

**STATE OF MICHIGAN
IN THE SUPREME COURT
(On Appeal from the Michigan Court of Appeals)
(Meter, P.J.; Murray and Beckering, J.J.)**

GREAT WOLF LODGE OF TRAVERSE
CITY, LLC,
Plaintiff-Appellee,

Supreme Court Docket No.: 139541-2
Court of Appeals Docket No.: 281398,
281404

v.

Ingham County CC No.: 06-001484-AA

MICHIGAN PUBLIC SERVICE
COMMISSION,
Defendant-Appellant,
and
CHERRYLAND ELECTRIC COOPERATIVE,
Defendant-Appellee.

MPSC: U-14593

GREAT WOLF LODGE OF TRAVERSE
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Supreme Court Docket No.: 139544-5
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281404

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**BRIEF OF THE ASSOCIATION OF BUSINESSES
ADVOCATING TARIFF EQUALITY AS *AMICUS CURIAE***

PROOF OF SERVICE

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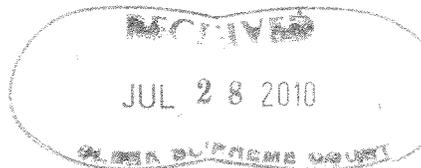


TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES	iii
STATEMENT OF INTEREST OF <i>AMICUS CURIAE</i>	1
STATEMENT OF JURISDICTION	5
STATEMENT OF QUESTIONS INVOLVED	6
STATEMENT OF FACTS	7
STANDARD OF REVIEW	8
ARGUMENT	9
I. THE COURT OF APPEALS CORRECTLY HELD THAT CHERRYLAND ELECTRIC COOPERATIVE DOES NOT HAVE AN AUTOMATIC RIGHT TO SERVE GREAT WOLF LODGE, AND THEREBY, CORRECTLY REMANDED THE CASE TO THE MICHIGAN PUBLIC SERVICE COMMISSION FOR FURTHER FINDINGS OF FACT.....	9
A. The Court of Appeals correctly interpreted <i>Consumers Energy</i> and held that it does not afford first providers the right to supply electricity in perpetuity for all currently serviced parcels of land.....	10
B. Defendants-Appellants overstate the alleged “negative impact” of the Court of Appeals’ ruling on the utilities industry.	12
C. The Court of Appeals applied the correct law to non-PSC governed utility providers and appropriately remanded to the Public Service Commission for development of the factual record.	14
D. Defendants-Appellants overstate the alleged “negative impact” of the Court of Appeals’ ruling on the non-PSC regulated utilities industry.	15

II.	THE COURT OF APPEALS CORRECTLY AFFIRMED THE CIRCUIT COURT’S DECISION TO AWARD INTEREST AND REMAND TO THE PSC FOR A DETERMINATION OF THE AMOUNT	16
III.	THE PSC SHOULD LEVY FINES.....	17
CONCLUSION AND RELIEF REQUESTED		17

INDEX OF AUTHORITIES

Cases

Great Wolf Lodge of Traverse City v Mich Pub Serv Comm’n,
285 Mich App 26; 775 NW2d 597 (Mich Ct App 2009)..... passim

In re Complaint of Consumers Energy Co,
255 Mich App 496; 660 NW2d 785 (2003)..... passim

Xerox Corp v Oakland Co,
191 Mich App 433, 441; 478 NW2d 702, 706 (1991)..... 16

Statutes

MCL 124.3(2) 14, 15

MCL 460.10 3, 10

MCL 460.10(a) 2, 3, 12

MCL 460.1001 2, 3, 12

MCL 460.558 1

Other Authorities

<http://www.abate-energy.org/> 2

Rules

1999 AC R460.3411 (“Rule 411”)..... 2, 3, 9, 12, 14, 15

1999 AC R460.3411(2) (“Rule 411(2)”) 9, 10, 12

1999 AC R460.3411(1)(a) (“Rule 411(1)(a)”) 9, 10

1999 AC R460.3411(11) (“Rule 411(11)”) 12

Treatises

Patek, Barbara A., McLain, Patrick, Granzotto, Mark, and Stockmeyer, N. O., Jr.,
Michigan Law of Damages and Other Remedies, Third Edition, The Institute
of Continuing Legal Education, pp. 28.2-28.3 (2002)..... 16

