construction, Company must provide notice to Municipality of such transfer, assignment or change in control no later than thirty (30) days after such occurrence; provided, however,

11.2.1 Any transferee or assignee of this Permit shall be qualified to perform under its terms and conditions and comply with applicable law; shall be subject to the obligations of this Permit, including responsibility for any defaults which occurred prior to the transfer or assignment; shall supply Municipality with the information required under Section 3.1; and shall comply with any updated insurance and performance bond requirements under Sections 6 and 8 respectively, which Municipality reasonably deems necessary, and

11.2.2 In the event of a change in control, it shall not be to an entity lacking the qualifications to assure Company's ability to perform under the terms and conditions of this Permit and comply with applicable law; and Company shall comply with any updated insurance and performance bond requirements under Sections 6 and 8 respectively, which Municipality reasonably deems necessary.

11.3 Company may grant a security interest in this Permit, its rights thereunder or the Telecommunication Facilities at any time without notifying Municipality.

12 Notices

12.1 Notices. All notices under this Permit shall be given as follows:

12.1.1 If to Municipality, to [address], with a copy to [address].

12.1.2 If to Company, to [address], with a copy to [address].

12.2 Change of Address. Company and Municipality may change its address or personnel for the receipt of notices at any time by giving notice thereof to the other as set forth above.

13 Other items

13.1 No Cable, OVS. This Permit does not authorize Company to provide commercial cable type services to the public, such as “cable service” or the services of an “open video system operator” (as such terms are defined in the Federal Communications Act of 1934 and implementing regulations, currently 47 U.S.C. §§ 522 (6), 573 and 47 CFR § 76.1500).

13.2 Duties. Company shall faithfully perform all duties required by this Permit.

13.3 Effective Date. This Permit shall become effective when issued by Municipality and Company has provided any insurance certificates and bonds required in Parts 6 and 8, and signed the acceptance of the Permit.

13.4 Authority. This Permit satisfies the requirement for a permit under Section 5 of the METRO Act [MCL 484.3105].

13.5 Amendment. Except as set forth in Section 2.1 this Permit may be amended by the written agreement of Municipality and Company.

13.6 Interpretation and Severability. The provisions of this Permit shall be liberally construed to protect and preserve the peace, health, safety and welfare of the public, and should any provision or section of this Permit be held unconstitutional, invalid, overbroad or otherwise unenforceable, such determination/holding shall not be construed as affecting the validity of any of the remaining conditions of this Permit. If any provision in this Permit is found to be partially overbroad, unenforceable, or invalid, Company and Municipality may nevertheless enforce such provision to the extent permitted under applicable law.

13.7 Governing Law. This Permit shall be governed by the laws of the State of Michigan.

[Municipality name]

Attest:

By: \_\_\_\_\_  
Clerk

By: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_



“Company accepts the Permit granted by Municipality upon the terms and conditions contained therein.”

[Company Name]

By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

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**Exhibit A**

**Public Right-of-Way to be Used by Telecommunication Facilities**

**Exhibit B**

**Bond**