

STATE OF MICHIGAN  
IN THE SUPREME COURT

---

GREAT WOLF LODGE OF TRAVERSE CITY, LLC

Plaintiff-Appellee,

Supreme Court Nos. 139541-2 &  
139544-5

Court of Appeals Nos. 281398 &  
281404

v

Ingham Circuit Court  
No. 06-001484-AA

MICHIGAN PUBLIC SERVICE COMMISSION and  
CHERRYLAND ELECTRIC COOPERATIVE

MPSC Case No. U- 14593

Defendants-Appellants.

---

**BRIEF OF MICHIGAN ELECTRIC COOPERATIVE ASSOCIATION AND MICHIGAN  
ELECTRIC & GAS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF  
CHERRYLAND ELECTRIC COOPERATIVE**

Shaun M. Johnson (P69036)  
Joseph J. Baumann (P69261)  
*Attorneys for Michigan Electric  
Cooperative Association*  
Dykema Gossett PLLC  
Capitol View  
201 Townsend Street, Suite 900  
Lansing, MI 48933  
(517) 374-9100

James A. Ault (P30201)  
*Attorney for Michigan Electric &  
Gas Association*  
110 W. Michigan Ave. STE 1000B  
Lansing, Michigan 48933  
(517) 484-7730



---

**QUESTIONS PRESENTED**

- I. IS A REGULATED ELECTRIC UTILITY ENTITLED TO SERVE THE ENTIRE ELECTRIC LOAD OF NEW BUILDINGS AND FACILITIES LOCATED ON A PREMISES IF THE PREMISES CHANGES OWNERSHIP BUT THE UTILITY HAS SERVED BUILDINGS AND FACILITIES ON THAT PREMISES IN THE PAST AND HAS CONTINUED TO MAINTAIN THE RIGHT TO PROVIDE ELECTRIC SERVICE?**

The Court of Appeals said “No.”

The Circuit Court said “Yes.”

The Michigan Public Service Commission presumably would answer “Yes.”

Cherryland Electric Cooperative answers “Yes.”

Great Wolf Lodge of Traverse City, LLC presumably would answer “No.”

MECA and MEGA answer “Yes.”

This Court should answer “Yes.”

- II. SHOULD THIS COURT OVERTURN A DECISION THAT REPLACED AN OBJECTIVE TEST THAT WAS BASED ON A REGULATION’S PLAIN LANGUAGE WITH A SUBJECTIVE TEST THAT EVISCERATES AN INDUSTRY STANDARD AND LEADS TO INCREASED COSTS, DUPLICATION OF SERVICES, AND LITIGATION?**

The Court of Appeals presumably would answer “No.”

The Circuit Court presumably would answer “Yes.”

The Michigan Public Service Commission presumably would answer “Yes.”

Cherryland Electric Cooperative presumably would answer “Yes.”

Great Wolf Lodge of Traverse City, LLC presumably would answer “No.”

MECA and MEGA answer “Yes.”

This Court should answer “Yes.”

**TABLE OF CONTENTS**

QUESTIONS PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES ..... iv

STATEMENT OF THE BASIS OF JURISDICTION AND AUTHORITY FOR FILING  
AMICUS BRIEF ..... i

STATEMENT OF INTEREST.....1

INTRODUCTION TO MECA AND MEGA AND STATEMENT OF MATERIAL FACTS  
AND PROCEEDINGS .....3

I. INTRODUCTION TO MECA AND MEGA.....3

II. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS. ....4

    A. Timeline. ....4

    B. Procedural History. ....5

        1. The Commission dismissed Count II of the Lodge’s Complaint,  
           because Cherryland was entitled to serve the Lodge under Rule  
           411.....6

        2. The Circuit Court affirmed the Commission’s decision. ....6

        3. The Court of Appeals reversed the Circuit Court and the  
           Commission, and remanded the case to the Commission with a  
           directive to analyze the case under two new tests created by the  
           Court of Appeals. ....6

SUMMARY OF ARGUMENT .....8

ARGUMENT .....10

I. A CORPORATION CANNOT UNILATERALLY SWITCH TO A NEW  
ELECTRIC UTILITY ONCE A REGULATED UTILITY HAS SERVED  
BUILDINGS AND FACILITIES ON THE PREMISES WHERE THE  
CORPORATION’S BUILDINGS AND FACILITIES NOW SIT AND THAT  
REGULATED UTILITY HAS NEVER RELINQUISHED ITS RIGHT TO  
SERVE BUILDINGS AND FACILITIES LOCATED ON THE PREMISES. ....10

    A. Rule 411 protects utilities and customers alike by maintaining stability,  
       lowering costs, and avoiding the dangers of several duplicative electric  
       lines in one area. ....10

B.	Rule 411’s plain language entitles a regulated electric utility to serve the entire electric load of a customer’s premises if it is the first utility to serve a building or facility located on the premises. ....	12
1.	Rule 411 must be enforced and interpreted according to its plain language. ....	12
2.	Rule 411’s plain language entitles the first utility to serve a building or facility on a premises to serve the entire electric load on that premises. ....	13
3.	Under the facts as admitted by the Lodge, Cherryland is entitled to serve the entire electric load on the Lodge’s property because Cherryland was the first utility to serve a building or facility on that property. ....	14
C.	The Court of Appeals ignored the plain language of Rule 411, years of Commission interpretation, and Court of Appeals’ precedent to wrongly conclude that Rule 411’s right to serve may be extinguished by the actions of a new owner. ....	15
II.	IN ADDITION TO IGNORING RULE 411’S PLAIN LANGUAGE, THE COURT OF APPEALS’ TEST GREATLY UPSETS THE CURRENT SYSTEM RELIED UPON BY ALL UTILITIES FOR DETERMINING WHICH UTILITY MAY SERVE A CUSTOMER. IT WILL RESULT IN INCREASED COSTS, UNCERTAINTY IN THE MARKET, AND A SIGNIFICANT INCREASE IN LITIGATION. ....	19
A.	To accept the Court of Appeals’ newly enunciated test is to welcome uncertainty in regulatory oversight and extensive litigation in almost all areas of Michigan. ....	19
B.	The Court of Appeals’ test for municipal utilities will result in erosion of service territory. ....	21
	CONCLUSION. ....	24

