

STATE OF MICHIGAN  
IN THE SUPREME COURT  
Appeal from the Court of Appeals  
[Meter, P.J. and Murray, and Beckering, JJ.]

GREAT WOLF LODGE OF TRAVERSE CITY,  
LLC,

Plaintiff-Appellee,

v

MICHIGAN PUBLIC SERVICE  
COMMISSION,

Defendant-Appellant,

and

CHERRYLAND ELECTRIC COOPERATIVE,

Defendant-Appellee.

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Docket Nos. **139541 and 139542**

Court of Appeals Nos. **281398 and  
281404**

Ingham County Circuit Court  
Docket No. 06-1484-AA

MPSC Case No. U-14593

**MICHIGAN PUBLIC SERVICE COMMISSION'S BRIEF ON APPEAL**

**ORAL ARGUMENT REQUESTED**

**MICHIGAN PUBLIC SERVICE  
COMMISSION**

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## STATEMENT OF QUESTIONS

- I. The Michigan Public Service Commission applied its longstanding interpretation of its administrative rule, Rule 411, that a regulated utility, such as Cherryland, who initially provides a premise with electric distribution service, continues to maintain the right to provide that service even if the premises changes ownership or has structures removed. The Court of Appeals has previously affirmed the Commission's interpretation of this rule. Did the lower court err in holding to the contrary in this matter?

Defendants-Appellants' answer: "Yes."

Plaintiff-Appellee's answer: "No."

- II. The Michigan Public Service Commission determined that in its earlier decision it ordered Cherryland to continue to provide electric service to Great Wolf Lodge under the same rate as provided in a proposed tariff which had certain minimum load requirements. Great Wolf Lodge did not meet these load requirements. Nonetheless, the Commission ordered Cherryland to refund the difference between the Commission's ordered rate and the higher rate Cherryland believed was applicable to Great Wolf Lodge. The Commission was not required to also impose interest on the \$72,550 refund to Great Wolf Lodge. Did the lower court err in holding that the Commission was required to impose interest on the refunded amount?

Defendants-Appellants' answer: "Yes."

Plaintiff-Appellee's answer: "No."

- III. The Commission found that Cherryland did not willfully and knowingly misinterpret the prior order that Cherryland should continue to provide Great Wolf Lodge with the same rate Cherryland had proposed in its tariff even if Great Wolf Lodge failed to meet the minimum load requirements contained in the tariff. Therefore, the Commission was not required to levy a fine under MCL 460.558. Did the lower court err in finding to the contrary?

Defendants-Appellants' answer: "Yes."

Plaintiff-Appellee's answer: "No."

## INTRODUCTION

Under its statutory authority, the Michigan Public Service Commission's (MPSC or Commission) lawfully promulgated Rule 411 of its Technical Standards for Electric Service (Rule 411) for the purpose of determining the proper regulated utility to distribute or extend electrical power to a particular location. The Commission has consistently interpreted Rule 411 to provide that the first utility to extend distribution and transmission lines for electrical service to a particular location maintains the right to continue to serve that location irrespective of any change of ownership or structures at the location. Previously, the Court of Appeals endorsed the MPSC's longstanding application of Rule 411 in *Consumers Energy v. MPSC*.<sup>1</sup> The application of Rule 411 protects against costly duplication of utility services and provides certainty, not only as to the rights of the utilities but to its ratepayers as well.

The Court of Appeals' decision, which modifies a longstanding and successful regulatory practice, creates only uncertainty and confusion. In essence, it holds that a change of the ownership or destruction of buildings could extinguish the incumbent utility's right to continue to provide utility service.. This means that henceforth a regulated utility's service territory will be determined, not by the actions of that utility but rather by the actions of customers. The folly of this reasoning is amply demonstrated in this case. Here, the unmistakable fact is that an electric service line was constructed by the incumbent utility and extended onto the property. And for years electrical service was provided by that incumbent utility to buildings on that property. But despite the fact that the incumbent utility and its ratepayers have borne the expense of this capital improvement, as well as any operation and maintenance costs, their entire investment can now be

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<sup>1</sup> *Consumers Energy Co v MPSC*, 255 Mich App 496; 600 NW2d 785 (2002).

extinguished by the actions of others. The result is that the Court of Appeals has now driven a wedge into a fairly straightforward regulatory practice and created another one that can be manipulated by customers and non-customers alike. Where there was once certainty there is now a potential for great mischief.

Presumably, the Court of Appeals' rationale is hinged on a mistaken notion of competition. But if this is competition there is little doubt as to who the losers will be. For in the highly regulated utility industry – where the extension of distribution and transmission lines are recoverable costs from the ratepayers – the duplication of services by competing utilities will ultimately be passed onto the ratepayers in the form of higher utility rates.

The Court of Appeals' decision is wrong and should be reversed.

The Court of Appeals further erred by impermissibly substituting its judgment for that of the Commission and reversing the Commission's determination that Cherryland was sufficiently penalized for failing to seek clarification of its earlier Order as to which rate to charge Great Wolf Lodge by requiring Cherryland to refund to Great Wolf Lodge \$72,550. The Court of Appeals failed to defer to the Commission's decision to not further penalize Cherryland for its error by including interest or fines to this refund.

## STATEMENT OF PROCEEDINGS AND FACTS

This case involves the distribution of electrical service by Cherryland Electric Cooperative (Cherryland) to Great Wolf Lodge's (GWL) water park resort located in Traverse City, Michigan. GWL's Complaint before the Michigan Public Service Commission, in MPSC Case No.U-14593, alleged two counts. (MPSC Appendix 65a). Count I alleged that Cherryland was charging an unauthorized rate in violation of MCL 460.552. Count II requested that the Commission declare that, after the termination of GWL's agreement with Cherryland, GWL could contract to receive its electrical service from any provider it chose.

### I. Past Proceedings before the Commission.

GWL's Complaint was not the parties' first interaction. In order to place the Commission's Order in its proper context, discussed below is the historical background between GWL and Cherryland in executing a special electric service agreement in 2002 and 2003; the MPSC approval of the Large Resort Service rate in Case No. U-13716; (MPSC Appendix 1a) and the Commission's decision in MPSC Case No. U-14593.

#### A. MPSC Case No. U-13716 – Cherryland's Application for authority to implement a Large Resort Service rate.

On February 24, 2003, Cherryland filed an Application with the MPSC requesting authority to implement the Large Resort Service (LRS) tariff. This was done specifically to provide electric service to GWL. Cherryland's LRS rate application, in that docket, set forth the availability of that rate and its monthly rate as follows:

##### Availability

Available to member-consumers of Cherryland . . . for service to resort lodge facilities . . . subject to the Cooperative's established rules and regulations. **This schedule is available to member-consumers with greater than a 50% load factor and at least a 1500 KW load. If the member-consumer does not meet the requirements of the prior sentence, it shall be billed at another applicable rate.**

\* \* \*

Monthly Rate

For all usage other than outside lighting      Energy Charge:      \$0.0496/kWh.  
Emphasis added. (MPSC Appendix 15a).

Thus, under Cherryland's proposed LRS tariff rate, a customer could take service pursuant to the LRS tariff rate if the customer had greater than a 50% load factor and at least a 1,500 kW load. For usage other than outside lighting, the energy charge would be \$0.0496/kWh. GWL did not intervene in Cherryland's LRS tariff case, and the MPSC's Staff supported Cherryland's proposed tariff with minor modifications.

After reviewing the record, the MPSC denied Cherryland's Application. Specifically, the Commission denied the Application because (1) GWL was the only customer eligible for the LRS rate; and (2) it was imprudent to approve a "generally available" LRS tariff based on the incremental costs of serving a single customer—GWL. (MPSC Appendix 70a). The Commission further stated:

The application filed by Cherryland Electric Cooperative on February 24, 2003 for approval of a large resort service tariff is rejected, but **the rate currently charged by Cherryland to Great Wolf Lodge is approved on a temporary basis for one year from the date of this order or the date that a special contract becomes effective, whichever occurs first.** Emphasis added. (MPSC Appendix 12a).

