

STATE OF MICHIGAN
IN THE SUPREME COURT
(On Appeal From The Michigan 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.

Supreme Court Nos.
139541-2 & 139544-5

Court of Appeals Nos.
281398 & 281404

Ingham County Circuit
Court No. 66-001484-AA

Michigan Public Service
Commission No. U-14593

**BRIEF *AMICUS CURIAE* OF
THE MICHIGAN MUNICIPAL ELECTRIC ASSOCIATION**

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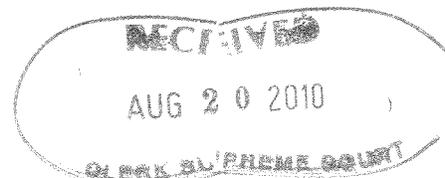


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STATEMENT OF BASIS OF JURISDICTION

The Michigan Municipal Electric Association concurs with Appellant Cherryland Electric Cooperative (at p ix) and Appellee Great Wolf Lodge of Traverse City, LLC (at p vi) that this Court has jurisdiction pursuant to MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED

Amicus Michigan Municipal Electric Association addresses only the following questions:

- I. Whether the Court of Appeals correctly determined that to the extent the Great Wolf Lodge wishes to conduct business with Traverse City Light & Power, "the operative authority is MCL 124.3, not Rule 411"?
-

The MPSC answers "No."

Cherryland answers "No."

The Great Wolf Lodge answers "Yes."

Amicus MMEA answers "Yes."

- II. Whether the MPSC has authority to apply MCL 124.3(2) in the context of this case?

The Court of Appeals directed the MPSC to apply this statute.

MMEA answers "No."

I. INTRODUCTION

This brief *amicus curiae* is filed by the Michigan Municipal Electric Association ("MMEA") in general support of the position of Plaintiff-Appellee Great Wolf Lodge of Traverse City, LLC ("Lodge").¹ As set forth below, MMEA agrees with the decision of the Court of Appeals with one important exception: MMEA disagrees with that part of the Court of Appeals' order that directs the Michigan Public Service Commission ("MPSC") to apply MCL 124.3(2) in the context of this dispute. That statute provides that other than by permission, a municipally-owned utility cannot serve the customer of another utility outside of its corporate limits if that customer is "already receiving service" from the other utility. This statute is sometimes described as a "no switch rule." Municipal utilities are not subject to regulation by the MPSC, and the MPSC has no jurisdiction or authority to apply the statute to the facts in this case.

A. Background and Statement of Facts

As set forth in the facts provided by the Lodge, this dispute arose originally when Defendant-Appellant Cherryland Electric Cooperative ("Cherryland") wrongfully coerced the Lodge into breaching its electric service contract with Traverse City Light and Power (TCL&P), a municipally-owned electric utility. Cherryland accomplished this by refusing to remove a de-energized distribution line from an abandoned farm building, despite the facts that: 1) the owner of the property requested the removal of the electric lines (*see* Lodge Br at 3 and citations

¹ By separate motion, MMEA seeks leave to file this brief pursuant to MCR 7.306(D) and Sup. Ct. Int. Op. Pro. I(C). On July 27, 2010, MMEA filed a motion seeking an extension of time in which to file its *amicus curiae* brief, to and including August 20, 2010.

therein), and 2) this line had not been in use for several months.² Cherryland's refusal to remove the lines prevented the Lodge from receiving a permit authorizing demolition of the structures, which, in turn, threatened to delay the Lodge's construction schedule for its new hotel and water park. Cherryland told the Lodge it would remove the lines only if the Lodge broke its contract with TCL&P and agreed to take service from Cherryland. Threatened with a costly delay in construction, the Lodge agreed. (*See* Lodge Br at 3-4.)

TCL&P sued Cherryland in the Grand Traverse County Circuit Court for tortious interference with contract rights.³ The case was settled when both parties accepted a case evaluation award.

MMEA adopts the statement of facts provided by the Lodge.⁴

B. Interest Of The Michigan Municipal Electric Association

MMEA is a trade association composed of 41 municipally-owned electric utilities in Michigan. One of MMEA's members is TCL&P which may be directly affected by this litigation. Other members include the cities of Detroit, Lansing, Wyandotte, Holland, Grand Haven, Zeeland, Coldwater, Marquette, Escanaba, Charlevoix, Petoskey, and Harbor Springs.⁵

² Good utility practice dictates that distribution lines be removed from structures by the utility which erected the lines.

³ *Traverse City Light & Power Dept and The City of Traverse City v Cherryland Electric Cooperative*, Grand Traverse County Circuit Court No. 02-22514 CZ (Power, J).