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Apsey v Memorial Hosp,</i> 477 Mich 120; 730 NW2d 695 (2007).....	13
<i>Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Services,</i> 431 Mich 172; 428 NW2d 335 (1998).....	12
<i>Great Wolf Lodge v Pub Service Comm,</i> 285 Mich App 26; 775 NW2d 597 (2009).....	passim
<i>In the matter of the adoption of rules governing the extension of single-phase electric service in areas served by two or more utilities, MPSC Case No. U-2291 .....</i>	11
<i>In the Matter of the application of Cherryland Electric Cooperative for authority to implement a Large Resort Service ("LRS") Rate, MPSC Case No. U-13716 .....</i>	4
<i>In the matter of the complaint of Great Wolf Lodge of Traverse City, LLC, against Cherryland Electric Cooperative, MPSC Case No. 14593, May 25, 2006 Order, p 18.....</i>	6
<i>In re Complaint of Consumers Energy Co,</i> 255 Mich App 496; 660 NW2d 785 (2003).....	13, 14
<i>Koontz v Ameritech Services, Inc,</i> 466 Mich 304; 645 NW2d 34 (2002).....	16
<i>Little Caesar Enterprises, Inc v Dep't of Treasury,</i> 226 Mich App 624; 575 NW2d 562 (1998).....	13
<i>People v Hill,</i> 269 Mich App 505; 715 NW2d 301 (2006).....	16
<i>Reiss v Pepsi Cola Metro Bottling Co, Inc,</i> 249 Mich App 631; 643 NW2d 271 (2002).....	12

---

**RULES**

1999 AC, R 460.3411 ..... passim

MCR 7.215(C)(2).....15

MCR 7.306(D).....v

R 460.3102(1)(f) .....13

**STATUTES**

MCL 124.3.....5, 17

---

**STATEMENT OF THE BASIS OF JURISDICTION AND AUTHORITY FOR FILING  
AMICUS BRIEF**

Amicus Curiae Michigan Electric Cooperative Association (“MECA”) and the Michigan Electric and Gas Association (“MEGA”) accept and incorporate Defendant-Appellant Cherryland Electric Cooperative’s (“Cherryland”) Jurisdictional Statement. MECA further states that this Court has jurisdiction and authority to consider this Brief pursuant to MCR 7.306(D) and the Court’s Order entered on April 9, 2010, which granted MECA’s application for leave to file an *amicus* brief. Pursuant to this Court’s April 9, 2010 Order, which invited other “persons or groups interested in the determination of the issues presented in this case” to move the Court for permission to file an *amicus* brief, MEGA files a motion to file an *amicus* brief in conjunction with the filing of this brief.

---

## STATEMENT OF INTEREST

This case involves the interpretation and application of Michigan Public Service Commission (“Commission”) regulations and a Michigan statute addressing a customer’s ability to unilaterally switch electric utilities. Michigan law plainly prohibits customers from switching electric utilities once they receive service, and with good reason—uncertainty in service territory and customer base leads to increased costs of capital and unwarranted expenses.

Plaintiff-Appellee in this case, Great Wolf Lodge of Traverse City, LLC (the “Lodge”) filed a petition with the Commission requesting an order declaring that the Lodge could “elect to receive all components of electric service from any provider of its choosing.” Based on applicable rules and statutes, the Commission properly determined that, *as a matter of law*, the Commission could not grant the Lodge’s request. The Ingham County Circuit Court agreed. The Court of Appeals, however, ignored regulatory and statutory language and remanded the case back to the Commission. In so doing, the Court of Appeals announced two new tests for determining whether an electric utility is entitled to serve a customer. If upheld, these tests, which ignore the plain language of Commission rules establishing a utility’s right to serve and prior Court of Appeal’s published precedent, will undoubtedly lead to uncertainty and confusion in the electric industry. Indeed, the decision rendered in this case will have far-reaching effects on how the electric industry operates in Michigan.

Currently, service areas and the ability to serve new or existing customers are well-defined concepts—electric utilities operate within an accepted and understandable standard. Once a utility serves a building located on a parcel of land, it is entitled to serve the entire electric load of the entire parcel upon which that building sits. Unless the electric utility agrees in writing to another utility serving a customer, the customer cannot switch utilities. Under the newly announced Court of Appeals test, however, utilities must determine whether there were

---

any changes in buildings and facilities on a parcel of land, why the owner made such changes, and when they made those changes. And none of those questions will even matter if the customer desires to switch to a municipal utility. Under the Court of Appeals' new standard, regardless of how long a utility has been serving a facility, it is possible for a customer to request a shut-off from its current utility, and then request new service from a municipal utility. Allowing such a standard to exist not only ignores the law; it turns the rules of the game on their head. Litigation to determine a customer's intent is now inevitable every time an expansion or new development is in the works. And the ensuing litigation may be the least of the problems—the increased potential for duplication of service and all of the corresponding increased costs and safety risks to Michigan's consumers that will result from the Court of Appeals test are obvious.

In sum, failing to follow the plain language of the regulations involved in this case will do nothing but hurt the consumer—increased litigation, costs of capital, and safety risks are in no one's best interest. MECA and MEGA respectfully request that the Court issue an opinion and judgment reversing the Court of Appeals and reinstating the Commission's order holding that the Lodge is not permitted to select any electric provider of its choosing.<sup>1</sup>

---

<sup>1</sup> Although this case also addresses issues regarding the Commission's decision to not award interest or fines, MECA and MEGA are not addressing those issues.