**B.      MPSC Case No. U-14240 – Cherryland's Application for approval of a Special Contract with Great Wolf Lodge.**

After the Commission's July decision in MPSC Case No. U-13716, on August 20, 2004, Cherryland subsequently submitted an Application for approval of a special contract with GWL. GWL intervened in the proceeding. But GWL refused to sign the contract, and the MPSC issued an order dismissing Cherryland's application. (MPSC Appendix 18a).

## **II. MPSC Case No. U-14593 – Great Wolf Lodge's Complaint.**

MPSC Case Nos. U-13716 and U-14240 were the precursors to GWL's Complaint in Case No. U-14593. On July 13, 2005, GWL filed a two-count Complaint with the Commission against Cherryland: Count I alleged that Cherryland was charging an unauthorized rate in violation of MCL 460.552; and Count II requested that the Commission declare that, after the termination of GWL's agreement with Cherryland, GWL could contract to receive all components of its electrical service from any provider it chose. (MPSC Appendix 65-66a, 21a). On August 30, 2005, Cherryland responded to GWL's Complaint with a Motion for Summary Disposition asserting that Count I of the Complaint should be dismissed because GWL had failed to meet the threshold load requirement for the LRS rate; and Count II should be dismissed because, as a matter of law, GWL could take electric generation services from an AES or alternative electric supplier but can not choose the provider from which it receives electric transmission and distribution services. (MPSC Appendix 66-67a, 32a).

Oral arguments on Cherryland's Motion for Summary disposition were heard by an Administrative Law Judge (ALJ) on September 8, 2005. After requesting supplemental briefs, the ALJ issued a ruling on the motion. Noting that the material facts in this proceeding were undisputed, the ALJ made the following statement:

In 2001, GWL solicited bids for the provision of electric service to its planned water park/resort lodge on the site of the Oleson family farm in Garfield Township outside Traverse City, Michigan. At that time, Cherryland maintained a de-energized service drop to the farm. Bids were submitted by Cherryland, Traverse City Light & Power (TCLP), and Consumers Energy. TCLP's bid was accepted and GWL and TCLP executed an electric service contract on December 18, 2001.

Shortly thereafter, the Olesons, who still owned the property, requested the removal of Cherryland's service drop. On January 10, 2002, Cherryland informed GWL that it would remove the service drop only upon GWL's agreement to accept service from Cherryland. GWL conceded to Cherryland's demand and, on January 29, 2002, terminated its contract with TCLP. (MPSC Appendix 52a).

Additionally, the ALJ discussed the Special Customer Electric Service Agreements entered into by Cherryland and GWL. With respect to these agreements, the ALJ stated:

On May 30, 2002, the parties to this complaint signed a Special Customer Electric Service Agreement which was superseded by a second Special Customer Electric Service Agreement on March 31, 2003.

Under the second agreement, GWL was to pay Cherryland pursuant to the rates, terms, and conditions of the LRS schedule that was being submitted to the MPSC for approval. See Motion for Summ Disp, Exh B, ¶5.1 (August 30, 2005). By its terms, the LRS schedule was limited to resort lodge facilities "with greater than a 50% load factor and at least a 1,500 KW load" and the energy charge was set at \$0.0496/kWh. See Motion for Summ Disp, Exh C (August 30, 2005). The agreement contained a no waiver clause that stated, in part, "[n]o course of dealing nor any failure or delay on the part of a party in exercising any right, power or privilege under this Agreement shall operate as a waiver of any such right, power or privilege." Motion for Summ Disp, Exh B, ¶14.4 (August 30, 2005). The agreement also contained an amendment clause that stated that the "agreement may be changed, waived, or terminated only by written agreement signed by the parties . . . ." Motion for Summ Disp, Exh B, ¶14.5 (August 30, 2005). (MPSC Appendix 52-53a).

Lastly, the ALJ discussed Cherryland's previous application for authority to implement a LRS tariff rate for GWL, in MPCS Case No. U-13716. With respect to GWL taking service under the LSR rate, the ALJ stated:

...on February 24, 2003, Cherryland filed an application for authority to implement the LRS tariff rate. On July 22, 2004, the application was "rejected, but the rate [then] charged by Cherryland to [GWL] [was] approved on a temporary basis for one year . . . or [to] the date that a special contract [became] effective, whichever [was] first." *In re Application of Cherryland Electric Co-op*, U-13716, Order, p. 8 (July 22, 2004). On the date of the July 22, 2004 order, GWL was receiving service pursuant to the LRS schedule. However, as of that date, Cherryland had never enforced the 1,500 kW load requirement contained in the LRS schedule. Later, in November of 2004, Cherryland began charging GWL under its Large Commercial and Industrial tariff "because [GWL] failed to satisfy the 50% load factor/1,500 kW load threshold requirements under the proposed LRS tariff." *Affidavit of Tony Anderson*, ¶ 4 (September 7, 2005). GWL has met the 1,500 kW requirement in only August of 2003 and July of 2005. *id.* at ¶ 3. (MPSC Appendix 53a).

Based on these material facts, the ALJ ruled as follows:. As to Count I of the Complaint, the ALJ recommended that the Commission decide in favor of GWL because Cherryland

violated the Commission's July 22, 2004 order by applying, the 1,500 kW provision of the Special Customer Electric Service Agreement. (MPSC Appendix 67a, 57a). Regarding Court II of the Complaint, the ALJ recommended that the Commission decide in favor of Cherryland because existing administrative rules do not permit GWL to receive distribution services from the utility of its choice. (MPSC Appendix 67a, 62a).

GWL and Cherryland appealed the ALJ's ruling. After arguments related to damages under Count I of GWL's Complaint were made, the ALJ issued his Proposal for Decision on February 22, 2006. Cherryland, GWL, and the Staff filed exceptions and replies to exceptions to the Proposal for Decision.

On May 25, 2006, the Commission issued its Opinion and Order addressing GWL's Complaint. As to the allegations in Count I, the MPSC concluded:

Thus, the plain language of the order [MPSC July 22, 2004 order in Case No. U-13716] provided that Cherryland continue to charge the LRS rate for up to one year. The Commission intended to preserve the status quo between the parties while they worked out the terms of a special contract. . . . Therefore, the Commission finds that Cherryland should have continued charging the LRS rate to GWL until July 22, 2005 as stated in the order. **Cherryland's subsequent concerns about charging GWL an inappropriate rate are recognized. However, in the unique circumstances of this case, Cherryland should have sought clarification of the July 22 order.** Cherryland failed to do so and instead switched GWL to its LCI rate, which, although Commission-approved, was not the rate approved in the July 22 order. As a result, the Commission agrees with the ALJ's finding that Cherryland should refund \$72,550.16 to GWL for the period during which GWL was charged at the higher LCI rate. Emphasis added. (MPSC Appendix 79a).

Due to the unique circumstances in this case, the MPSC declined GWL's request to levy a fine, as permitted by MCL 460.558, on Cherryland for electric service overcharges. The Commission determined that Cherryland's conduct did not warrant imposing a fine. The Commission found that:

**Incorporated in the application filed in Case No. U-13716, and never questioned by the parties, was the assumption that GWL was in compliance with all of the terms and conditions of the LRS rate. . . .**

Nevertheless, because the issue of additional terms and conditions of the proposed tariff and special agreement were not before the Commission in Case No. U-13716, **the Commission agrees with the Staff that Cherryland's interpretation of the July 22 order was not so clearly unreasonable as to justify the imposition of a fine or interest on the refund to GWL.** Emphasis added. (MPSC Appendix 79a).

The MPSC also rejected GWL's claim that the LRS rate should be continued on a going-forward basis until a special contract is signed and approved. In rejecting the claim, the MPSC stated:

The Commission also finds that under the plain language of the July 22 order, the LRS rate was only available to GWL until a special contract was signed, or for one year, whichever occurred first. July 22 order, p. 12. Because a special contract was never signed by the parties, Cherryland has properly charged GWL a Commission-approved rate since July 22, 2005 and should continue to do so until a special contract is executed and approved. (MPSC Appendix 79-80a).

Regarding Court II of GWL's Complaint, the Commission found that GWL could not choose its electrical service distribution provider. When declining GWL's request, the MPSC stated:

The Commission . . . agrees with . . . Staff . . . that GWL's request for a declaratory ruling that would permit the lodge to elect to receive all elements of electric service from a provider other than Cherryland should be denied. (MPSC Appendix 80a).

