

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-Appellant.

Docket Nos. **139541-2** and 139544-5

Court of Appeals Nos. 281398 and
281404

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

MPSC Case No. U-14593

APPELLANT MICHIGAN PUBLIC SERVICE COMMISSION'S REPLY BRIEF

**MICHIGAN PUBLIC SERVICE
COMMISSION**

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INTRODUCTION

In Great Wolf Lodge's (GWL) brief to this Court, what GWL fails to say is more significant than what it does say. GWL attempts to sway the Court with facts never presented to the Michigan Public Service Commission (MPSC or Commission); inaccurate references to the Commission's Orders; and only a vague reliance on the Court of Appeals' decision that it claims to support. Notwithstanding its efforts, GWL fails to address either the statutory responsibilities the Legislature has placed on the Commission to regulate utilities or the codification of that responsibility in Rule 411, as well as the Commission's longstanding interpretation of that Rule. Instead, GWL asserts that there is a nonsensical loophole in utility regulation. If this Court affirmed the Court of Appeals' Order or accepted GWL's argument, it would drastically alter utility regulation in the State of Michigan by allowing property owners to manipulate a utility's service territory. This Court should reverse the Court of Appeals' decision.

ARGUMENT

I. Great Wolf Lodge relies on one subsection in MPSC Rule 411 for its argument that vacant land permits a new owner to choose any available utility for service. Review of Rule 411's entire regulatory scheme, as well as the Commission's interpretation of its Rule, indicates that the first utility serving that land is entitled to serve subsequent owners of the land.

A. The facts asserted by Great Wolf Lodge obscure the proper legal question.

The Commission does not contest that GWL requested a hearing below; however, the Commission disagrees with the claim that the facts pertaining to GWL's complaint before the Commission were in dispute. While GWL's brief depicts a scenario of coercion perpetrated by Cherryland Electric Cooperative (Cherryland)¹, these facts, even if true, are

¹ See Great Wolf Lodge's brief, pp 2-4.

irrelevant. The facts relevant to the question asked by the Court are what utility has the right to serve the premises where the Oleson farm was located, where GWL stands today.² In answering the Court's question, it is unnecessary to examine the nature of the relationship between the parties. The Court only has to consider the undisputed facts in this matter that demonstrate that Cherryland served the property purchased by GWL.

Since the hearing before the Commission, only GWL's portrayal of the facts has changed. To the Court, GWL states that "The property was situated at a location where three electric service providers had facilities."³ and discusses how all three electric service providers (two utilities and one non-utility municipal provider) had a presence on the property.⁴ This is different from what GWL stated to the Commission. In its response to Cherryland's motion for summary disposition before the MPSC, where GWL alleged the "actual facts," it stated:

The resort sits on what was, at the time bids were solicited, a farm owned by the Oleson family in Garfield Township, Michigan, near Traverse City. The property sits in a location where **three different utilities** – Cherryland, Traverse City Light & Power ("TCL&P"), and Consumers Energy – **all provide service in the immediate area.** The property is not clearly in the service territory of any of the three, and all three serve customers all around the property. In addition, all three providers had **lines running across the property. The vacant Oleson farmhouse had previously received electric service from Cherryland,** but this service had been deactivated several years earlier. However, **a service drop running from one of Cherryland's distribution lines** (which traversed the property) to the Oleson farmhouse **had never been removed.** [Cherryland Appendix 243a (emphasis added).]

Over time, GWL's facts have shifted and three utilities have gone from providing service in the immediate area surrounding the property to having facilities on the site where GWL is located. The issue should simply be whether Cherryland is entitled to provide transmission and

² This Court specifically asked the parties to address: "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?" (MPSC Appendix 107-108a).

³ Great Wolf Lodge's brief, p 4.

⁴ Great Wolf Lodge's brief, p 5.

distribution service to the property, GWL's attempt to re-cast the facts, however, is nothing more than a red herring to draw this Court's attention away from the central issue.

B. The premises, where Great Wolf Lodge is located, is an existing customer of Cherryland.

GWL's brief begins with what it believes to be the outlandish proposition that the Michigan Public Service Commission held that:

Great Wolf Lodge was forever bound as an "existing customer" of Cherryland because a prior owner had at one time taken service at the site of the real estate at a building that was no longer being served and in fact no longer existed at the time of the sale of the property in March 2002.⁵

While the Commission determined in Case No. U-14593 that Cherryland had the right to continue providing transmission and distribution service to the land purchased by GWL from a previous owner, its decision is not outlandish, imprudent, or illegal, as GWL asks this Court to believe. Indeed, it is GWL's position that is inconsistent with the Commission's statutory responsibilities set forth in 1909 PA 106; MCL 460.551 *et seq* and at odds with rules promulgated in furtherance of that responsibility.