---

**INTRODUCTION TO MECA AND MEGA AND STATEMENT OF MATERIAL FACTS  
AND PROCEEDINGS**

**I. INTRODUCTION TO MECA AND MEGA.**

MECA is a Michigan nonprofit corporation serving as the statewide association for Michigan's nine rural electric distribution cooperatives and one generation and transmission cooperative. Its members include: Alger Delta Cooperative Electric Association, Cherryland Electric Cooperative, Cloverland Electric Cooperative, Great Lakes Energy Cooperative, HomeWorks Tri-County Electric Cooperative, Midwest Energy Cooperative, The Ontonagon County Rural Electrification Association, Presque Isle Electric & Gas Co-Op, Thumb Electric Cooperative, Wolverine Power Cooperative ("Wolverine"), and Wolverine Power Marketing Cooperative ("Wolverine Power Marketing"). With the exception of Wolverine (a wholesale power supply cooperative) and Wolverine Power Marketing (an alternative electric supplier), the cooperatives operate local distribution systems that provide electric service to more than 600,000 citizens in rural areas covering all or a part of 58 counties in Michigan's Lower and Upper Peninsulas. The cooperatives' distribution systems include approximately 35,750 miles of overhead lines. In addition, Wolverine's transmission system includes approximately 1,600 miles of electric transmission lines.

MECA's members share many important features. Most importantly, unlike an investor owned utility, cooperatives are controlled and owned by its members. For that reason, any cooperative earnings in excess of operating expenses are returned to the members and/or invested in the cooperative according to the cooperative's bylaws.

MEGA is a Michigan nonprofit corporation serving as a trade association for its member electric and gas public utilities providing service in Michigan. MEGA's electric utility members include Alpena Power Company, Indiana Michigan Power Company, Upper Peninsula Power

---

Company, We Energies, Wisconsin Public Service Corporation, and Northern States Power, a Wisconsin corporation, doing business as Xcel Energy.

If the Court of Appeals' decision is allowed to stand, each of MECA and MEGA's members, along with every electric customer served by their members, will be drastically affected. The decision completely changes the regulatory landscape followed by electric utilities in Michigan for years. The inevitable litigation and duplication of service that will result from the Court of Appeals' opinion will do nothing but cause uncertainty and drive up costs for the foreseeable future.

## **II. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS.**

### **A. Timeline.**

MECA and MEGA generally adopt Cherryland Electric Cooperative's ("Cherryland") Statement of Facts. Succinctly, MECA and MEGA would like to emphasize the following facts:

- Sometime in 1940, Cherryland started serving the 48-acre parcel upon which the Lodge's existing buildings and facilities sit. (Cherryland Brief, p 5.)
- Before the Lodge purchased the property, the then-owner requested that Cherryland de-energize its line. (Cherryland Brief, p 6.)
- Although it de-energized its line, Cherryland never abandoned its right to serve. (Cherryland Brief, p 6.)
- On March 5, 2002, the Lodge purchased the property. (Cherryland Brief, p 5.)
- On May 30, 2002, the Lodge entered into an electric service agreement with Cherryland. (Cherryland Brief, p 6.)
- Because it was required by the electric service agreement, on February 24, 2003, Cherryland sought approval of a Large Resort Service tariff—the same rate that was in the contract between the parties. (*See In the Matter of the application of Cherryland Electric Cooperative for authority to implement a Large Resort Service ("LRS") Rate*, MPSC Case No. U-13716.)
- The Lodge never participated in the case before the Commission.
- On March 31, 2003, the Lodge entered into a new electric service agreement with

---

Cherryland. (Cherryland Brief, p 7.)

- The Lodge and Cherryland could not agree on a new contract, and negotiations apparently broke down—on August 20, 2004, Cherryland submitted an unsigned agreement to the Commission. (*See* Cherryland’s Application in MPSC Case No. U-14240).
- On July 13, 2005, the Lodge filed the Complaint.

**B. Procedural History.**

Although the property ownership history in this case is important, it has been fully explained by the Commission and Cherryland. The procedural posture of this case is also important to understanding why the Commission could not grant the Lodge’s request as a matter of law. The Complaint filed by the Lodge *was not* the first interaction between Cherryland and the Lodge, and certainly was not the first time the Commission reviewed the relationship between the parties.

The Lodge filed the complaint in this case almost a full three years after first taking service from Cherryland. In Count II of its Complaint, the Lodge requested an order from the Commission declaring that, after the termination of the Lodge’s agreement with Cherryland, the Lodge could choose any electric utility that it wanted to receive all components of its electrical service. (Dkt. 01, Cherryland’s appendix, p 67a (the “Complaint”). In response to the Lodge’s complaint, Cherryland filed a motion to dismiss, arguing, among other things, that 1999 AC, R 460.3411 (“Rule 411”) entitled Cherryland to serve the entire load for the premises upon which the Lodge’s facilities were situated, and that MCL 124.3 prevented the Lodge from switching to a municipal utility without Cherryland’s written consent. (Cherryland’s appendix 98a). Commission Staff supported Cherryland’s motion.

---

**1. The Commission dismissed Count II of the Lodge’s Complaint, because Cherryland was entitled to serve the Lodge under Rule 411.**

On May 25, 2006, the Commission issued an order dismissing Count II of the Lodge’s complaint because Cherryland “did not violate Rule 411,” and that under Rule 411, Cherryland was the proper service provider to the Lodge. *In the matter of the complaint of Great Wolf Lodge of Traverse City, LLC, against Cherryland Electric Cooperative*, MPSC Case No. 14593, May 25, 2006 Order, p 18. Importantly, the Commission noted that “the Lodge has not cited any legal authority as a basis for the Commission to grant the relief sought under the circumstances of this case.” *Id.* at p 17.

**2. The Circuit Court affirmed the Commission’s decision.**

The Lodge appealed the Commission’s decision. On October 2, 2007, the Ingham County Circuit Court issued an Opinion and Order that, in pertinent part, affirmed the Commission with regard to Cherryland’s right to serve the Lodge. (*See generally*, Cherryland’s appendix, p 831a).