Referencing the analysis of the MPSC Staff, the Commission stated:

Regarding Count II of the complaint, the Staff concurred with Cherryland's position and argued that under both Rule 411 and MCL 124.3, GWL was an existing customer of Cherryland and therefore could not switch distribution providers—at all under Rule 411—or without Cherryland's permission under MCL 124.3. The Staff also argued that the [Grand Traverse] Circuit Court's decision was erroneous because the Circuit Court failed to recognize that the "customer" includes not only the building but the premises as well. Moreover, the Staff claimed that under the Circuit Court's interpretation of

the statute, regulated utilities have less protection than municipal utilities. (MPSC Appendix 72a).

The MPSC further concluded:

The definition of "customer" in Rule 411 distinguishes between the parent corporation that may own a facility or property at a site, and the site itself. Rule 411(1)(a) provides that the site itself is the "customer," not the corporation or individual who owns the site nor a particular building on the site. Thus, a change in ownership does not create a new customer, nor does the loss or addition of a building, as the customer is also the "facilities." Furthermore, once a utility has extended service to a customer, the utility then has the right to serve the entire premises, even if a portion of the load is closer to another utility's distribution facilities. *See*, June 7, 2005 order in Case No. U-14193, pp. 17-18.

It is undisputed that the GWL premises was an existing customer of Cherryland under Rule 411 in 2001. Cherryland had provided service to a farmhouse located on the GWL premises for many years before GWL purchased the property....

... Although the Commission may order a utility to transfer distribution services to another utility, it has only done so to remedy a Rule 411 violation; i.e., to restore the customer's service to the distribution utility that was entitled to provide service under the rule. *See, e.g.* April 20, 2004 order in Case No. U-13764 and June 7, 2005 order in Case No. U-14193. In the instant case, however, it appears that Cherryland did not violate Rule 411. Therefore, the Commission declines to grant the relief that GWL requests. . . .

GWL further argues that the Commission is bound by the Circuit Court's interpretation of "customer" under MCL 124.3 and that under that interpretation, GWL had a choice of electric service providers in 2001. According to GWL, because that choice was thwarted by Cherryland's refusal to remove the service drop, the Commission should now declare that GWL has full choice in transmission and distribution services. The Commission disagrees. GWL has not cited any legal authority as a basis for the Commission to grant the relief sought under the circumstances of this case. (MPSC Appendix 80-81a).

GWL sought review of the MPSC's May 25, 2006 Opinion and Order in MPSC Case No. U-14593 by the Ingham County Circuit Court.

### **III. The Ingham Circuit Court decision.**

Following the filing of briefs and oral arguments, the Ingham County Circuit Court issued an Opinion and Order on October 2, 2007. (MPSC Appendix 85a). Regarding GWL's

claim that the MPSC unlawfully concluded that Rule 411 precluded GWL's requested relief in Count II, the Ingham County Circuit Court affirmed the Commission's interpretation of Rule 411 and found that *Consumers Energy v MPSC*<sup>2</sup> was binding precedent. As to whether fines should be assessed against Cherryland and whether interest should be awarded on GWL's refund, the Ingham County Circuit Court reversed the Commission.

Both the MPSC and GWL filed Applications for Leave to Appeal the Circuit Court's October 2, 2007 Opinion and Order. By an order entered June 16, 2008, the Court of Appeals granted both applications.

#### **IV. The Court of Appeals' decision.**

On July 14, 2009, the Court of Appeals issued a published opinion in *Great Wolf Lodge of Traverse City, LLC v Michigan Public Service Commission and Cherryland Electric Cooperative*. (MPSC Appendix 99a). The Court of Appeals reversed the Michigan Public Service Commission and the Ingham County Circuit Court regarding the application of Rule 411 in this case (MPSC Appendix 104a) and affirmed the Ingham County Circuit Court's determination that the Commission erred in not assessing a fine pursuant to MCL 460.554 and in not awarding interest on the refund to Great Wolf Lodge. (MPSC Appendix 105a).

On August 25, 2009, the Commission and Cherryland filed separate Applications for Leave to Appeal the Court of Appeals' July 14, 2009 Opinion. By an order entered April 9, 2010, this Court granted both applications for leave to appeal:

On order of the Court, the applications for leave to appeal the July 14, 2009 judgment of the Court of Appeals are considered, and they are GRANTED. The parties shall include among the issues to be briefed: (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

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<sup>2</sup> *Consumers Energy Co v MPSC*, 255 Mich App 496; 600 NW2d 785 (2002);

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. (MPSC Appendix 107-108a).

## ARGUMENT

**I. The Michigan Public Service Commission applied its longstanding interpretation of its administrative rule, Rule 411, that a regulated utility, such as Cherryland, who initially provides a premise with electric distribution service, continues to maintain the right to provide that service even if the premises changes ownership or has structures removed.**

**A. Standard of Review.**

The Legislature has prescribed the manner and standard by which courts review MPSC orders. Section 25 of the Railroad Act provides that all rates, classifications, regulations, practices, and services fixed by Commission are deemed *prima facie* lawful and reasonable:

All rates, fares, charges, classification and joint rates fixed by the commission and all regulations, practices and services prescribed by the commission shall be in force and shall be *prima facie*, lawful and reasonable until finally found otherwise in an action brought for the purpose pursuant to the provisions of section 26 of this act, or until changed or modified by the commission as provided for in section 24 of this act.<sup>3</sup>

Section 26(8) of the Railroad Act places a heavy burden of proof on the appellant, who must show by clear and satisfactory evidence that the Commission's order is unlawful or unreasonable:

In all appeals under this section the burden of proof shall be upon the appellant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable.<sup>4</sup>

Under a Section 26 review, the broad issue is whether an appellant can show by clear and satisfactory evidence that the MPSC's order is either unlawful or unreasonable. This Court, in *In re MCI*, after citing Section 26 as governing its standard of review of an order of the MPSC, went on to find:

Against this background, we have held:

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<sup>3</sup> 1909 PA 300, MCL 462.25.

<sup>4</sup> 1909 PA 300, MCL 462.26(8).

To declare an order of the commission unlawful there must be a showing that the commission failed to follow some mandatory provision of the statute or was guilty of an abuse of discretion in the exercise of its judgment. [*Giaras v Public Service Comm*, 301 Mich 262, 269; 3 NW2d 268 (1942).]

The hurdle of unreasonableness is equally high. Within the confines of its jurisdiction, there is a broad range or "zone" of reasonableness within which the PSC may operate. *Michigan Bell Telephone Co. v Public Service Comm*, 332 Mich 7, 26-27; 50 NW2d 826 (1952). Cognizant of these confines, we proceed onward.<sup>5</sup>

Const 1963, art 6, § 28, requires the substantial evidence test as the minimum standard of review only for "judicial or quasi-judicial" agency decisions that follow a contested case hearing. The review standard applicable to non-legislative Commission actions (those that are judicial or quasi-judicial in nature) involves determining whether the Commission order is supported by competent, material, and substantial evidence on the whole record, in accordance with Const 1963, art 6, § 28. Even in these "substantial evidence" cases, however, Michigan courts have held that Section 26 does not grant the court all of the powers traditionally vested in a court of equity, nor the power to make *de novo* findings of fact.

With respect to the Commission's findings of fact, the Court should not substitute its own fact-finding or regulatory judgment in place of the Commission. When the evidence warrants the decision of the Commission, it is the general rule that such administrative findings are conclusive upon the reviewing court.<sup>6</sup>

By contrast, the MPSC's legislative judgments are subject to the limited "abuse of discretion" test for judicial review. Justice Williams, dissenting on other grounds in *Michigan*

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<sup>5</sup> *In re MCI*, 460 Mich 396, 427; 596 NW2d 164 (1999).

<sup>6</sup> *In re Rovas Complaint*, 482 Mich 90, 99, 101; 754 NW2d 259 (2008); *Bejin Co v Public Service Comm*, 352 Mich 139, 153; 89 NW2d 607 (1958).