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Association of Businesses Advocating Tariff Equity (“ABATE”) is an association of major energy consuming corporations who have joined together to solve problems related to the supply of electric power and transportation of natural gas to industrial facilities located in the State of Michigan. A significant amount of ABATE’s activities involves representing the interests of its members before courts, United States and Michigan legislatures, and state and federal administrative agencies. ABATE appears before this Court as a representative of a number of major energy-consuming corporations which collectively make up a substantial part of Michigan’s industrial economy and are potentially affected by the issues currently before this Court.

In its April 9, 2010 order granting leave to appeal, this Court asked the parties to brief the following issues:

- 1) Whether Cherryland Electric Cooperative is entitled to provide any component of electric service to Great Wolf Lodge of Traverse City or its buildings and facilities,
- 2) Whether the Michigan Public Service Commission must impose interest on the refund it ordered Cherryland Electric Cooperative to pay, and
- 3) Whether the Michigan Public Service Commission must levy a fine, under MCL 460.558, on Cherryland Electric Cooperative.

This Court also asked ABATE to file a brief, stating: “The Association of Businesses Advocating Tariff Equity and the Electric Consumers Resource Council are invited to file briefs of *amicus curiae*.”

One of ABATE's many goals is to "promote competitive markets for energy where no single seller or group of sellers can control market prices."¹ Michigan's regulated monopoly utility market until recent years favored the interests of monopoly utility companies through a series of statutes and regulations, such as R460.3411 ("Rule 411"), adopted in 1983 at issue in the present case, that restrict customers' ability to transfer utility services between providers. Those statutes and regulations were misinterpreted to afford too much latitude to monopoly utility providers, who have demonstrated their propensity to engage in heavy-handed, monopolistic practices as in the instant case, and is inconsistent with more modern statutes recognizing customer choice.

The Court of Appeals' opinion adopts an approach to the regulatory issues that recognizes some amount of power for consumers, in limited circumstances, as intended by more modern laws, to choose their utility providers. By allowing for the severance of the customer-utility relationship under specific and narrowly-tailored circumstances, the Court of Appeals recognizes the possibility for consumer choice intended by the Legislature. The Michigan Legislature has expressly endorsed this policy goal in 2000 with the enactment of the Customer Choice and Electricity Reliability Act, MCL 460.10a, *et seq.*, and again in 2008 with the Clean, Renewable, and Efficient Energy Act, MCL 460.1001, *et seq.* The stated purposes of the Customer Choice and Electricity Reliability Act are:

- (a) To ensure that all retail customers in this state of electric power have a choice of electric suppliers.
- (b) To allow and encourage the Michigan public service commission to foster competition in this state in the provision of electric supply and maintain regulation of electric supply for customers who continue to choose supply from incumbent electric utilities.

¹ Association of Businesses Advocating Tariff Equity <<http://www.abate-energy.org/>> (accessed July 13, 2010).

- (c) To encourage the development and construction of merchant plants which will diversify the ownership of electric generation in this state.
- (d) To ensure that all persons in this state are afforded safe, reliable electric power at a reasonable rate.
- (e) To improve the opportunities for economic development in this state and to promote financially healthy and competitive utilities in this state.
- (f) To maintain, foster, and encourage robust, reliable, and economic generation, distribution, and transmission systems to provide this state's electric suppliers and generators an opportunity to access regional sources of generation and wholesale power markets and to ensure a reliable supply of electricity in this state.

MCL 460.10.

Additionally, the Clean, Renewable, and Efficient Energy Act of 2008 was enacted:

to promote the development of clean energy, renewable energy, and energy optimization through the implementation of a clean, renewable, and energy efficient standard that will cost-effectively do all of the following:

- (a) Diversify the resources used to reliably meet the energy needs of consumers in this state.
- (b) Provide greater energy security through the use of indigenous energy resources available within the state
- (c) Encourage private investment in renewable energy and energy efficiency.
- (d) Provide improved air quality and other benefits to energy consumers and citizens of this state.