**3. The Court of Appeals reversed the Circuit Court and the Commission, and remanded the case to the Commission with a directive to analyze the case under two new tests created by the Court of Appeals.**

The Lodge appealed the Circuit Court’s decision. On July 14, 2009, the Court of Appeals issued an opinion that, among other things: (1) vacated the Commission’s decision regarding Cherryland’s right to serve the Lodge; and, (2) remanded the case to the Commission for further proceedings and fact finding.

In remanding the case, the Court of Appeals announced that it is possible that “discontinuation in service, and demolition of buildings, coming about for reasons other than direct furtherance of a plan to change ownership or land uses, can indeed extinguish an existing customer.” *Great Wolf Lodge v Pub Service Comm*, 285 Mich App 26, 40; 775 NW2d 597

---

(2009). The Court then declared the following test to be used to determine whether an “existing customer” of an electric utility exists:

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...those changes and that interruption did not create a new customer. If, however, the previous owner held on to the site for a significant period after all land uses requiring electricity had been abandoned, requested that 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.

*Id.* The Court also declared that, since a municipal utility is involved, the Commission must also consider whether the Lodge was “already receiving service” from an electric utility, and that such a customer is not necessarily “already receiving service” even if it is an “existing customer” under Rule 411. *Id.* It is these newly announced tests that MECA and MEGA now urge this Court to overturn.

---

## SUMMARY OF ARGUMENT

Rule 411, which was validly promulgated by the Commission, and has been relied upon by the electric industry for years, provides that once a utility serves a customer, then that utility is entitled to serve the entire electric load of all customers located on a single premises. A “customer” is the buildings and facilities receiving service—not the owner of the buildings and facilities. For years, the clear policy in Michigan, which is based on Rule 411’s plain and unambiguous language, was to protect an electric utility’s investment by preventing current or new property owners from switching electric utilities once that utility had at some point in time served buildings or facilities located on the property with electric service. That policy had been upheld through numerous Commission orders in contested cases as well as Court of Appeals decisions.

The Lodge initiated this litigation when it filed a two Count complaint with the Commission. Count II of the complaint requested that the Commission declare that, once a special electric service contract between the Lodge and Cherryland expired, the Lodge would be free to choose any electric provider that it desired. Both the Commission and the Circuit Court applied Rule 411’s plain language and arrived at the correct result—as a matter of law, the Commission could not issue an order declaring that the Lodge was free to choose any electric provider once its contract with Cherryland expired. The Court of Appeals, however, ignored Rule 411’s plain language and remanded this case to the Commission. The decision violates Michigan’s rules of statutory construction and ignores binding precedent from the Court of Appeals. For those reasons alone, the Court should overturn the decision.

Going beyond the legal flaws of the Court’s decision, however, this case is the perfect example of why a Court must follow the plain language of a regulation it is interpreting. In ignoring Rule 411’s plain language, the Court of Appeals created two subjective and imprudent

---

tests that utilities must address when determining which utility is entitled to serve a customer. Completely gutting the current objective industry standard by which all utilities operate, this new Court of Appeals' policy will lead to increased costs to everyone involved, including electric consumers. The decision requires that utilities determine a property owner's motivation in demolishing a building or requesting a shut-off, whether a reasonable amount of time has passed since a property owner has demolished buildings, and whether a municipal utility might want to serve the customer. Furthermore, if a municipal utility is involved (which is highly likely since every regulated utility's service area in the state is next to at least one municipal utility), a completely different test is involved. It is now possible that a regulated utility is "entitled" to serve a customer under Rule 411, but must cede its right to a municipal utility even though the regulated utility has served the premises for decades. Again, this will lead to increased costs, duplication of facilities, and voluminous litigation.

Stated simply, the entire industry standard followed by all utilities in the State—co-ops, investor owned, and municipal—was destroyed by the Court of Appeal's decision. By ignoring Rule 411's plain language, the Court created new standards that completely change the game. As a result, territorial disputes are bound to skyrocket, facilities will be duplicated, and costs will increase. Every electric utilities' customer base is now in jeopardy—the utilities' investment of time and money to extend services to customers may now all be meaningless if a new owner of property decides it wants to receive service from a municipal utility. Such reasoning cannot stand, and should be reversed.

ARGUMENT

- I. **A CORPORATION CANNOT UNILATERALLY SWITCH TO A NEW ELECTRIC UTILITY ONCE A REGULATED UTILITY HAS SERVED BUILDINGS AND FACILITIES ON THE PREMISES WHERE THE CORPORATION’S BUILDINGS AND FACILITIES NOW SIT AND THAT REGULATED UTILITY HAS NEVER RELINQUISHED ITS RIGHT TO SERVE BUILDINGS AND FACILITIES LOCATED ON THE PREMISES.**
  
- A. **Rule 411 protects utilities and customers alike by maintaining stability, lowering costs, and avoiding the dangers of several duplicative electric lines in one area.**

Central to this appeal is Rule 411, which governs territorial disputes between regulated utilities. Rule 411 provides, in relevant part:

(1) As used in this rule:

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

\* \* \*

(2) Existing customers 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 if another utility is closer to a portion of the customer’s load.

R. 460.3411(1), (2), and (11) (emphasis added). Under this rule, “customers” are buildings and facilities, not the legal entities that own the facilities. This definition, in combination with subsection (2), prevents a mere change in ownership to allow the new owner of buildings and facilities to switch utilities. And when read in combination with subsection (11), it creates another protection—the first utility that serves a building or facility is “entitled” to serve the “entire electric load” on the same premises of “that” building or facility. These protections, which guard the economic interests of electric utilities—eliminate companies or individuals

---

receiving service from an electric utility to freely switch service from one utility to another. Rule 411's origins explain why its protections are vital to the electric utility industry and electric consumers alike.