As the Commission previously indicated, the purpose of Rule 411 is to protect ratepayers against excessive rate increases, which would occur with the unnecessary duplication of transmission and distribution lines if utilities were left to compete unfettered for customers. Apparently, GWL does not disagree with the Commission's position that customer rates would increase as unnecessary transmission and distribution lines were added to the Michigan landscape; instead, GWL simply speculates – without support – that this would not occur frequently.⁶

⁵ Great Wolf Lodge's brief, p 1.

⁶ Great Wolf Lodge's brief, p 18.

Conversely, GWL does not indicate how the risk of these wasteful expenditures would assist any of the utilities' customers. While wanting this Court to assume that competition between utilities will benefit customers in securing lower utility rates, GWL never addresses how the duplication of transmission lines by competing utilities will assist customers in general as utility rates increase in order to pay for these unnecessary expenditures. Rule 411 was promulgated to avoid such a wasteful and expensive scenario.

Throughout the course of its brief, GWL references Rule 411 as support for its argument that customers, in the same factual setting as GWL, should be allowed to choose among a number of utilities for service at the added expense to all other ratepayers.⁷ To make this argument, however, GWL relies on a definition of one term in a subsection of Rule 411 in isolation rather than the applicability of the entire Rule 411:

Rule 411(1)(a) states:

"Customer" means the buildings and facilities served rather than the individual, association, partnership, or corporation served.⁸

GWL proceeds to assert throughout its brief that under Rule 411 only the buildings are the customers. It even asserts that Rule 411 specifically provides that a premises is not a customer.

Cherryland also argues that Rule 411 applies whenever the utility ever "served a customer" on the premises. That interpretation turns the express language of Rule 411 on its head. The rule specifically provides that the premises is not the customer. Only the buildings and facilities served are customers.⁹

GWL's interpretation of Rule 411 is selective and inaccurate. Rule 411(1)(a) provides that it is not the owner of a building that is considered the customer, but rather the building itself is the customer. Therefore, a change in the building's ownership does not change the utility's

⁷ See Great Wolf Lodge's brief, pp 14-24.

⁸ 1999 AC, R 460.3411(1)(a).

⁹ Great Wolf Lodge's brief, p 18.

customer. Rule 411's definition of customer prevents the unnecessary extension of transmission lines to the same buildings every time there is a change of ownership of the buildings. GWL appears to accept this concept as prudent.

However, GWL asserts that the definition of "customer" under Rule 411(1)(a) is dispositive in this matter as there were no buildings on the land when it purchased the property. Thus with the absence of any building, GWL alleges that it becomes a new customer who is free to choose any utility in its service area, along with the unnecessary expenditures for additional transmission lines. This assertion alone is contrary to utility regulation in the State of Michigan, and GWL does not identify any public purpose for such a curious loophole in regulation. Instead, it only purports that such a loophole exists and that it chose to take advantage of it.

The Court of Appeals' decision does not give a new property owner such latitude. Perhaps this is why GWL does not address the Court of Appeals' findings in this matter. The Court of Appeals seemed troubled by the concept initially set forth in GWL's brief that the first utility serving a property can do so in perpetuity. Thus, the Court of Appeals remanded the matter to the Commission for a factual determination.

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. [MPSC Appendix 102-103a (emphasis added).]

In the Commission's brief, the Commission took issue with the Court of Appeals' analysis of Rule 411. Moreover, the Commission indicated concern with the test advocated by the Court of Appeals as it uses a subjective standard incorporating terms like "reasonable proximity" and "significant period of time" and "reasons other than anticipation of immediate change of ownership." This standard differs from the Commission's bright line test of first utility entitlement.

Under the new test employed by the Court of Appeals, as the Commission noted in its initial brief, it will no longer be able to employ its bright line test but will now be faced with countless scenarios presented in administrative hearings in which current owners simply ripped down old buildings, waited a few months before selling to a new owner who then claimed this action was not taken in "anticipation of an immediate change of ownership." Yet, in its brief, GWL concedes facts far worse than even the Commission imagined.

GWL fails to present any arguments demonstrating how its acquisition of the property fits anywhere within the parameters of Rule 411 as set forth by the Court of Appeals' decision. Instead, it concedes that on July 14, 2000, it entered into an option agreement to buy the property. Under its agreement, GWL had the ability to walk away from any commitment to purchase the property with only a forfeiture of the monthly option payments.¹⁰ It further states that under its option to purchase, it planned to obtain the property cleared of all structures and was aware that it would have a vacant parcel near three electric providers' service territory.¹¹

GWL then states that in September of 2001, the owner of the property, where GWL maintained its option to purchase, requested Cherryland to discontinue providing electric service

¹⁰ Great Wolf Lodge's brief, p 4.

