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Municipal Law News

August 2012

"SMART METER" UPDATE

- Ronald D. Richards Jr.

Our June 2012 newsletter noted that the Michigan Public Service Commission (Commission) was investigating electric utility's intent to deploy "smart meters." MPSC Case No. U-17000. The Commission ordered all regulated electric utilities to submit information to the Commission by March 16, 2012, on a number of issues, including (1) the utility's existing plans for deployment of smart meters in its service territory, (2) any scientific information known to the utility that bears on the safety of smart meters, and (3) an explanation of the steps that the utility intends to take to safeguard the privacy of the information gathered. Comments were due April 16, 2012. The Commission also required the Commission Staff to file a report summarizing its review of smart meter literature, how other jurisdictions deal with smart meters, and make recommendations for the Commission's consideration.

After about 400 comments were filed – many of which voiced concerns about health and safety, privacy, and bill impacts - the Commission Staff filed its report on June 29th. In short, the Staff Report states:

1. Smart meters are a critical component of creating a "smart grid." A "smart grid" encompasses technological improvements to the electric grid designed to increase reliability, reduce outage time, accommodate the integration of distributed generation sources, and improve electric vehicle charging capacity.

2. Smart meters are quickly becoming the primary replacement meter to the existing electronic meters because they are more accurate, enhance outage response and offer opportunities for customer energy management. The traditional electronic meter is obsolete and currently not in production.

3. That the health risk from the installation and operation of metering systems using radio transmitters is insignificant. In addition, the appropriate federal health and safety regulations provide assurance that smart meters represent a safe technology.

Based on its findings, Staff made these recommendations:

1. **Smart Meter Implementation:** Smart meters are part of the larger smart grid initiative that is being pursued by investor-owned and other utilities throughout the world. The smart grid initiative has been endorsed by federal laws, and the technologies have been declared to be safe by accredited national agencies and industry councils. The Staff recommended that Commission-regulated utilities in Michigan continue to assess smart grid technologies as part of their efforts to improve the reliability and efficiency of the grid.

2. **Opt-out:** Staff understands that some people remain opposed to the installation of smart meters for a number of reasons and should be allowed to opt-out. The Staff believes that ratemaking for the opt-out provision should be based on cost of service principles. If ■►

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smart meters result in a reduced cost of service, this could be accounted for by either an additional charge for those customers choosing to opt-out or a discount for those customers with a smart meter.

To date, the Commission has not yet issued an Order in Docket U-17000. So there are still unanswered questions, including these:

- whether the Commission will adopt Staff's recommendations to allow smart meters;
- if smart meters are allowed to go forward, whether the Commission will allow an opt-out program;
- whether customers would have to pay for an opt-out or to remove a previously installed smart meter.

Another unsettled question is whether the smart meter program can move forward at all, given the Court of Appeals' April 2012 ruling that the Commission erred in letting Detroit Edison increase its rates to pay for the smart meters. Of course, that ruling, too, could be challenged at the Michigan Supreme Court.

If you have questions about the Commisson's smart meter case in U-17000, or the Court of Appeals' April 2012 ruling on the smart meter program, feel free to contact Ronald Richards of the Foster Swift Municipal Team.

To view the full MPSC Staff Report, go to: tinyurl.com/d9ys3tu

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FEDERAL COURT STRIKES DOWN PART OF MICHIGAN'S CABLE FRANCHISE ACT

- Ronald D. Richards Jr.

Our January 2012 newsletter notified you of the then-pending fight between Comcast and the City of Detroit over the validity of Michigan's 2006 Uniform Video Services Local Franchise Act (the Michigan Cable Act), *Detroit v State of Michigan*, 10-12427 (7/10/12). The parties argued their positions in December 2011, and the Court issued its decision on July 10, 2012. We summarize below the decision – which in some ways is positive news for municipalities:

1. The Michigan Cable Act is invalid on conflicting with federal cable laws insofar as it modified existing franchise agreements and barred enforcement relating to public, government, and education channels. Put another way, the Court ruled that the Michigan Cable Act's modifying existing franchise agreements and barring enforcement relating to public, government, and educational channels conflicts with the federal cable laws and so it cannot be enforced.

2. The Michigan Cable Act's renewal procedures and its failure to require universal build-outs are not preempted by federal law, and so are vaild.

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3. The Michigan Cable Act does not violate the Michigan Constitution because there is a way to interpret the Act that avoids a conflict with the Michigan Constitution – i.e., that a municipality may refuse to approve a franchise renewal application and may negotiate acceptable terms with the cable provider without the standard form agreement automatically taking effect. As a result, a municipality may refuse to approve franchise renewal proposals from cable operators if the municipality acts on the proposal within the Act's 30-day time limit.