There are obviously several sparsely populated areas in the State. Traditionally, large incumbent utilities did not serve those areas because there was a perception that the customer density was simply not high enough to ensure profitability. Over the last 75 years, in the vacuum created by this perceived lack of profitability, Michigan's less profitable areas have been served by Michigan's rural cooperatives and small town utilities because rural America's electrification was imperative and these cooperatives and small companies found a way to stay afloat with much lower customer densities. And for years, there were no disputes among electric utilities regarding service territory, because there was no one else offering to serve customers in these areas. But as densities grew and others recognized that a utility company could sustain itself on fewer consumers/customers per mile, competition grew. This competition led to electric utilities attempting to "steal" another utility's customers. Even though a utility may have made significant investments to extend service, and even though that utility might have been providing service for several years, another utility would attempt to "poach" certain customers with high-energy demands. This could lead to situations where several utilities have investments in the area, resulting in several utility facilities on one piece of property.

In response to increasing competition and disputes between the electric cooperatives and privately owned electric companies, and with a desire to minimize the uneconomical duplication of electric services, the Commission adopted "Rules Governing the Extension of Single-Phase Electric Service in Areas Served by Two or More Utilities" on March 24, 1966. *See Case No. U-2291, In the matter of the adoption of rules governing the extension of single-phase electric*

*service in areas served by two or more utilities*, March 24, 1966 (“Initial Rules”). Among other things, and similar to the current Rule 411, these Initial Rules prohibited existing customers from transferring from one utility to another and allowed the first utility serving a customer to serve the entire electric load on the premises of that customer, even if another utility was closer.

These protections were particularly important to Michigan’s electric cooperatives and smaller power companies because they had spent the significant amount of money needed to build generation, transmission, and distribution facilities to serve these areas where the larger companies were unwilling to do so. Since 1966, the entire electric industry has relied upon Rule 411 to sustain rate bases and ensure stability in covering debt service requirements of government and private loans. In short, Rule 411 provides a bright line test for utilities to rely on when deciding whether to extend service. For over 40 years, this bright line test has led to stability in the industry for territorial disputes—without much trouble, a utility can determine whether it may serve a new customer. This keeps costs down, and avoids the safety concerns related to having several different utilities serving the same parcel of property or parcels of property in the same area.

**B. Rule 411’s plain language entitles a regulated electric utility to serve the entire electric load of a customer’s premises if it is the first utility to serve a building or facility located on the premises.**

**1. Rule 411 must be enforced and interpreted according to its plain language.**

Stated simply, the Court of Appeals’ decision in this case must be overturned because it simply avoided Rule 411’s plain language. Concepts of statutory construction apply equally to the interpretation of administrative rules. See *Reiss v Pepsi Cola Metro Bottling Co, Inc*, 249 Mich App 631, 637; 643 NW2d 271 (2002); *Detroit Base Coalition for the Human Rights of the Handicapped v Dep’t of Social Services*, 431 Mich 172, 185; 428 NW2d 335 (1998). Central

among those concepts of statutory construction is the mission to give effect to the Legislature's (in this case the Commission's) intent. *Apsey v Memorial Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007); *Little Caesar Enterprises, Inc v Dep't of Treasury*, 226 Mich App 624, 629; 575 NW2d 562 (1998). The best indicator of that intent is the administrative rule's plain and unambiguous language. Here, the plain and unambiguous language leads to the undeniable conclusion that Cherryland was entitled to serve the Lodge.

**2. Rule 411's plain language entitles the first utility to serve a building or facility on a premises to serve the entire electric load on that premises.**

The "first utility serving a customer...is entitled to serve the entire electric load on the premises of that customer..." R. 460.3411(11). A "premises" is "an undivided piece of land which is not separated by public roads, streets, or alleys." R. 460.3102(1)(f). And a "customer" is "the buildings and facilities served rather than the individual, association, partnership, or corporation taking service." R. 460.3411(1). Thus, Rule 411 clearly and unambiguously provides that the first utility serving a building or facility is entitled to serve the entire electric load on the undivided piece of land upon which the building or facility sits. In fact, the Court of Appeals has already interpreted this language and confirmed Rule 411's plain language.

In 2003, the Court of Appeals applied Rule 411's plain language and recognized that the first utility to provide electric service is entitled under Rule 411 to continue to serve the entire electric load on the property where the facilities are located. See *In re Complaint of Consumers Energy Co*, 255 Mich App 496; 660 NW2d 785 (2003). The Court recognized that a change in ownership of the property, a change in use of the property, or even a discontinuance of service does not sever the first utility's entitlement to serve:

The fact that electric service to two of the parcels was discontinued for a period is of no consequence under [Rule 411]. Consumers continued to maintain three-phase energized facilities on the southern edge of the parcels and the electric service was

discontinued at 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 service the customers on the property and it never abandoned the facilities because the facilities remained and Consumers was prepared to provide electric service.

*In re Complaint of Consumers Energy Co*, 255 Mich App at 502-03 (footnote omitted). It could be no other way under Rule 411’s plain and unambiguous language—to conclude that a customer may unilaterally destroy a utility’s entitlement to serve the entire electric load on a premises that the utility has previously served would require that a court ignore Rule 411(11). Rule 411(11) states that the first utility serving a building or facility on a parcel of property is entitled to serve the entire electric load on the building’s or facility’s parcel of property. There is no requirement that the service be continuous for any period. So, once the electric utility provides service, unless the electric utility takes action to waive its rights by somehow abandoning its entitlement, it has the right to serve the entire electric load in perpetuity.

The *Consumers Energy* decision—which properly recognized the first-serving utility’s entitlement to serve—recognized that a customer could not discontinue electric service and switch utilities. It is the utility’s entitlement to serve, and only the utility may waive that entitlement. Rule 411(11)’s plain and unambiguous language was bolstered by *Consumers Energy*, which itself leads to the inexorable conclusion that an electric utility is entitled to serve a “customer’s” entire load located on the property if: (1) the electric utility first served buildings and facilities on the property; and (2) the electric utility did not relinquish its rights to do so.