*Consolidated Gas Co v MPSC*, outlined the standard of review applicable to "legislative" decisions of the Commission:

We begin with the proposition, now axiomatic, that rate making is a legislative function. The Legislature has entrusted the implementation of this legislative function to the administrative expertise of the Michigan Public Service Commission. Legislative policy determinations by the Public Service Commission, properly made, are not reviewable by the courts. Speaking to this we said in *In Re Consolidated Freight Co*, 265 Mich 340, 351 (1933):

"In such instances the determinations of fact issues pertain only to the functioning of the commission in its legislative capacity, as an adjunct to the legislature. The policy or wisdom of such action by the commission cannot be reviewed by the courts\*\*\*. In short, in so far as the functioning of a commission pertains to the administration of executive or legislative matters, it is not reviewable in this court."<sup>7</sup>

Although *Consolidated* involved the issuance of a "certificate of public convenience and necessity," the principle of separation of powers there expressed is also applicable in this case.

With respect to the standard of review of the Commission's statutory interpretations, this Court, in *In re Rovas Complaint* held that an agency's interpretation of a statute is entitled to "respectful consideration," but courts may not abdicate their judicial responsibility to interpret statutes by giving "unfettered deference" to an agency's statutory interpretation.<sup>8</sup> This Court, in *Rovas*, reaffirmed the *Boyer-Campbell Co v Fry* standard of review for agency statutory construction,<sup>9</sup> and quoted *Boyer-Campbell* with approval as follows:

[T]he construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. However, these are not binding on the courts, and [w]hile not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given

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<sup>7</sup> *Michigan Consolidated Gas Co v Public Service Comm*, 389 Mich 624, 644-645; 209 NW2d 210 (1973) (footnotes omitted).

<sup>8</sup> *In re Rovas Complaint*, 482 Mich at 93.

<sup>9</sup> *Boyer-Campbell Co v Fry*, 271 Mich 282, 296-297; 260 NW 165 (1935).

weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature.<sup>10</sup>

Most recently, this Court, in *First Industrial*, reversed the Court of Appeals and reinstated a lower courts decision when the Court of Appeals failed to give "respectful consideration" to a state agency's "longstanding policy" and "failed to provide cogent reasons for the reversal."<sup>11</sup>

The MPSC's interpretation of Rule 411 is entitled to respectful consideration and should not be overruled because there are no cogent reasons for doing so.

## **B. Analysis.**

- 1. Under its statutory authority, the Commission lawfully promulgated its Technical Standards for Electric Service, which includes Rule 411, and the Commission's longstanding interpretation of Rule 411 provides that the first utility to distribute or extend electrical power to a location is entitled to serve prospective and existing customers.**

The Transmission of Electricity Through Highways Act provides the MPSC with the specific statutory authority to set rates, rules, and conditions of service for the business of transmitting and distributing electricity.<sup>12</sup> Section 1 provides:

When electricity is generated or developed by steam, water or other power, within 1 county of this state, and transmitted and delivered to the consumer in the same or some other county, then the transmission and distribution of the same in or on the public highways, streets and places, the rate of charge to be made to the consumer for the electricity so transmitted and distributed and the **rules and conditions of service under which said electricity shall be transmitted and distributed shall be subject to regulation** as in this act provided.<sup>13</sup>

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<sup>10</sup> *In re Rovas Complaint*, 482 Mich at 103, quoting with approval *Boyer-Campbell Co v Fry* at 296-297 (internal citations and quotation marks omitted).

<sup>11</sup> *First Industrial v Department of Treasury*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ S.C. Docket No 139748 (April 23, 2010). Citing *In re Rovas Complaint*, 482 Mich at 103.

<sup>12</sup> 1909 PA 106; MCL 460.551 *et seq.*

<sup>13</sup> 1909 PA 106; MCL 460.551, emphasis added.

The Legislature has vested the Commission with the power to order the distribution of electricity to be delivered and through what transmission lines. Section 6 provides:

The commission shall have power in its discretion to order electric current for distribution to be delivered at a suitable primary voltage, to any city, village or township through which a transmission line or lines may pass....<sup>14</sup>

Under the Act, the Commission was lawfully authorized to promulgate rules to carry out the legislation's purpose.<sup>15</sup>

Pursuant to the authority granted by the Legislature, the Commission lawfully promulgated its rules for Technical Standards for Electric Service.<sup>16</sup> When promulgating the Technical Standards for Electric Service, Rule 102 was provided as a definition section to be used throughout. Rule 102 provides in part:

(1) As used in these rules:

\* \* \*

(b) "Customer," except as used in R 460.3411, means any person, firm, association, or corporation, or any agency of the federal, state, county, or municipal government that purchases electric service supplied by a utility.

\* \* \*

(f) 'Premises' means an undivided piece of land which is not separated by public roads, streets, or alleys.<sup>17</sup>

Rule 411 was enacted as part of the Commission's Technical Standards for Electric Service for the purpose of determining the proper utility to distribute or extend electrical power to a particular location. Rule 411 provides in pertinent part:

(1) As used in this rule:

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<sup>14</sup> 1909 PA 106; MCL 460.556.

<sup>15</sup> 1909 PA 106; MCL 460.557(6).

<sup>16</sup> 1999 AC, R 460.3101 *et seq.*

<sup>17</sup> 1999 AC, R 460.3102.

(a) customer means the buildings and facilities served rather than the individual, association, partnership, or corporation taking service.

\* \* \*

(2) Existing customer shall not transfer from one utility to another.

\* \* \*

(11) The first utility serving a customer pursuant to these rules is entitled to serve the entire electric load on the premises of that customer even though another utility is closer to a portion of the customer's load.<sup>18</sup>

The Court has provided guidance when interpreting statutes and administrative rules. In *Petersen v Magna Corp*, the Court stated:

The primary goal of such interpretation is to give effect to the intent of the Legislature. The first step in ascertaining such intent is to focus on the language of the statute itself. If statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute. The words of a statute provide the most reliable evidence of the Legislature's intent, and as far as possible, effect should be given to every phrase, clause, and word in a statute. If the statutory language is certain and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written.<sup>19</sup>

As such, the plain meaning of a statute is to be preferred and enforced.<sup>20</sup> Further, statutory provisions are to be construed harmoniously.<sup>21</sup> Courts may only construe statutes and administrative rules if the language is internally inconsistent or ambiguous.<sup>22</sup> When a court

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<sup>18</sup> See, 1999 AC, R 460.3411.

<sup>19</sup> *Petersen v Magna Corp*, 484 Mich 300, 307; 773 NW2d 564 (2009). Internal citations omitted.

<sup>20</sup> *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001).

<sup>21</sup> *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159-160; 627 NW2d 247 (2001).

<sup>22</sup> *LAF v BJB*, 463 Mich 895, 897; 618 NW2d 575 (2000) (applying this rule to statutes); MCL 24.232 (applying the statutory rules of construction to administrative rules).

construes an ambiguous or inconsistent statute or administrative rule, it must consider the document in its entirety.<sup>23</sup>

Following its legislative directive and the applicable rules of statutory construction, the Commission properly determined the purpose of its own administrative rules. The Commission has stated that Rule 411's purpose is "to avoid unnecessary and costly duplication of facilities and to provide objective standards for extension of electric service."<sup>24</sup> This purpose coincides with the Legislature's intent, as illustrated by the MPSC's statutory authority, granted by the Transmission of Electricity Through Highways Act, to regulate electric distribution.

The Commission's longstanding interpretation of Rule 411 properly applies the definitions of "customer" and "premises." A review of Rule 102 and Rule 411 demonstrates that Rule 411 was specifically and intentionally exempt from the general definition of "customer" used throughout the Commission's Technical Standards for Electric Service; but the general definition of "premises" remains applicable. By deliberately changing the definition of a customer under Rule 411, the Commission established a clear, straightforward standard to determine the appropriate utility to extend electric distribution service to prospective or existing customers.

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<sup>23</sup> *Liberty Hill Housing Corp v City of Livonia*, 480 Mich 44, 69; 746 NW2d 282 (2008) (holding statutes must be read as a whole); MCL 24.232 (applying the statutory rules of construction to administrative rules).

<sup>24</sup> *In the matter of the complaint of Indiana Michigan Power Company, d/b/a American Electric Power Company, against Michigan Energy Cooperative, Village of Edwardsburg, Ontwa Township*, MPSC Case No. U-14193, Order, June 7, 2005, p 17.