⁴ No evidentiary hearing was held by the MPSC in this case. In its brief, Cherryland has made numerous factual assertions not supported by the record. The Lodge has responded to these assertions, and MMEA acknowledges that many of the facts stated by the Lodge are also outside the record.

⁵ A complete list of MMEA's municipally-owned utility members is as follows: Baraga, Bay City, Charlevoix, Chelsea, Clinton, Coldwater, Crosswell, Crystal Falls, Daggett, Detroit, Dowagiac, Eaton Rapids, Escanaba, Gladstone, Grand Haven, Harbor Springs,

In addition to municipally-owned utilities, MMEA includes among its members two joint action agencies formed pursuant to statute, the Michigan Public Power Agency ("MPPA") and the Michigan South Central Power Agency ("MSCPA"). MPPA and MSCPA are public agencies formed pursuant to the Energy Employment Act of 1976, MCL 460.801 *et seq* for the purpose of supplying wholesale electric power to municipally-owned electric utilities in Michigan. Both MPPA and MSCPA own portions of electric generating plants in Michigan, and certain of MMEA's members also own electric generating plants in Michigan.

Cities and villages are authorized to own and operate electric utilities by Const 1963, art 7, § 24. Municipal utilities are not regulated by the MPSC but rather by the cities and villages that have established them. The cities and villages set rates and terms and conditions of service. In some cases, the utility reports directly to an elected city council or other legislative body; in other cases, the utility reports to an appointed or elected board.

By law, municipal utilities have geographically-limited service areas. They may serve only in the city or village which owns the utility and in municipal units adjacent to that city or village. MCL 117.4f; MCL 124.3(1)(a).⁶ In areas outside the city or village limits, the municipal utility must obtain a franchise from the appropriate township, city, or village legislative body. Const 1963, art 7, § 29.

Contrary to assertions being made in this case, direct competition between municipal utilities and MPSC-regulated utilities is the exception rather than the rule. In some cases,

Hart, Hillsdale, Holland, L'Anse, Lansing, Lowell, Marquette, Marshall, Negaunee, Newberry, Niles, Norway, Paw Paw, Petoskey, Portland, St. Louis, Sebewaing, South Haven, Stephenson, Sturgis, Traverse City, Union City, Wakefield, Wyandotte and Zeeland.

⁶ An exception to the adjacent unit rule is that a city or village may continue serving in a non-adjacent area where it was serving on June 20, 1974. *Id.*

townships and other municipal units grant franchises for a specific geographic area to a single utility. In only a few areas of the state do municipal utilities have service areas that overlap with those of MPSC-regulated utilities. Garfield Township, where the Lodge is located, is one such area. The Garfield Township Board has granted franchises to TCL&P, Cherryland, and Consumers Energy Company, and all three of these utilities have distribution lines in the immediate vicinity of the Lodge's property.

MMEA members will be directly affected by the decision in this case. In addition, the MMEA and its members are regularly involved in the application of the statutes at issue in this case – MCL 117.4f, MCL 124.3, and MCL 460.10y.

Courts are "always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest leave is generally granted to file a brief as *amicus curiae*...." *Grand Rapids v Consumers Power Co*, 216 Mich 409, 415; 185 NW 852 (1921). Leave is also often granted to interested persons or entities to file briefs *amicus curiae*. *Woll v Attorney Gen*, 409 Mich 500, 551; 297 NW2d 578 (1980).

II. ARGUMENT

A. Standard Of Review

This case involves the construction of a statute, MCL 124.3, and an administrative rule, 1999 AC, R 460.3411 ("Rule 411"). As this Court recently clarified, a review of an agency's interpretation of a statute is *de novo*. *SBC Mich v MPSC (In re complaint of Rovas)*, 482 Mich 90; 754 NW2d 259 (2008).

This Court announced the proper standard of review for agency statutory construction more than 70 years ago in *Boyer-Campbell v Fry*, [271 Mich 282; 260 NW 165 (1935)] which dealt with the proper construction of the General Sales Tax Act. The *Boyer-Campbell* Court held that

the 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 be overruled without cogent reasons. However, these are not binding on all 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 weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature. [*Id.* at 296-297 (internal citations and quotation marks omitted)]

This standard requires "respectful consideration" and "cogent reasons" for overruling an agency's interpretation. Furthermore, when the law is "doubtful or obscure," the agency's interpretation is an aid for discerning the Legislature's intent. However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue. [*SBC Mich*, 482 Mich at 103]

In sum, there is no evidentiary record below, and thus no deference is to be accorded the decision of the MPSC.⁷