MCL 460.1001.

Such goals will not be accomplished under the current Public Service Commission's ("PSC") antiquated regulatory view reflected in this case and the PSC's ever-expanding interpretation of "customer" from its Rule 411 first issued in 1983, which encourages unreasonably high monopolistic rates and status-quo energy sources, running contrary to the State's attempts to

foster customer choice, competitive utility rates, and use of clean, renewable, and efficient energy sources. This Court should uphold the Court of Appeals' decision to reconcile outdated interpretation of old regulations with the forward-looking goals of the Michigan Legislature's enactments of 2000 and 2008 in a practical and sensible manner.

STATEMENT OF JURISDICTION

Amicus ABATE adopts by reference the jurisdictional statement of Plaintiff-Appellee.

STATEMENT OF QUESTIONS INVOLVED

Amicus ABATE adopts by reference the statement of questions involved of Plaintiff-Appellee.

STATEMENT OF FACTS

Amicus ABATE adopts by reference the statement of facts of Plaintiff-Appellee.

STANDARD OF REVIEW

Amicus ABATE adopts by reference the standard of review of Plaintiff-Appellee.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT CHERRYLAND ELECTRIC COOPERATIVE DOES NOT HAVE AN AUTOMATIC RIGHT TO SERVE GREAT WOLF LODGE, AND THEREBY, CORRECTLY REMANDED THE CASE TO THE MICHIGAN PUBLIC SERVICE COMMISSION FOR FURTHER FINDINGS OF FACT.

1999 AC R460.3411(2) (“Rule 411(2)”), first adopted in 1983, states that a customer of a utility cannot transfer service from one utility to another. 1999 AC R460.3411(1)(a) (“Rule 411(1)(a)”) defines “customer” for purposes of this regulatory regime: “(a) ‘Customer’ means **the buildings and facilities** served rather than the individual, association, partnership, or corporation taking service.” 1999 AC R 460.3411(1)(a) (emphasis added). Courts have since attempted to clarify this definition. For example, in *In re Complaint of Consumers Energy Co*, 255 Mich App 496; 660 NW2d 785 (2003), the Court of Appeals, attempting to determine what constitutes a utility-customer relationship, stated, “for purposes of Rule 411, a change in ownership and demolition of all buildings served **did not** create a new customer.” *Great Wolf Lodge of Traverse City v Mich Pub Serv Comm’n*, 285 Mich App 26, 38; 775 NW2d 597, 604 (Mich Ct App 2009) (citing *Consumers Energy, supra* at 502) (emphasis added). Here, the “buildings and facilities served” by Cherryland Electric Cooperative (“Cherryland”) were razed before Great Wolf Lodge purchased the land on which they sat. (Appellee’s Brief at 3.) Thus, determining whether the utility-customer relationship with Cherryland was severed before Great Wolf Lodge purchased the land requires an interpretation of *Consumers Energy’s* holding. The Court of Appeals correctly interpreted *Consumers Energy, supra*, and applied it to the facts at issue.

A. The Court of Appeals correctly interpreted *Consumers Energy* and held that it does not afford first providers the right to supply electricity in perpetuity for all currently serviced parcels of land.

The Court of Appeals correctly stated that *Consumers Energy, supra*, does not allow first providers to supply electricity in perpetuity for all currently serviced parcels of land. The Court of Appeals stated:

If the changes in buildings and facilities and interruption of service came about in reasonable proximity to and for the purpose of a change in ownership and plan for the site, then under *In re Complaint of Consumers Energy*, those changes and that interruption did not create a new customer. If, however, the previous owner held on to the site for a significant period after all land uses requiring electricity had been abandoned, requested that the electric service be terminated, and demolished buildings or removed facilities, or at least allowed them to stand without electricity, for reasons other than anticipation of an immediate change of ownership or land use, then those actions should be deemed to have extinguished the previously existing customer or customers on the site, thus severing the utility-customer relationship.

Great Wolf Lodge, supra at 40.