3. **Under the facts as admitted by the Lodge, Cherryland is entitled to serve the entire electric load on the Lodge’s property because Cherryland was the first utility to serve a building or facility on that property.**

In this case, the Lodge’s complaint even admits that Cherryland “serviced the building” on the Lodge’s parcel “at some point in the past.” (Complaint, ¶ 17). More recently, the Lodge

has stated that “[a]t some point when the Olesons owned the farm Cherryland provided electric service to up to three buildings on the property.” (The Lodge’s Brief on Appeal, p 3). “The property” referenced by the Lodge is the premises upon which the Lodge’s buildings and facilities now sit. In other words, the Lodge even admits that Cherryland was serving a customer on the relevant premises before the Lodge purchased the property. Under those facts, Rule 411’s plain language “entitles” Cherryland to serve the buildings and facilities located on the premises. That should be the end of the analysis—Cherryland was the first utility to serve, it did not relinquish its rights to serve, and so it has the right to serve the entire electric load on the premises. The bright-line test that the utility industry has relied upon for so many years is satisfied. No questions, no worries, and no opportunity for drawn out litigation or duplication of service. The Commission recognized this, the Circuit Court recognized this, but the Court of Appeals blurred the lines.

**C. The Court of Appeals ignored the plain language of Rule 411, years of Commission interpretation, and Court of Appeals’ precedent to wrongly conclude that Rule 411’s right to serve may be extinguished by the actions of a new owner.**

In the face of such a plainly written rule, Court of Appeals precedent,<sup>2</sup> and numerous Commission interpretations, all of which supported a bright line, objective test for territorial disputes between utilities, the Court of Appeals declared the following as the proper test to be used to determine whether the premises has an “existing customer” that the first-serving utility is entitled to serve:

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...those changes and that interruption did not create a new customer. If, however, the

---

<sup>2</sup> See MCR 7.215(C)(2) (“A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis.”).

---

previous owner held on to the site for a significant period 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.

*Great Wolf Lodge v Pub Service Comm*, 285 Mich App at 40. In addition to permitting a customer to game Rule 411 in an effort to change electric utilities and extinguish the utility's right or entitlement to serve that parcel as contemplated by the 50 years of public utility regulation, years of precedent, and consistent interpretation from the Commission, this test also violates the rules of statutory construction.

A court cannot interpret a rule so as to render portions of that rule nugatory or surplusage. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Nor may a court ignore words in a rule—it must give effect to every word, phrase, and clause. *People v Hill*, 269 Mich App 505, 515; 715 NW2d 301 (2006). But the Court of Appeal's new test does exactly that. It renders Rule 411(11) completely meaningless, because now, a customer may overcome a utility's entitlement to serve an electric load. Now, even though Rule 411(11) says that the first-serving utility is "entitled" to serve the entire electric load on a premises, a property owner can "allow[] [buildings or facilities] to stand without electricity, for reasons other than anticipation of an immediate change of ownership or land use," and the first-serving utility will have lost its entitlement. The Court of Appeal's interpretation completely ignores Rule 411(11), and renders it meaningless. For that reason alone, the Court of Appeals' decision in this case must be overturned. And the presence of a municipal utility does not change this conclusion.

The Court of Appeals' decision in this case not only ignored Rule 411's plain language; it also concluded that Rule 411 was inapplicable to the Lodge, because an unregulated municipal

utility was involved. See *Great Wolf Lodge*, 285 Mich App at 36. Such a conclusion entirely ignores the plain fact that once a utility is serving a customer, no other utility, municipal or regulated, may serve that customer. So, any determination of whether Rule 411 binds an unregulated municipal utility is, at best, an academic inquiry.

Additionally, MCL 124.3, the statute relied upon by the Court of Appeals, prevents a municipal utility from serving customers already receiving service from another utility, unless the serving utility consents in writing:

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 consents in writing,

MCL 124.3(2). To get around this statute's prohibition that a municipal utility not serve a consumer already receiving service from an electric utility, the Court of Appeals was forced to create a distinction where one does not exist. See *Great Wolf Lodge*, 285 Mich App at 41-45. The Court of Appeals questioned whether the Lodge was "already receiving service" from Cherryland when the Lodge requested service from TCL&P. *Id.* To conclude that the Lodge was not "already receiving service" from Cherryland, the Court of Appeals accepted a Circuit Court's determination from another unrelated case as controlling in finding that the customer "never received electric services . . . merely by acquiring this property at which Cherryland was serving prior to the acquisition." *Id.* at 44. As explained more fully below, to accept this Circuit Court's logic is to turn the entire regulatory regime upside down creating huge uncertainty in the industry.

Setting aside the practical problems with the Court's test for municipal utilities, however, the Court of Appeals' decision has a bigger problem, because it fails to recognize that Cherryland *is currently serving the customer*. Cherryland, the on-site utility, built facilities to

---

serve the Lodge and has served the Lodge for the last five years. Cherryland served the Lodge for a full three years before the Lodge even filed its complaint. There is no way, regardless of how one interprets the term “already receiving service,” to conclude that the Lodge was not already receiving service from Cherryland when the Lodge filed its complaint.

Simply stated, the Court of Appeals’ decision ignored Rule 411(11)’s plain and unambiguous language. The opinion holds that a property owner can extinguish a first-serving electric utility’s entitlement to serve a premise’s entire electric load. Such a conclusion renders 411(11) meaningless. And the presence of a municipal utility does not change this fact. Especially in this scenario, where the customer was receiving service from the electric utility for several years before it asked the Commission to declare that it could unilaterally choose any electric utility. As a result, this Court should reverse the Court of Appeals and reinstate the Commission’s decision regarding Count II of the Complaint.

The Court of Appeal’s decision must be reversed. There is simply no question that the Lodge was receiving service from Cherryland, and that as a result, the Commission could not enter an order declaring that the Lodge could choose another electric provider. To un-ring this bell would be to permit customers to see their electric-provider-situation in hindsight. The only thing worse than the potential gaming of the system by customers at the time of purchase of the property or building on-site, would be to allow the customer to do so one, two, five, or more years after purchasing/building.