A number of prior Commission orders have interpreted Section 11 of Rule 411 finding that the definition of "customer," found in Rule 411(1)(a), must control when applying the rule.<sup>25</sup>

When interpreting the term "customer" under Rule 411, the Commission has held:

Rule 411(1)(a) indicates that the site itself is the "customer," not the corporation or individual who owns the site (who may change repeatedly over the years), nor simply a specific building sitting on the site (which may also change repeatedly over the years). Thus, a change in ownership does not create a new customer, nor does the loss or addition of a building, as the customer is also the "facilities."<sup>26</sup>

When determining how to properly interpret Rule 411(11), the Commission applied the appropriate definitions for "customer," found in Rule 411(1)(a), and the definition of "premises," found in Rule 102(f).<sup>27</sup> *In Western Michigan Electric Cooperative*, the Commission examined the issue of the proper interpretation of Rule 411(11). The Commission stated:

The Commission agrees with the ALJ's conclusion that the definition of "customer" found in Rule 411(1)(a) must control when applying Rule 411. Pursuant to established rules of statutory construction, the more specific definition must be used when it is applicable. ... The Commission finds that this case can be resolved without straining the language of the rule or violating principles of statutory construction. If Rule 411(11) is rewritten using the appropriate definitions for the words "customer" [found in Rule 411(1)(a)] and "premises" [found in Rule 102(f)], it reads:

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<sup>25</sup> *In the matter of the complaint of Western Michigan Electric Cooperative against Consumers Power Company for improperly extending single-phase distribution service on Deren Road in Summit Township, Mason County, Michigan*, MPSC Case No. 10116, Opinion and Order, February 8, 1993, p 11; *In the matter of the complaint of Consumers Energy Company against Presque Isle Electric & Gas Co-Op relative to the provision of electric service to the Big Stone Bay Fishery in Mackinaw Township, Cheboygan County*, Case No. U-11564, Opinion and Order, July 24, 1998, pp 7-9; *In the matter of the notice of Alpena Power Company of the extension of facilities to serve the Hillman Community School District's new secondary school building site*, MPSC Case No. U-11622, Opinion and Order, September 28, 1998, pp 12-14; *In the matter of the complaint of Indiana Michigan Power Company, d/b/a American Electric Power, Advance against Midwest Energy Cooperative*, MPSC Case No. U-13764, Opinion and Order, April 20, 2004, pp 14-15.

<sup>26</sup> MPSC Case No. U-14193, Order, June 7, 2005, pp 17-18.

<sup>27</sup> 1999 AC, R 460.3102(f).

"The first utility serving [one or more buildings and facilities] pursuant to these rules is entitled to serve the entire electric load on the [undivided piece of land, which is not separated by public roads, streets, or alleys] of [those buildings or facilities]."<sup>28</sup>

The Commission further found that:

Once Consumers received the request for service, the residence became a "customer" within the meaning of Rule 411. Subsequent changes in circumstance do not affect Consumers' right to serve that customer.<sup>29</sup>

In accordance with its past interpretation of Rule 411(11), the Commission has historically issued orders applying the principle of first utility entitlement. Indeed, over the past decade, the Commission has found that "...once a first utility entitlement is established, a subsequent change in ownership does not create a new prospective customer on the old premise."<sup>30</sup> In essence, the first utility to distribute electricity to a property maintains the right to continue to distribute electricity to the property, no matter how the site changes overtime. The first utility entitlement test furthers the purpose of Rule 411 by avoiding unnecessary and duplicative construction of electric distribution lines, which is consistent with Section 14 of Rule 411,<sup>31</sup> which prohibits duplication and supersedes the provisions of other subsections of the rule, including Rule 411(11).<sup>32</sup>

Consistent with its past orders and its longstanding interpretation of its administrative rule, the Commission applied the first utility entitlement standard in this proceeding. The Commission noted that "It is undisputed that the GWL premises was an existing customer of Cherryland under Rule 411 in 2001. Cherryland had provided service to a farmhouse located on

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<sup>28</sup> MPSC Case No. U-10116, Opinion and Order, February 8, 1993, pp 11-12.

<sup>29</sup> MPSC Case No. U-10116, Opinion and Order, February 8, 1993, p 12.

<sup>30</sup> MPSC Case No. U-14193, Order, June 7, 2005, pp 17-18. *See also*, MPSC Case No. U-11622, Opinion and Order, September 28, 1998, p 12-14; MPSC Case No. U-10116, Opinion and Order, February 8, 1993, p 14.

<sup>31</sup> AC 1999, R 460.3411(14).

the GWL premises for many years before GWL purchased the property." (MPSC Appendix 80a). As Cherryland, a regulated utility, provided service to the farmhouse where GWL is now located, Cherryland is entitled to continue to distribute electric service to that location. This straightforward application of Rule 411 is easy to determine and fair to the utilities, but, more importantly, it avoids the cost of duplication of services for the benefit of the ratepayers.

**2. The Court of Appeals has previously upheld the Commission's application of Rule 411 when determining the proper utility to distribute electricity to a location.**

The Court of Appeals has previously upheld the Commission's standard of first utility entitlement, under Rule 411(11), when holding that a change in title does not change which utility is entitled to distribute and transmit electricity to a location.<sup>33</sup> In reaching its decision, the Court of Appeals relied on an Order from a previous MPSC proceeding.

In *Alpena Power*, the MPSC construed its own administrative rules when determining who was the "customer" of a Commission-regulated utility for distribution purposes. In that proceeding, the Commission concluded that "...a mere change in ownership or the identity of the individual, association, partnership, or corporation using power at a particular location was not intended to present an opportunity for the new owner to switch power providers."<sup>34</sup> Plainly stated, the Commission determined that a regulated utility is entitled to continue providing electric distribution service to the property regardless of an interruption in service, demolition of the buildings on the property, or a change in ownership of the underlying real property.

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<sup>32</sup> MPSC Case No. U-10116, Opinion and Order, February 8, 1993, p 14.

<sup>33</sup> *Consumers Energy Co v Public Service Comm*, 255 Mich App 460, 503; 660 NW2d 785 (2003).

<sup>34</sup> MPSC Case No. U-11622, Opinion and Order, September 28, 1998, p 8 (emphasis added).

In 2003, in the case of *Consumers Energy Co v MPSC*, the Court of Appeals endorsed the MPSC's holding in *Alpena Power* and explained the definition of an existing "customer" under Rule 411 as follows:

Rule 411(1)(a) defines "customer" as the buildings and facilities served, rather than the individual, association, partnership, or corporation served. Therefore, a change in ownership does not allow the new owner to be considered a prospective "customer" for purposes of customer choice. Here, Consumers was the first and only utility to provide electric service to the three parcels. Consumers provided electric service to the first parcel until 1992, when the house was demolished; the second parcel until 1994, when a sign was removed; and the third parcel until November 1999, after the parcel was purchased by Meijer. The fact that electric service was discontinued for a period of time to two of the parcels is of no consequence under the administrative rules. Consumers continued to maintain three-phase energized facilities on the southern edge of the parcels and the electric service was discontinued because of the request of the property owners, not because of any action by Consumers. The evidence is clear that at no time did Consumers ever waive its right to continue serving the customers on the property and it never abandoned the facilities since the facilities remained and Consumers was prepared to provide electric service.<sup>35</sup>

The Court of Appeals, in *Consumers Energy Co*, agreed with the MPSC's application of Rule 411 stating that an interruption of electric service to the "customer," as long as service was discontinued at the owner's request, would not affect the Rule 411 prohibition on switching utilities.

The facts in *Consumers Energy Co* are analogous to the facts here. In that 2003 case Consumers Energy served a property, which began as an eighty-acre farm that was subsequently divided into two parcels in the early 1960s. The southern parcel was further divided in 1962 and 1971. Consumers Energy provided electric service to the three new parcels from 1992 until 1994 and never waived its right to continue to distribute electricity to the property. Eventually, Meijer, Inc. purchased in separate sales all three parcels that had been created in the southern parcel in

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<sup>35</sup> *Consumers Energy Co v MPSC*, 255 Mich App 496, 502-503; 600 NW2d 785 (2002); footnotes omitted.