This decision may be beneficial to some municipalities, such as one that has cable franchises that pre-date Michigan's Cable Act, or one that is approached by a cable operator seeking a uniform franchise under that Michigan Cable Act in the future.

If you have questions about cable franchises, feel free to contact Ronald Richards of the Foster Swift Municipal Team.

JUST WHEN YOU THOUGHT IT WAS SAFE TO GO IN THE WATER … ANOTHER MEDICAL MARIJUANA RULING COMES ALONG

- Ronald D. Richards Jr.

We have previously written several newsletter articles about court decisions interpreting the Michigan Medical Marijuana Act (the Act). Some may have thought the dust had settled on those decisions and that there may be some clarity as to what a municipality can – and can't – do under the Act. Not so fast. Along comes a case to confirm the waters are still muddy in this area. The City of Wyoming, like many Michigan municipalities, adopted a zoning ordinance that barred any land uses that are contrary to federal law. A medical marijuana patient sued to have the court declare that the ordinance is invalid as conflicting with the Act. The city argued that its ordinance is valid, even if preempted by the Act, because the federal controlled substances law preempts the Act; as such, the Act cannot stand as an obstacle to enforcing its ordinance. The trial court ruled in favor of the city, finding that the federal controlled substances law preempted the Act because the Act stood as an obstacle to the purposes embodied in the federal law.

The Court of Appeals reversed and voided the city's ordinance. Its ruling is 2-fold:

1. It said that the city's zoning ordinance directly conflicted with the Act.

2. It said that the federal controlled substances law does not preempt the Act.

What does this decision mean to municipalities? We take three lessons away from this ruling:

1. This may not be the last we hear of this case. For several reasons, this is yet another medical marijuana case that the Michigan Supreme Court will likely take a close look at and possibly get involved in reviewing.

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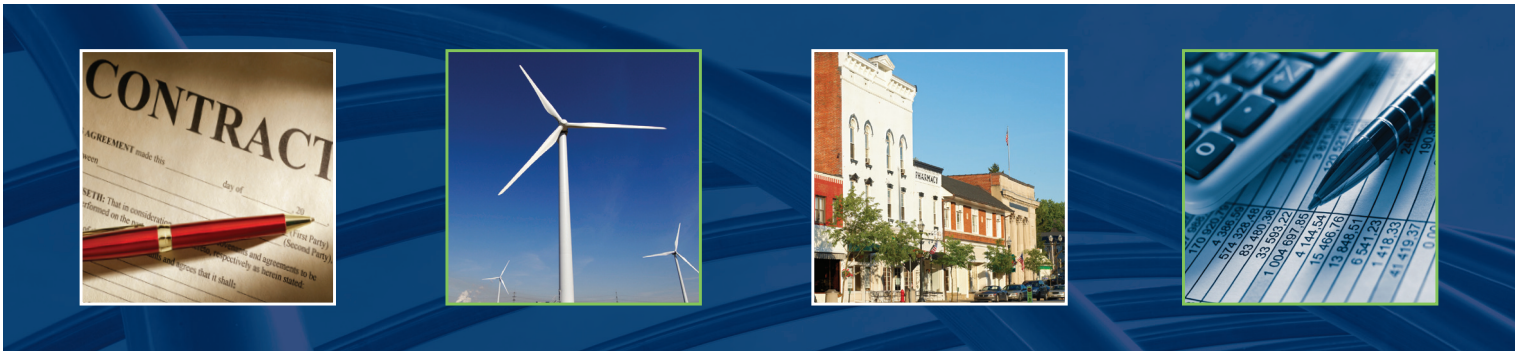

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2. Zoning ordinances like the city's – which bar land uses that are contrary to federal law – are of suspect enforceability as long as this decision stands.

3. The haze continues. Just when you thought you may know the boundaries of what individuals and municipalities can and can't do under the Act, we get a decision like this.

If you have questions about this article, please contact Ronald Richards of the Foster Swift Municipal Team.

UPCOMING WEBINAR SERIES FOR NEW MUNICIPAL OFFICIALS

From December 2012 through May 2013, the Foster Swift Municipal Law Group will conduct a series of free webinars to help newly-elected municipal officials get up to speed on the laws that govern Michigan municipalities. The webinars will outline basic municipal law principles, along with suggested "best practices" to avoid pitfalls. This is a "can't miss" for new municipal officials! It is also a nice refresher for veteran municipal officials as well.

The webinar series will consist of six seminars. The planned topics are as follows:

December 2012	Planning Commission & ZBA nuts and bolts
January 2013	Open Meetings Act
February 2013	Freedom of Information Act
March 2013	Labor Law Basics and Update
April 2013	Municipal Ethics
May 2013	Municipal Bonds

Look for specific dates and more details in upcoming newsletters.

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