**II. IN ADDITION TO IGNORING RULE 411'S PLAIN LANGUAGE, THE COURT OF APPEALS' TEST GREATLY UPSETS THE CURRENT SYSTEM RELIED UPON BY ALL UTILITIES FOR DETERMINING WHICH UTILITY MAY SERVE A CUSTOMER. IT WILL RESULT IN INCREASED COSTS, UNCERTAINTY IN THE MARKET, AND A SIGNIFICANT INCREASE IN LITIGATION.**

**A. To accept the Court of Appeals' newly enunciated test is to welcome uncertainty in regulatory oversight and extensive litigation in almost all areas of Michigan.**

The Court of Appeals created a new test which effectively throws the baby out with the bath water. While previously, utilities had a clear, objective test to determine what utility had the right to serve, the Court of Appeals has replaced it with a test that requires a determination of whether: (1) an interruption in electric service came about in a "reasonable proximity" to a change in ownership; (2) the "purpose" of a change in ownership; (3) a "significant period" of time has passed after all land uses requiring electricity have been abandoned; (4) buildings or facilities have been demolished, removed, or stood without electricity "for reasons other than anticipation of an immediate change of ownership or land use." *Great Wolf Lodge*, 285 Mich App at 26 40.

It is readily apparent that the Court of Appeals' new test creates significant exceptions to a utility's entitlement to serve under Rule 411. Utilities and customers will no doubt battle over the "reasonable proximity" of time, the subjective "purpose" of the change in ownership, whether the interruption in service was a "significant" time before the land use was abandoned, what is needed to prove "abandonment," and what reasons are sufficient to show that service was terminated. The Court of Appeals replaced the workable nature of Rule 411 with subjective inquiries that will lead to utilities pushing the boundaries of where they are permitted to serve. Such activity will lead immediately to duplication of electrical facilities, attempted cherry

---

picking of the best customers by utilities, and later, significant litigation over the interpretation of these new judge-made tests.

The fallacy of this new test is apparent when considered from the perspective of why stability in service area is an important concept in the utility industry. An electric utility typically will not serve without some guarantee that it will earn a reasonable return on its investment. That return is possible when a utility knows that it will be able to serve a customer without another utility swooping in and taking the customer away. But now a utility will not be able to determine if it has such an entitlement by simply looking at service history.

The factual scenarios which will come about under this new test are endless and will be difficult, if not impossible, to sort out without costly litigation. The current factual scenario is a perfect example: an electric utility has served a farm for decades, new developers obtained an “option” to purchase the property, then told the owner to request a shut-off, and then three years after purchasing the property and receiving service, claimed that it may choose another utility. Before the Court of Appeals’ decision in this case, there was certainty under that scenario—now, there is none. And without some certainty, the cost of capital will drastically increase. Electric companies will become unwilling to extend service further than is immediately profitable, or at the very minimum will only extend service in other areas for a very large fee. This could place electricity out of reach to the next generation of rural building, rural farm operations, or other relatively low density/low load customers. Although the exact consequences are still unknown, it seems clear that this change in the electric regulatory landscape, if permitted to stand, will limit access and increase costs to all Michigan-consumers of electricity.

Not only is the new Court of Appeals test unworkable and likely to lead to increased costs, it also guts Rule 411’s purpose and intent in limiting the duplication of facilities. (See,

*e.g.*, Case Nos. U-14193 and U-13764). A new rule that does nothing to limit duplication will ensure the uselessness of Rule 411 because the fights will now be over the bounds of the new, incredibly subjective test that the Court of Appeals thrust upon the utility industry. And, the effects will be extensive and far-reaching. Not only will utilities lose their entitlement to serve along with the related capital investment that was required to initially serve a premises, utilities will now be stuck with costs of removing the utility plant, the costs of which have likely not been fully recovered before a “new” customer takes over and forces the first-serving electric utility off the land. These costs will not be minor and will, no doubt, be passed on to customers and consumers, thereby directly increasing the cost of receiving electricity.

An electric utility must be permitted to serve the premises it previously served or, without exaggeration, utility service will be a morass of poaching, attempted poaching, extensive litigation, and increased cost for all involved. Everyone in the industry has been following the test used by the Commission—a test that parallels Rule 411’s plain language—for decades. The Court of Appeals even previously confirmed that test. Because of this, there is an understanding among the utilities—an understanding that keeps disputes to a minimum. The Court of Appeals completely abrogated that understanding. For those reasons, the Court of Appeals’ decision must be reversed.

**B. The Court of Appeals’ test for municipal utilities will result in erosion of service territory.**

Further complicating the process, after announcing the new and subjective test under Rule 411, the Court of Appeals’ decision announced that a completely different test must be applied when a municipal utility is involved. The Court concluded that a municipal utility is only prohibited from serving a new customer if that customer is already receiving service from a utility, but went on to hold that a customer is not necessarily “already receiving service” even if

---

it is an existing customer under Rule 411.<sup>3</sup> *Great Wolfe Lodge*, 285 Mich App at 44. The Court announced

[t]he relevant inquiry is whether...there were buildings or facilities on the site in question that were ‘already receiving’ electric service from Cherryland at the time Great Wolf came to the site and sought service from TCL&P. The inquiry thus shifts from determining whether there was an ‘existing customer,’ as would be appropriate for a rule 411 analysis, to determining whether a customer was ‘already receiving’ service.

*Id.* Amazingly, the Court went on to conclude, “a customer may more logically retain the status of ‘existing’ over an interruption in service than may a customer deemed to be ‘receiving service.’” *Id.*

This distinction between whether an existing utility served the premises and whether the buildings and facilities are currently receiving service provides a massive advantage to municipal utilities and another loophole for customers to avoid the electric utility that is entitled to serve that customer. If an “existing customer” under Rule 411 does not constitute a customer “already receiving service,” Rule 411(11)’s entitlement to serve a premises is meaningless. The protection would simply vanish, because customers could easily get around Rule 411(11) by requesting a shut-off before selling their property. This simple request will now allow new purchasers of property to switch electric utilities, thus creating the likelihood for duplication of service, related safety risks, and uneconomic operation of utility services that would immediately result in higher costs to consumers.