Thus, the Court of Appeals correctly declined to agree with Defendants-Appellants and hold that the definition of “customer” under Rule 411(2) is a “parcel” or “property,” electing instead to stay with the definition of “customer” actually in Rule 411(a) (i.e., “customer means the buildings and facilities served.” The PSC did not interpret Rule 411(a) according to its actual words and plain meaning, but instead interpreted the Rule as though it defined the customer as the “parcel” or “property.” It follows that the Court of Appeals appropriately rejected Defendants-Appellants’ argument that *Consumers Energy, supra*, stands for the proposition that:

an electric utility’s customer is the **parcel of land served**, such that, once service to a **parcel** is established, as long as the utility keeps a live distribution line in the vicinity and stands prepared to resume service, no period of interruption in service, and no degree of destruction of the actual buildings or removal of facilities extinguishes the utility-customer relationship.

Great Wolf Lodge, supra at 38 (emphasis added).

In so holding, the Court of Appeals expressed an understanding of the need for a balance between the rights of customers to freely select their providers and the rights of providers to be secure in their service territory. According to Defendants-Appellants' interpretation of *Consumers Energy, supra*, the utility-customer relationship may only be severed by the discontinuation of the live distribution lines that service a tract of land, an act that can only be carried out by the utility itself. Thus, Defendants-Appellants' interpretation amounts to giving absolute veto power to utilities to prevent a customer from severing its relationship with a utility and grants perpetual rights to utilities to supply power to every plot of land they ever serve. Cherryland demonstrated the unreasonable consequences that pervade the market under such a policy regime when it successfully forced Great Wolf Lodge to accept its utility service by refusing to remove its distribution line from the property in question. The Court of Appeals correctly limited the power that Defendants-Appellants' reading of *Consumers Energy, supra*, gave utilities, providing for the severability of the utility-customer relationship where there has been discontinuation of service, lapse of time, and abandonment or demolition of the facilities without any anticipation of a change in ownership or use of the property. *Great Wolf Lodge, supra* at 40. This interpretation, which retains an ample amount of territorial security for utility companies, grants a reasonable amount of opportunity to new landowners to "shop" for competitive utility prices, and prevents utilities from trapping their customers into permanent service agreements.

The complete absence of competition and customer choice from the market gives too much latitude to monopoly utilities and does not serve the interests of the public. Indeed, Cherryland demonstrated in the present case that heavy-handed and monopolistic actions are not

entirely absent from the regulated monopoly utility market. Where the PSC failed to protect the public from such activity, the Court of Appeals *did* effectively protect the public by recognizing a moderate amount of competition was to exist in the utility's market without endangering the security of existing utility service territory. The current state of the law and industry practice supports a consumer's ability to choose its electricity provider in certain circumstances.² The PSC's antiquated interpretation of Rule 411's prohibition on transferring utilities is a vestige of a bygone era where customers had no choices, unlike more modern current laws which recognize some consumer choice and encourage alternative and renewable energy supplies.

B. Defendants-Appellants overstate the alleged “negative impact” of the Court of Appeals’ ruling on the utilities industry.

As a practical matter, the property and facility arrangement giving rise to the instant case rarely occurs. As such, Cherryland greatly overstates the effects of the Court of Appeals’ ruling when it argues:

[I]f customers could unilaterally destroy a utility's entitlement to serve merely by selling property or requesting a disruption in service, the entire purpose behind Rule 411 would vanish – customers could easily get around Rule 411(11),³ thus creating the potential for duplication of services and all of the financial safety issues that come with it.

(Cherryland Brief at 23.)

² See, Customer Choice and Electricity Reliability Act, MCL 460.10a, and Clean, Renewable, and Efficient Energy Act, MCL 460.1001, discussed p. 2, *supra*.

³ Cherryland misinterprets Michigan Administrative Code Rule 460.3411(11) (“Rule 411(11)”) for the proposition that it, synonymously with Rule 411(2), prohibits the transfer of a customer from one utility to another. The Court of Appeals correctly pointed out that 411(11) is inapposite to this case, as “[r]ule 411(11) concerns extensions of service on premises already being served, and guards against any single premises being served by multiple utilities.” *Consumers Energy, supra* at 34. Thus, for purposes of this discussion, *Amicus* will assume that Cherryland's reference to Rule 411(11) is meant to refer to Rule 411(2).