¹¹ Great Wolf Lodge's brief, p 22.

to the buildings on the property after years of service, and in January of 2002, the property owner requested that Cherryland remove the service drop so the existing abandoned buildings could be demolished.¹² After the prior buildings were demolished, GWL purchased the property two months later on March 5, 2002.¹³

These admissions indicate that the previous owner of the property risked losing the sale to GWL if the owner failed to discontinue electric service with Cherryland and remove the buildings located on the property. Thus, the previous owners' actions anticipated an immediate change of ownership in order to permit GWL to choose among three electric providers. Yet, GWL maintains that the intent of the previous owner cannot be presumed on these facts without an evidentiary hearing.¹⁴ Presumably, GWL believes it can demonstrate that the previous owner just happened to decide serendipitously to end service with Cherryland and not because it feared that GWL would not exercise its option to purchase the land under an agreement entered into two years earlier.

GWL recognizes that the Court of Appeals was troubled by the idea of utility entitlement in perpetuity but knows that it cannot meet even the Court of Appeals' loosened standard. Accordingly, it attempts to resurrect arguments rejected by the Court of Appeals. In effect, GWL is now claiming that for a prospective owner to take advantage of the supposed loophole under Rule 411(1)(a) that the customer is only the buildings, and that a prospective purchaser need simply ask the current owner to raze the buildings located on the land before a transfer of ownership. Under this limited interpretation of Rule 411, no buildings equals no customers equals no entitlement. A new owner starts from scratch notwithstanding Rule 411's clear intent

¹² Great Wolf Lodge's brief, p 16.

¹³ Great Wolf Lodge's brief, p 16.

¹⁴ Great Wolf Lodge's brief, p 19.

to avoid duplication of services, along with the attendant construction of new lines. This proposition is deeply flawed and becomes absurd if GWL's limited analysis of Rule 411 is taken to its logical conclusion.

By looking at a customer as "buildings and facilities" in isolation, and not in the context of Rule 411 as a whole, the landowner's actions would not be as limited as GWL suggests. Current property owners would not need to rip down old buildings to change electric providers but could simply build other buildings on the property and request service from another utility to serve these new customers, since, as GWL argues, it is only the buildings that are the customers – not the premises. Or, if a building is destroyed by fire, according to GWL, the new replacement buildings would be a new customer that could choose the electric provider of its choice.

Of course, if an owner of land sought to obtain electric service from a different utility for his new buildings, he would run afoul of Rule 411(11), which is the operative rule for utility entitlement. Rule 411(11) states:

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 if another utility is closer to a portion of the customer's load.¹⁵

Under Rule 411(11), the first utility serving buildings on the premises is entitled to serve the entire premises whether buildings are removed, destroyed, or abandoned in favor of other buildings. Nothing in Rule 411 extinguishes a utility's entitlement to serve the property unless it waives its right to serve a customer, under Rule 411(12),¹⁶ but only if another utility is willing and able to provide the required service.

¹⁵ 1999 AC, R 460.3411(11).

¹⁶ 1999 AC, R 460.3411(12).

The Court of Appeals believed that there should be some method to extinguish this entitlement. Yet, as the Commission has previously indicated, there is no competitive advantage in eliminating this entitlement. This principle of first utility entitlement protects ratepayers from avoidable costs, and is consistent with utility regulation in the State of Michigan.

C. Great Wolf Lodge's reliance on MCL 124.3 is misplaced.

GWL asserts that the Commission, in determining that Cherryland is entitled to continue to serve the land purchased by GWL, improperly regulated Traverse City Light & Power, a municipal utility.¹⁷ To the contrary, nothing in the Commission's Order seeks to regulate the actions of Traverse City Light & Power. The Commission simply applied its longstanding interpretation of Rule 411 that Cherryland, a utility regulated by the Commission, is entitled to continue to serve the property notwithstanding a change of ownership or buildings. This decision applies to all utilities that are regulated by the Commission, such as Consumers Energy.

It is MCL 124.3(2) that prevents Traverse City Light & Power, a municipal utility, from serving this property because it provides:

A municipal corporation shall not render electric delivery service for heat, power, or light to customers outside its corporate limits already receiving the service from another utility unless the serving utility consent in writing.¹⁸

Therefore, if this Court agrees with the Commission that Cherryland is entitled to continue to provide service to the property under the authority of the Commission set forth in MCL 460.551 *et seq* and Rule 411, then MCL 124.3 automatically bars Traverse City Light & Power from providing service. If it is eventually determined that Cherryland is not entitled to continue to provide service to the property owned by GWL, then GWL is free to choose any

¹⁷ Great Wolf Lodge's brief, p 25.

¹⁸ MCL 124.3(2).

utility for its service, including Traverse City Light & Power, Consumers Energy, or even Cherryland. It is the application of MPSC Rule 411 that is determinative in this matter, not MCL 124.3.

RELIEF SOUGHT

The Michigan Public Service Commission respectfully requests this Honorable Court to reverse the decision of the Court of Appeals and reinstate the Commission's long standing interpretation of 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
COMMISSION**

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