Such a result should not be taken lightly. The fact of the matter is that there are now 41 municipal utilities in Michigan,<sup>4</sup> and they border on every single regulated electric utility’s

---

<sup>3</sup> As noted above, the Lodge is currently receiving power from Cherryland and, therefore, the Court of Appeals’ effort to enunciate a new test related to MCL 124.3(2) is inapplicable at best, and, at worst, is irrelevant *dicta*.

service territory. All municipal utilities currently operate under the industry standard—i.e., if an “existing customer” under Rule 411 exists, the municipal utility cannot serve the premises upon which that customer sits unless it obtains a written waiver from the electric utility with an entitlement to serve. But the Court of Appeals has eviscerated that standard. This will inevitably lead to a new practice whereby any seller of property will request a shut-off before sale, thus allowing any purchaser of property to have a choice of electric providers. This will likely be especially widespread with the sale of businesses consuming large amounts of energy, or properties located in areas identified for high-growth. But this will not happen just with large customers or in development areas—it will also happen with residential customers as well. There are literally thousands of Cherryland residential customers, for example, that could now be switched to Traverse City Light & Power with little effort. Every house for sale in a subdivision could now be “up for grabs” by a municipal utility, even if another electric utility has been serving that house for 30 years and is currently serving every other house in the neighborhood.

The results could be devastating to any electric utility. The vast erosion of service territories throughout the State and the enormous costs associated with that erosion would not only negatively impact electric utilities, but it would also affect electric consumers. Stated simply, if the Court of Appeals’ newly announced test for municipal utilities is allowed to stand,

---

<sup>4</sup> Those utilities include: Village of Baraga, City of Bay City, City of Charlevoix, Chelsea Department of Electric and Water, Village of Clinton, Coldwater Board of Public Utilities, Crosswell Municipal Light & Power Department, City of Crystal Falls, Daggett Electric Department, Detroit Public Lighting Department, City of Dowagiac, City of Eaton Rapids, City of Escanaba, City of Gladstone, Grand Haven Board of Light & Power, City of Harbor Springs, City of Hart Hydro, Hillsdale Board of Public Utilities, Holland Board of Public Works, Village of L’Anse, Lansing Board of Water & Light, Lowell Light & Power, Marquette Board of Light & Power, Marshall Electric Department, Negaunee Department of Public Works, Newberry Water and Light Board, Niles Utilities Department, City of Norway, Village of Paw Paw, City of Petoskey, City of Portland, City of Sebewaing, City of South Haven, City of St. Louis, City of Stephenson, City of Sturgis, Traverse City Light & Power, Union City Electric Department, City of Wakefield, Wyandotte Department of Municipal Service, and Zeeland Board of Public Works.

---

there will be a sea change in the way each utility operates. Extensions of service in areas bordering municipal utilities will become risky ventures that will increase costs and could lead to duplication of facilities. In addition, there is sure to be litigation involved with these issues—each time a shut off is requested, utilities will challenge the reasons behind the request; each time a municipal utility tries to take an “existing customer,” there will be challenges to their actions; each time a new development is proposed, there will be litigation to determine rights. In sum, there will be voluminous litigation where there used to be none. Essentially, before the Court of Appeals’ decision in this case, the electric utility industry operated within an understanding. With that understanding gone, the potential for disputes will increase significantly. For policy reasons alone, the Court of Appeals’ decision must be reversed.

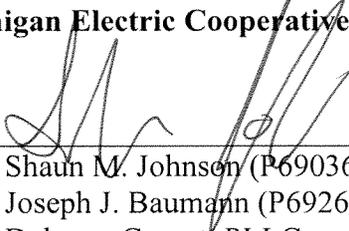
### **CONCLUSION**

The electric utility industry and the Commission have long recognized the financial and safety reasons for preventing unnecessary duplication of electric facilities. For years, Rule 411 has held the State to the sound policy of restricting duplication. The Rule’s plain language entitles a regulated utility to serve the entire electric load on a premises once the utility serves a building or facility on the premises. This is true even if a municipal utility wants to serve the premises—unless the municipal utility obtains written permission from the first-serving utility, it cannot serve the premises. The Court of Appeals’ decision in this matter completely ignored Rule 411’s plain language, and in so doing created two unworkable tests that will undeniably lead to increased duplication, costs, and litigation. Where there was once an understanding among the industry that kept disputes at bay, there now exists a subjective test that will encourage cherry picking and gaming of the system. Municipal utilities now have an extreme advantage, and the risk of service territory erosion is real. There simply is no reason to allow the Court of Appeals’ reasoning to stand.

The Lodge has admitted that Cherryland was the first-serving utility to facilities located on the premises. Cherryland, therefore, is entitled to serve the Lodge, and the Commission cannot issue an order allowing the Lodge to choose any electric provider that it desires. The Commission recognized and interpreted Rule 411's plain language, and its decision should stand. Reaching any other conclusion would destroy the industry standard, and cost electric consumers dearly. For these reasons, MEGA and MECA respectfully request that this Court reverse the Court of Appeals and reinstate the Commission's order with respect to Count II.

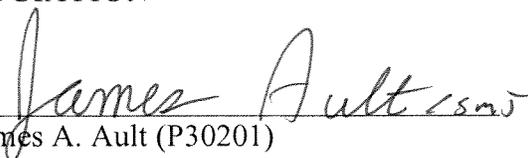
Respectfully submitted,

**DYKEMA GOSSETT PLLC, attorneys for  
Michigan Electric Cooperative Association**

By   
Shaun M. Johnson (P69036)  
Joseph J. Baumann (P69261)  
Dykema Gossett PLLC  
Capitol View  
201 Townsend Street, Suite 900  
Lansing, MI 48933  
(517) 374-9100

And

**MICHIGAN GAS AND ELECTRIC  
ASSOCIATION**

By   
James A. Ault (P30201)  
*Attorney for Michigan Electric & Gas  
Association*  
110 W. Michigan Ave. STE 1000B  
Lansing, Michigan 48933  
(517) 484-7730