1999. Subsequent to the sales of all three parcels, Great Lakes began serving Meijer with temporary single-phase electric service on the third parcel for construction purposes on November 18, 1999.<sup>36</sup> Despite the fact that Meijer purchased the property, the Court of Appeals concluded that the language of Rule 411 clearly required that Consumers Energy was the utility entitled to serve the "customer." The Court of Appeals reasoned that because Consumers Energy had first begun to provide electric service to the property in the 1940s, the change in property ownership or the "new" use of the property by Meijer, Inc., including the discontinuance of electric service to the property at the request of the owner, did not create a new "customer" under Rule 411.<sup>37</sup>

In this case, Rule 411 applies to Cherryland because it is a regulated utility subject to the MPSC administrative rules. It is undisputed that Cherryland has provided service to the property where GWL is currently located. The facts indicate that the property where GWL is located was purchased from the Oleson family who received electric service, including distribution service, from Cherryland. When GWL purchased the property, Cherryland's electric distribution lines traversed the property. Review of the facts alone demonstrates the applicability of Rule 411, as Cherryland, a regulated utility, maintained distribution lines and a service drop on the property

But rather than follow its earlier decision in *Consumers Energy Co*, the Court of Appeals erroneously relied on a decision by the Grand Traverse Circuit Court. In its July 14, 2009 decision, the Court of Appeals found the Grand Traverse Circuit Court decision in *Cherryland Electric Coop*<sup>38</sup> to be persuasive, saying:

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<sup>36</sup> *Consumers Energy Co v MPSC*, 255 Mich App at 497-499.

<sup>37</sup> *Consumers Energy Co v MPSC*, 255 Mich App at 502.

<sup>38</sup> *Cherryland Electric Cooperative v Traverse City Light and Power*, Grand Traverse Circuit Court, Docket No. 01-21871-CZ, Court's Decision at Non-Jury Trial, June 27, 2002.

The circuit court held that under MCL 124.3(2), a "complete change in use" of the parcel, along with the demolition or removal of all existing buildings and facilities and their replacement with a new structure, brings about a change of customer. (MPSC Appendix 104a).

Not only is the Grand Traverse Circuit Court's opinion inconsistent with Rule 411, which was applicable to the facts in that proceeding, but it erroneously interpreted MCL 124.3(2). Under MCL 124.3(2), a municipal corporation is prohibited from delivering "electric service to customers already receiving service from another utility."<sup>39</sup> Review of the statutory provisions establishes that the Grand Traverse Circuit Court's distinction between the property served and the change in ownership of the property fails, and accordingly, the Court of Appeals reliance on this distinction is erroneous.

**3. The Commission's application of Rule 411 of first utility entitlement is consistent with the Court's preference for a bright-line test of the law.**

The Court of Appeals' finding that a customer could choose another utility to provide its electric distribution and transmission service rather than the incumbent utility already serving the property not only disregards the Michigan Public Service Commission's longstanding interpretation of its rule and prior court precedent, but it is at odds with this Court's preference for a bright-line test of the law and the rights of the parties.<sup>40</sup>

Prior to the lower court's ruling, there was a bright-line test. If a utility extended distribution and transmission services to a premises, it was assured that it would have the opportunity to recoup those expenditures from that customer, or if not, from subsequent customers at that premises. A change of ownership of the premises, or the destruction or construction of buildings on the premises, was not of any particular significance to the utility,

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<sup>39</sup> MCL 124.3(2).

<sup>40</sup> *Robinson v City of Detroit*, 462 Mich 439, 454; 613 NW2d 307 (2000).

except to the extent that it affected electric usage and the utility's ability to recoup its expenditures on behalf of its stockholders and ratepayers.

The Commission's bright-line test, which has been upheld by the Court of Appeals, was both lawful and reasonable. The goal of Rule 411 is to eliminate duplication of services and not allow the installation and removal of expensive transmission and distribution lines whenever buildings on a premises are razed. Unfortunately, the lower court's holding in this matter would foster such an expensive and wasteful duplication of services. The Court of Appeals' decision erases the prior bright-line test and blue pencils in its own complex case-by-case factual test, which, at a minimum, involves: (i) the timing of electric service, (ii) the date(s) of any building demolition(s) and, (iii) the purpose(s) of the change of ownership of the premises.

Viewed from a utility perspective, under the lower court's holding a utility evaluating the prudence of extending transmission or distribution lines to a new customer on a parcel of land could not determine with any degree of certainty, the likelihood that it could ever recoup that cost. According to the lower court, this new customer could extinguish any right of a utility to continue to serve this parcel of land by demolishing the buildings and selling the land. The next customer could simply wait a decent period of time before constructing its own buildings on the premises. The next new customer could then demand that the utility remove its expensive transmission and distribution lines and select another utility to erect new transmission lines. Of course, these next new customers could follow the same pattern if they were willing to demolish the buildings or sever service in some other fashion; sell the premises, and so on and so on. Such uncertainty in electric utility investment is imprudent, not supported by the Michigan Public Service Commission and should not be allowed by this Court. To avoid such confusion, this

Court need only affirm the Commission's long-standing interpretation of its rules and adopt the Court of Appeals' decision in *Consumers Energy Co v MPSC*.<sup>41</sup>

This Court is asked to choose between the previous bright-line test and the lower court's suggested complex, expensive, and perhaps futile analysis as set forth in its opinion:

The question then remains whether, under these facts, there were buildings or facilities on the site in question that qualified as "existing customers" of Cherryland when Great Wolf acquired the site. 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 *Complaint of Consumers Energy*, those changes and that interruption did not create a new customer. If, however, the previous owner held onto the site for a **significant period of time after all land uses requiring electricity had been abandoned**, requested that 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. Emphasis added. (MPSC Appendix 102-103a).

Such general qualifiers as "reasonable proximity", "significant period of time", and "reasons other than anticipation of an immediate change of ownership" do not bring certainty to the law, but rather thrusts any future analysis into a myriad set of subjective case-by-case determinations. It is ill-advised and contrary to prudent regulatory policy.

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<sup>41</sup> See *Consumers Energy Co v MPSC*, 255 Mich App 496; 600 NW2d 785 (2002).

**II. The Michigan Public Service Commission determined that in its earlier decision it ordered Cherryland to continue to provide electric service to Great Wolf Lodge under the same rate as provided in a proposed tariff which had certain minimum load requirements. Great Wolf Lodge did not meet these load requirements. Nonetheless, the Commission ordered Cherryland to refund the difference between the Commission's ordered rate and the higher rate Cherryland believed was applicable to Great Wolf Lodge. The Commission was not required to also impose interest on the \$72,550 refund to Great Wolf Lodge.**

**A. Standard of Review.**

The standard of review applicable to decisions of the Michigan Public Service Commission is set forth in Argument I. A., *infra*, at page 12.

**B. Analysis.**

In MPSC Case No. U-14593, the Commission focused on three key factors in interpreting its earlier July 22, 2004 order, in MPSC Case No. U-13716, and ultimately awarding \$72,550 to Great Wolf Lodge. The first factor was the assumption that Great Wolf Lodge was in compliance with all of the terms and conditions of the proposed LRS rate (Large Resort Service); second, that under the unique circumstances of the case, Cherryland should have sought clarification of the Commission's earlier order; and third, that Cherryland's belief that it had to switch Great Wolf Lodge to the higher LCI rate was not so clearly unreasonable to justify the imposition of a fine or interest on a refund to Great Wolf Lodge.

In its July 22 order, the Commission stated:

[T]he Commission agrees with the ALJ's finding that individual contract language is inappropriate in a general tariff, which lends support to the Commission's finding that Cherryland's proposed tariff should be rejected. However, because the Commission agrees that the LRS rate is in the public interest as applied to GWL, the rate shall be authorized for up to one year or until a special contract is approved.