B. Whether TCL&P May Serve The Lodge Is Governed By MCL 124.3, Not By MPSC Rule 411.

1. Rule 411.

Rule 411, 1999 AC, R 460.3411, among other things and as interpreted by the MPSC, establishes a "no switch" rule with respect to existing customers of MPSC-regulated utilities. In

⁷ The MPSC's citation to the rate provisions of Section 25 of the Railroad Act (MPSC Br at 12) is inapplicable here, for the obvious reason that this is not a rate making or similar proceeding. Likewise, the MPSC's reference to the Commission's findings of fact (MPSC Br at 13) is equally inapplicable – there was no evidentiary hearing below. Finally, the MPSC's reference to the MPSC's "legislative judgments" (MPSC Br at 13) is also not germane. This case involves statutory interpretation – not rate making, findings of fact, or legislative judgments.

broad terms, this rule – again as applied to MPSC-regulated utilities – precludes a customer from choosing (i.e. switching to) another electric service provider. But instead of defining the existing "customer" as the building and facility served,⁸ as provided in Rule 411(1)(a), the MPSC effectively redefines "customer" to mean the land upon which the building and facilities are situated. The reason for this is the "premises rule" set forth in Rule 411 (11), which provides that:

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.

The premises rule, as construed by the MPSC, effectively transforms the definition of "customers" from "buildings and facilities," as provided in Rule 411(1)(a), to the land upon which the buildings and facilities are located. Moreover, "premises" is not confined to the land immediately adjacent to the buildings and facilities but rather is expansively defined to include "an undivided piece of land that is not separated by public roads, streets, or alleys." 1999 AC, R 460.3102(j). For utilities covered by the rule, this gives a competitive advantage to electric cooperatives, such as Cherryland, and small investor-owned utilities both of which tend to serve in less populated areas of Michigan. Under Rule 411, as interpreted by the MPSC, for example, service to a single farmhouse located on the edge of a 400 acre parcel gives the "first" utility the power to preclude customers from selecting service from another utility no matter how many times the parcel may have been subdivided in the meantime. In addition, under the MPSC's interpretations, which are not supported by the text of the rule, the "first" utility acquires the

⁸ Electric utilities throughout Michigan and elsewhere are in general agreement that the term "customer" in "no switch" rules should not be interpreted as the owner, occupant, or person paying the electric bill. Such an interpretation would enable a change in the electric provider whenever the owner, occupant or bill payer changes, regardless of whether there is a change in use.

exclusive right to serve the entire parcel even if there are substantial interruptions in service, thus effectively giving that utility the right to serve in perpetuity.

The nonsensical net effect of the MPSC's interpretation of Rule 411 is well illustrated by this case. Cherryland began service to several small farm buildings located on a 140 acre parcel in the 1940s. Six months before the Lodge's acquisition of part of the property, the buildings were abandoned and electric service was discontinued.⁹ The buildings were eventually razed to make way for the Lodge's hotel and water park complex.¹⁰ These facts notwithstanding, Cherryland now claims that it alone had the exclusive right to serve the entire parcel and further, that the Lodge had no right to explore receiving service from either TCL&P or Consumers Energy Company, both of which have distribution lines in the immediate area.

2. Rule 411 Is Not Applicable To A Municipal Utility

In their briefs, both the MPSC and Cherryland assert that, notwithstanding the substantial interruption in service and eventual demolition of the buildings formerly served by Cherryland, Cherryland is entitled by the premises rule in Rule 411 to serve the Lodge to the exclusion of TCL&P. (*See* MPSC Br at 20-21; Cherryland Br at 17-23.) This is nonsense. As determined by the Court of Appeals below, Rule 411 does not apply to a municipal utility such as TCL&P, and

⁹ When buildings or facilities are abandoned, it is, for obvious safety reasons, good utility practice to de-energize all connecting power lines. *See, e.g., Thomas v Penn Power Co*, 402 F2d 88, 93 (3d Cir 1968) (Freedman, J dissenting) ("The power company offered no explanation for its failure to de-energize the abandoned line which the evidence indicated could have been done in a matter of minutes with no difficulty.").