Cherryland first ignores the fact that the Court of Appeals limited its holding with the phrase “for reasons other than anticipation of an immediate change of ownership or land use . . . ” *Great Wolf Lodge, supra* at 38. This limiting language eliminates the possibility that customers all over the State of Michigan will transfer their services and create a complete upheaval of the current utility territories, instead guaranteeing that the Court of Appeals’ ruling will not have the far-reaching effects that Cherryland claims. Under the strict requirements of the Court of Appeals’ language, an average consumer could not transfer to another utility so easily.⁴

Cherryland also criticizes the Court of Appeals’ holding because it would cause a great expense to utilities due to the need to duplicate facilities that it creates. (Cherryland Brief at 23, 33.) This argument fails because, as explained above, the situation will rarely arise where the duplication of services will be required. Additionally, if the factual situation does arise, the cost of duplication of facilities is one that the utility can pass on to the customer receiving the “duplication.” Thus, a customer would factor in the cost of the new facilities in deciding whether to switch from the utility that previously serviced its buildings to a different utility. In light of these limiting factors, the Court of Appeals’ decision is carefully drawn and simply does not foreshadow large scale customer switching or place significant utility investment at risk.

The PSC points out the importance of having a bright-line rule to minimize the cost and amount of subsequent litigation. (PSC Brief at 26.) The PSC overlooks the fact that *Consumers*

⁴ Switching utility providers is really only possible when the competing utility providers are both adjacent to the customer’s property and structures. It would be nearly impossible for a competing utility to get the necessary rights-of-way, easements or licenses to provide electric utility service to a customer completely surrounded by the incumbent utility’s service territory. Consequently, it is pure hyperbole that the Court of Appeals decision will open “. . . the floodgates for new litigation regarding whether a customer can switch electric utilities. . . .” Cherryland Brief at 3.

Energy, supra, initially created confusion with regard to this issue. Indeed, the very existence of the present case illustrates the need for clarification of the *Consumers Energy, supra*, case. The Court of Appeals has provided clarity to the law while still allowing for a reasonable outcome. Additionally, the underlying theory of the rule is still clear. The Court of Appeals' holding stands for the proposition that the utility-customer relationship can be severed where a substantial period of time goes by without any electricity use in the facilities that stand on a property that does not immediately change ownership. Only a brief factual inquiry is required to determine if this standard has been met, whereas the rule in *Consumers Energy, supra*, provides no such guidance yet still requires a similar factual inquiry.

C. The Court of Appeals applied the correct law to non-PSC governed utility providers and appropriately remanded to the PSC for development of the factual record.

The Court of Appeals correctly held that Traverse City Light & Power (“TCL&P”) “does not fit the definition of ‘utility’ for purposes of Rule 411, and so the strictures of that rule do not come to bear.” *Great Wolf Lodge, supra* at 40. Indeed, TCL&P is not regulated by the PSC, as it has no jurisdiction to do so. Therefore, when the PSC ruled against Great Wolf Lodge on Count II of its Complaint, which sought a declaration that Great Wolf Lodge would be free to choose a different electricity provider at the end of its coerced contract with Cherryland, the PSC improperly over-reached its jurisdiction.

Instead, the Court of Appeals correctly stated that TCL&P, a municipal electricity provider, is governed by MCL 124.3(2) which provides:

A municipal corporation shall not render electric delivery service for heat, power, or lights to customers outside its corporate limits already receiving the service from another utility unless the serving utility consents in writing. (emphasis added)

Additionally, the Court of Appeals correctly held that the definition of “customer” for purposes of Rule 411 also applies to MCL 124.3(2), thus extending its standard for extinguishing the utility-customer relationship to non-PSC regulated utilities such as municipal providers. *Great Wolf Lodge, supra* at 32.