Thus, the plain language of the order provided that Cherryland continue to charge the LRS rate for up to one year. The Commission intended to preserve the status quo between the parties while they worked out the terms of a special contract. Incorporated in the application filed in Case No. U-13716, and never questioned by the parties, was the assumption that GWL was in compliance with

all of the terms and conditions of the LRS rate. Therefore, the Commission finds that Cherryland should have continued charging the LRS rate to GWL until July 22, 2005 as stated in the order. Cherryland's subsequent concerns about charging GWL an inappropriate rate are recognized. However, in the unique circumstances of this case, Cherryland should have sought clarification of the July 22 order. Cherryland failed to do so and instead switched GWL to its LCI rate, which, although Commission-approved, was not the rate approved in the July 22 order. As a result, the Commission agrees with the ALJ's finding that Cherryland should refund \$72,550.16 to GWL for the period during which GWL was charged at the higher LCI rate.

Nevertheless, because the issue of additional terms and conditions of the proposed tariff and special agreement were not before the Commission in Case No. U-13716, the Commission agrees with the Staff that Cherryland's interpretation of the July 22 order was not so clearly unreasonable as to justify the imposition of a fine or interest on the refund to GWL. (MPSC Appendix 79a).

The Commission further noted that since the plain language of the earlier order stated that the lower LRS rate was only temporarily available to Great Wolf Lodge for up to one year, Cherryland properly charged Great Wolf Lodge the higher Commission approved LCI rate after the year expired.

The Commission also finds that under the plain language of the July 22 order, the LRS rate was only available to GWL until a special contract was signed, or for one year, whichever occurred first. July 22 order, p. 12. Because a special contract was never signed by the parties, Cherryland has properly charged GWL a Commission-approved rate since July 22, 2005 and should continue to do so until a special contract is executed and approved. (MPSC Appendix 79-80a).

Thus, the Commission rejected Great Wolf Lodge's contention in this matter that it had an inherent right to the lower temporary rate set forth in the Commission's earlier order for any extended period of time. Rather, in reviewing its earlier order, the Commission acknowledged the unique circumstances of the case: the assumption of minimum usage by Great Wolf Lodge and Cherryland's failure to seek clarification when it had a concern regarding the appropriate rate to charge.

Implicit in these Commission findings is that if Cherryland had returned to the Commission for a clarification of the appropriate rate to charge Great Wolf Lodge with evidence that Great Wolf Lodge was not meeting the threshold load requirements for the earlier proposed LRS rate, the Commission may have authorized Cherryland to switch Great Wolf Lodge to the higher rate sooner than the one-year period ordered in Case No. U-13716.

The Commission was penalizing Cherryland the \$72,550 rate differential for failing to seek Commission clarification of the appropriate rate to be charged Great Wolf Lodge. And yet, given the unique circumstances of the case, the Commission recognized that had Cherryland reasonably believed the rates were appropriate, it would not have thought it needed to return to the Commission for further clarification.

The point is simply that when there is doubt (or possible doubt) as to the appropriate rate clarification should be sought from the Commission. Otherwise, there is the risk losing what may be obtained had clarification been sought. The penalty for Cherryland's unreasonable assumption was a refund of \$72,550 to Great Wolf Lodge. Nonetheless, in the Commission's discretion, and the unique circumstances of this case, the Commission was not required to increase that penalty by adding interest to the refund to Great Wolf Lodge for not having received a lower rate for which apparently it was not actually qualified.

This was not the typical case where a customer claimed to be charged under the wrong tariff. But rather a utility failing to seek clarification of a Commission order as to the appropriate rate to charge. Though Cherryland's interpretation was not clearly unreasonable, the Commission's imposition of the \$72,550 penalty in the form of a refund served to encourage utilities with any doubt on the meaning of future Commission orders to seek clarification before acting rather than seeking forgiveness after the fact. Therefore, Great Wolf Lodge is not entitled

to interest on a refund, which by its nature was a penalty paid to them for Cherryland's failure to seek clarification of the Commission's order.

The Court of Appeals adopted the Ingham County Circuit Court's position that the \$72,550 refunded to Great Wolf Lodge required the imposition of interest and that the Commission is not permitted to view its award to Great Wolf Lodge as a penalty.

The PSC declined to award interest on the refund it ordered Cherryland to issue to Great Wolf, apparently treating interest as some kind of penalty it thought was not deserved. The circuit court in turn cited caselaw for the proposition that the PSC is authorized to award interest on customer refund, and concluded that its failure to do so in this instance was error. See *Detroit Edison Co. v. Pub. Service Comm.*, 155 Mich.App 461,469; 400 NW2d 644 (1986). (MPSC Appendix 105a).

The Court of Appeals recognized that the Commission viewed any additional award above the \$72,550 as a form of penalty against Cherryland. Yet, without any factual or legal basis, the Court of Appeals substituted its judgment for that of the Commission's and rewrote it to require the adding of interest to this refund/penalty.

In *Ameritech Michigan v PSC*, the Court of Appeals held:

With regard to issues of interpretation of MPSC orders in particular, this Court accords substantial deference to the MPSC's interpretations of its own orders, and this Court ordinarily will uphold the MPSC's interpretations as long as they are supported by the record or otherwise reasonable. *ABATE v Public Service Comm*, 219 Mich App 653, 661-662; 557 NW2d 918 (1996).<sup>42</sup>

Further, the scope of review is narrowest when the order appealed involves the MPSC's exercise of the legislative power of ratemaking as opposed to quasi-judicial findings. This is because ratemaking power is a legislative power and necessarily implies a range of legislative discretion.<sup>43</sup>

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<sup>42</sup> *Ameritech Michigan v PSC*, 240 Mich App 292, 303; 612 NW2d 826 (2000).

<sup>43</sup> *Duquesne Light Co v Barasch*, 488 US 299, 313; 109 S Ct 609; 102 L Ed 2d 646 (1989).

The Commission agrees with the lower courts that it has the authority to award interest as in the case of *Detroit Edison Company v Public Service Commission*, where it was determined that ratepayers were owed a refund for being overcharged. However, the decision on whether to assess interest falls within the Commission's authority.

[T]his Court held in *Detroit Edison Co v PSC*, 155 Mich App 461; 400 NW2d 644 (1986), that the determination of the rate of interest to be paid on customer refunds falls within the broad grant of authority vested in the PSC. We noted that the circuit court's equitable powers are to be exercised in cases where irreparable injury is threatened, and that the setting of an interest rate is not such a case and is better left to the expertise of the PSC. Applying the unlawful or unreasonable standard of review, this Court upheld the order of the PSC. Likewise, **we hold that the PSC and not the circuit court has authority to order both the rate of interest to be paid and the method of compounding the interest. We will not set aside the order of the PSC unless it is unlawful or unreasonable.**<sup>44</sup>

Although the Court of Appeals relies on *Detroit Edison*, it fails to draw the distinction between Detroit Edison ratepayers who were charged too much under the applicable tariff and Great Wolf Lodge who never actually qualified for a tariff. The Court of Appeals states:

Cherryland argues that the interest-free refund award to Great Wolf "itself shielded [Great Wolf] from paying the 'higher' appropriate rate for not meeting the LRS rate condition." However, interest is not a penalty, but rather part of the judgment, compensating the person owed for the lost time-value of the money during the course of the dispute. See *Xerox Corp. v. Oakland Co.*, 191 Mich.App 433, 441; 478 NW2d 702 (1991). Accordingly, an award of interest on top of the nominal dollars found to have been overpaid is necessary to restore Great Wolf to its original condition. See *Detroit Edison, supra* at 470 ("a guarantee of a refund *with interest* protects the customers of a utility" [emphasis added]). (MPSC Appendix 105a).

As is evident from the earlier discussion, Great Wolf Lodge was not being restored to its "original condition." The Commission recognized that Great Wolf Lodge believed its original

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<sup>44</sup> *Attorney General v Public Service Comm; The Detroit Edison Co v Public Service Comm*, 165 Mich App 230, 235-236; 418 NW2d 660 (1987) (emphasis added).

condition was the rate ordered by the Commission, and Cherryland believed the "original condition" was the proposed tariff rate that included minimum load requirements. Had Cherryland sought clarification of the Commission's order, that "original condition" may have kept Great Wolf Lodge at the higher rate with no refund. Furthermore, had Cherryland and GWL entered into a special contract with the assumed minimum load requirements during that one year grace period, GWL would have subsequently failed to qualify for the lower rate and would not have been eligible for a refund. Given the unique circumstances of this case, dissimilar from the facts in *Detroit Edison*, the Commission's decision to penalize Cherryland the rate differential without adding a further penalty of interest was not unlawful or unreasonable.