D. Defendants-Appellants overstate the alleged “negative impact” of the Court of Appeals’ ruling on the non-PSC regulated utilities industry.

Because the Court of Appeals applies the same definition of “customer” to both types of utilities, Cherryland’s concerns over the negative impact of the Court of Appeals’ holding⁵ are no more likely to occur under the non-PSC utilities’ statutory scheme than under that governing PSC-regulated utilities. Cherryland also overlooks that fact that MCL 124.3(2)’s phrase “unless the serving utility consents in writing” imposes an additional safeguard against non-PSC regulated utilities switching clients. If this Court affirms the Court of Appeals, the resulting rule will be that where a non-PSC regulated utility serves a customer, the customer may sever the utility-customer relationship by engaging in activity that fits the Court of Appeals’ description. It should be noted, however, that this possibility is already uncommon. If, however, that utility-customer relationship remains in place, the serving utility will be able to prevent the transfer of services to a non-PSC utility under the limiting language “unless the serving utility consents in writing.” Therefore, the Court of Appeals’ holding does not constitute a change in a PSC-regulated utility’s rights to prevent its customers from switching their services to a non-PSC regulated utility.

⁵ Specifically, Cherryland states: “Every electric utilities’ customer base is now in jeopardy – the utilities’ investment of time and money to extend services to customers may now all be for naught, as long as a new owner of property decides it wants to receive service from a municipal utility.” Cherryland Brief at 3.

II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE CIRCUIT COURT’S DECISION TO AWARD INTEREST AND REMAND TO THE PSC FOR A DETERMINATION OF THE AMOUNT.

The Court of Appeals correctly affirmed the Circuit Court’s determination that interest should be imposed on Cherryland’s refund to Great Wolf Lodge and rightfully remanded the case to the PSC for a determination of the amount.

Interest is not a penalty to a wrongful party, but is instead compensation for the lost time-value of funds. *See, Xerox Corp v Oakland Co*, 191 Mich App 433, 441; 478 NW2d 702 (1991); *see also, Michigan Law of Damages and Other Remedies*.⁶ “For more than 100 years, courts have recognized that complete compensation of the plaintiff can only be accomplished if the plaintiff is awarded interest from the date of the injury.” *Michigan Law of Damages and Other Remedies*.⁷

As such, the PSC misstated the law when it said that Cherryland’s action was “not so clearly unreasonable as to justify the imposition of a fine or interest on the refund to [Great Wolf Lodge].” (PSC Appendix 79a.) As the Court of Appeals described, the PSC “apparently treat[ed] interest as some kind of penalty it thought was not deserved.” *Great Wolf Lodge, supra* at 27.

The Court of Appeals decided correctly that, “An award of interest on top of the normal dollars found to have been overpaid is necessary to restore Great Wolf to its original condition,” accurately characterizing the interest owed as compensation, not a penalty. *Great Wolf Lodge, supra* at 27. This Court should affirm the Court of Appeals’ acknowledgement that the award of

⁶ Patek, Barbara A., McLain, Patrick, Granzotto, Mark, and Stockmeyer, N. O., Jr., *Michigan Law of Damages and Other Remedies*, Third Edition, The Institute of Continuing Legal Education, pp. 28.2-28.3 (2002) (“These two forms of interest . . . share a common purpose – compensating the plaintiff for the loss of the use of funds.”).

⁷ *Michigan Law of Damages and Other Remedies*, n.5, *supra*.

interest on refunds is fundamental to the fair treatment of customers when they have been overcharged, and is a necessary element of making a wronged party whole.

III. THE PSC SHOULD LEVY FINES.

ABATE supports the arguments made by Plaintiff-Appellee to the effect that the plain meaning of the statute requires that fines be levied under the facts presented.

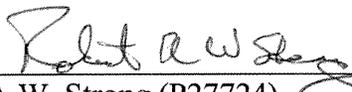
CONCLUSION AND RELIEF REQUESTED

Amicus Curiae, The Association of Businesses Advocating Tariff Equity, respectfully requests that this Court affirm the Court of Appeals in this case.

Respectfully submitted,

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Dated: July 28, 2010

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