**III. The Commission found that Cherryland did not willfully and knowingly misinterpret the prior earlier Commission order that Cherryland should continue to provide Great Wolf Lodge with the same rate Cherryland had proposed in its tariff even if Great Wolf Lodge failed to meet the minimum load requirements contained in the tariff. Therefore, the Commission was not required to levy a fine under MCL 460.558.**

**A. Standard of Review.**

The standard of review applicable to decisions of the Michigan Public Service Commission is set forth in Argument I. A., *infra*, at page 12.

**B. Analysis.**

MCL 460.558 provides:

Every corporation, its officers, agents and employees, and all persons and firms engaged in the business of furnishing electricity as aforesaid shall obey and comply with every lawful order made by the commission under the authority of this act so long as the same shall remain in force. Any corporation or person engaged in such business or any officer, agent, or employee thereof, **who willfully or knowingly fails or neglects to obey or comply with such order** or any provision of this act shall forfeit to the state of Michigan not to exceed the sum of 300 dollars for each offense. Every distinct violation of any such order or of this act, shall be a separate offense. and in case of a continued violation, each day shall be deemed a separate offense. An action to recover such forfeiture may be brought in any court of competent jurisdiction in this state in the name of the

people of the state of Michigan, and all moneys recovered in any such action, together with the costs thereof, shall be paid into the state treasury to the credit of the general fund.<sup>45</sup>

Both lower courts profess that they are not substituting their judgment for the Commission's decision to not impose fines under MCL 460.558. Yet when choosing to accept the Commission's findings that its order had not been followed by Cherryland, but ignoring the significance of these findings, the courts have effectively substituted their judgment for that of the Commission. The Court of Appeals simply adopts the Ingham County Circuit Court's determination that the Commission is required to impose fines under MCL 460.558 by referring to the Commission's determination that if Cherryland had any doubts about the meaning of its order, it should have sought clarification. The Courts gleaned that this failure to seek clarification of the order is conclusive evidence that Cherryland willfully and knowingly disobeyed the Commission order.

The PSC and Cherryland argue that the circuit court improperly substituted its judgment for that of the PSC by independently concluding that Cherryland's behavior in this regard was sufficiently egregious to trigger the forfeiture provision of MCL 460.558. However, the court in fact referred, and thus properly deferred, to the PSC's own determination that Cherryland should have sought clarification rather than unilaterally departing from the terms of an order still in operation. The statutory forfeiture provision does not come to bear only in response to a willful or knowing failure to comply with a lawful PSC order; it also applies in the event of negligent noncompliance. In identifying Cherryland's proper remedy if it really had concerns about the rate it charged Great Wolf-i.e., seeking clarification-and Cherryland's failure to resort to that obvious avenue of ensuring it was performing as required the PSC itself provided factual findings setting forth an episode of negligence at best, thus calling for imposition of a statutory fine. The PSC's decision to overlook that negligence (or worse) by not imposing a fine was thus unlawful as a violation of its statutory duty in the matter, as the circuit court declared. (MPSC Appendix 105a).

However, implicit in the Commission's findings is that it recognized that its order could have been clearer, since it had been based on the unstated assumption that Great Wolf Lodge was

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<sup>45</sup> MCL 460.558 (emphasis added).

meeting the minimum load requirements of the proposed LRS rates. The Commission was not imposing the \$72,550 refund against Cherryland for charging the wrong rate as much as for not seeking clarification of its order. Had Cherryland sought clarification, it might not even have had to refund \$72,550. Both lower courts impermissibly ignored the Commission's finding and instead substituted their own finding that Cherryland's failure to seek clarification of the order constituted negligent noncompliance with the order mandating imposition of a fine.

The penalty provisions of MCL 460.558 come into play when a utility "willfully and knowingly fails or neglects to obey" a Commission order. It does not automatically come into play when a utility fails to seek clarification of an order. If an order is clearly unambiguous, the utility cannot disobey it, claiming confusion. But in the unique circumstances of this case – where the Commission had rejected Cherryland's special tariff for Great Wolf Lodge but ordered the rate to continue and where Great Wolf Lodge did not meet the proposed tariff's minimum load requirements, which the Commission assumed was being met – the Commission properly determined that Cherryland's interpretation of the Commission order was not so clearly unreasonable as to constitute a willing, knowing or negligent failure to comply that would justify the imposition of a fine or interest.

Furthermore, the Court of Appeals reliance on MCL 460.552 is misplaced. This statute requires a utility to only charge rates approved by the Commission.

[A]nd no public utility supplying electricity shall put into force any rate or charge for the same without first petitioning said commission for authority to initiate or put into force such rate or charge and securing the affirmative action of the commission approving said rate or charge.<sup>46</sup> [Footnote omitted.]

Cherryland did not charge Great Wolf Lodge an unapproved rate. The Commission's order acknowledged that Cherryland had switched Great Wolf Lodge to an approved rate in the

belief that Great Wolf Lodge did not qualify for the rate set forth in the Commission's order because of the failure to meet load requirements.

This case is similar to the situation presented in *In re MCI Complaint*.<sup>47</sup> There, the Court of Appeals reviewed a Commission decision that declined to fine Ameritech for violating a prior Commission order:

Here, the MPSC did not impose any penalties against Ameritech for violating either the letter or the spirit of the order in Case No. U-11038. To the contrary, the MPSC rejected the hearing officer's recommendation that Ameritech be fined for its violations. In doing so, the MPSC stated that there were "mitigating circumstances," specifically indicating that it was persuaded by Ameritech's argument that the violations arose from actions taken pursuant to Ameritech's reasonable interpretation of the prior order.<sup>48</sup>

A similar situation was presented here, but the Court of Appeals, rather than according even "respectful consideration" to the Commission's interpretation of its own (July 22) order, substituted its judgment for that of the Commission.

Ironically, the consequences for Cherryland's failure to seek clarification of the Commission's earlier order was that it had to refund \$72,550 for not applying a rate for which Great Wolf Lodge ultimately did not qualify, but for which the Commission had assumed it did. The Commission recognized that Cherryland had a basis for switching Great Wolf Lodge to the higher rate, but that even though Great Wolf Lodge may not have qualified for a lower rate, the Commission had so ordered it. The message the Commission sent with its resolution of this controversy is that when in doubt, seek clarification or suffer the consequences.

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<sup>46</sup> MCL 460.552.

<sup>47</sup> *MCI Telecommunications Corp v Michigan Bell Telephone Co, d/b/a Ameritech Michigan; Ameritech Michigan v MPSC and MCI Telecommunications*, 240 Mich App 292; 612 NW2d 826 (2000).

<sup>48</sup> *MCI Telecommunications Corp v Michigan Bell Telephone Co, d/b/a Ameritech Michigan; Ameritech Michigan v MPSC and MCI Telecommunications*, 240 Mich App at 305; (footnote omitted).

The Commission's finding that Cherryland had not willfully and knowingly disobeyed its order was neither unlawful nor unreasonable. Its finding that Cherryland's failure to seek clarification of the order did not establish a willful act to disobey was an appropriate exercise of the Commission's regulatory authority, and the lower courts erred in holding to the contrary. The Commission resolved this controversy by allowing Great Wolf Lodge to obtain the benefit of the rate the Commission ordered without overly penalizing Cherryland for its misinterpretation of that order. The Commission's lawful and reasonable regulation of a utility under its jurisdiction should be upheld by this Court.

**RELIEF SOUGHT**

The Michigan Public Service Commission respectfully request this Honorable Court to reverse the decision of the Court of Appeals and reinstate the Commission's interpretation of its Rule 411 of first utility entitlement and uphold its decision to not add interest or fines to Cherryland's \$72,550 refund to Great Wolf Lodge.

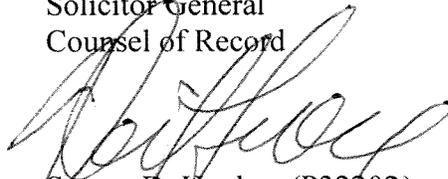
Respectfully submitted,

**MICHIGAN PUBLIC SERVICE  
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