¹⁰ Cherryland's assertion in this case that service to the Lodge by TCL&P or Consumers Energy would have resulted in duplication of facilities is nonsense. Cherryland's distribution facilities at the site were inadequate to serve the Lodge's new complex and had to be substantially upgraded. The same would have been true for the distribution facilities of TCL&P or Consumers Energy.

it cannot be used as a backhanded means of regulating the actions of a non-MPSC regulated utility or its customers. *See Great Wolf Lodge of Traverse City, LLC v MPSC*, 285 Mich App 26, 35; 775 NW2d 547 (2009) ("Great Wolf"). The MPSC has no jurisdiction or authority to regulate a municipal utility. *See* MCL 460.6(1) ("The [MPSC] is vested with complete power and jurisdiction to regulate all public utilities in the state *except a municipally owned utility...*") (emphasis added); MCL 460.10y(11) ("[T]he commission does not have jurisdiction over a municipally owned utility."); MCL 460.54 ("The power and authority granted by this act shall not extend to, or include, any power of regulation or control of any municipally owned utility[.]"). Furthermore, on their face, the MPSC's rules make it clear that they apply *only* to utilities regulated by the MPSC. 1999 AC, R 460.3101(1). ("These rules apply to electric utilities that operate within the state of Michigan under the jurisdiction of the public service commission."); 1999 AC, R 460.3102(l) ("'Utility' means an electric company, whether private, corporate, or cooperative, *that operates under the jurisdiction of the commission.*") (emphasis added).

3. Statutory "No Switch" Provisions.

Rule 411 is not applicable in situations in which a municipal utility is in competition with an MPSC-regulated utility or in the rare situation in which municipal utilities are in competition with one another. Two statutes control in such situations. MCL 460.10y(2) protects customers of municipal utilities and provides that:

Except with the written consent of the municipally owned utility, a person shall not provide delivery service or customer account service to a retail customer that was receiving that service from a municipally owned utility as of June 5, 2000, or is receiving the service from a municipally owned utility. For purposes of this subsection, "*customer*" means the building or facilities served rather than the individual, association, partnership, corporation,

governmental body, or any other entity taking service. (Emphasis added).

MCL 124.3(2) prohibits a municipal utility from providing service to a customer *already receiving* that service from another utility without permission:

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.¹¹

Even if Rule 411 were applicable to municipal utilities (which it is not), MCL 124.3(2) and MCL 460.10y(2) would obviously control to the extent of any conflict between the rule and the statutory provisions. *See, e.g., Mich Sportservice, Inc v Comm'r of Dep't of Rev*, 319 Mich 561, 566; 30 NW2d 281 (1948) ("The provisions of the rule must, of course, be construed in connection with the statute itself. In case of conflict, the latter governs. It is not within the power of the department of revenue to extend the scope of the act."). And, as discussed below, major conflicts do exist.

C. The Court Of Appeals Correctly Interpreted The Term "Customer" In MCL 124.3(2) As Meaning Buildings And Facilities

The term "customer" is not defined in MCL 124.3(2). The Court of Appeals held that "customer" in MCL 124.3(2) means buildings and facilities and not the owner or occupant of the premises. *Great Wolf*, 285 Mich App at 50. That decision is correct and should be upheld by this Court.

¹¹ A third statute, MCL 117.4f, which is not mentioned by the Court of Appeals or addressed in any brief filed with the Court is also applicable in competitive situations involving municipal utilities owned by home rule cities. MCL 117.4f is nearly identical in material respects to MCL 124.3.

The term "customer," as employed in MCL 124.3(2), is a technical term having a specific meaning within the electric industry. Because MCL 124.3(2) does not define "customer," it is appropriate for this Court to construe the term according to its peculiar and appropriate meaning within the electric industry. *See* MCL 8.3a; *GTE Sprint Commc'n Corp v Dep't of Treasury*, 179 Mich App 276, 283 n3; 445 NW2d 476 (1989) ("[W]here the Legislature uses a term of art which has a specific meaning within the industry affected by the statute, the industry's commonly accepted definition of that term is instructive in determining what meaning the Legislature intended for a term not otherwise defined in the statute."). Here, within the context of the electric industry, the term "customer" refers to the building or facilities served rather than an entity taking service. Thus, the term "customer" in MCL 124.3 should be interpreted as buildings or facilities served.

This conclusion is supported by the legislative definition of the term "customer" utilized in MCL 460.10y(2) ("[C]ustomer" means "the building or facilities served rather than the individual, association, partnership, corporation, governmental body, or any other entity taking service."). This Court has held that when construing statutory terms it is helpful to refer to other statutes on the same subject in which such terms are used. *See Szydelko v Smith's Estate*, 259 Mich 519, 521; 244 NW 148 (1932); *see also World Book, Inc v Treasury Dep't*, 459 Mich 403, 416; 590 NW2d 293(1999) (*citing Jennings v Southwood*, 446 Mich 125, 136; 521 NW2d 230 (1994)) ("[T]he terms of statutory provisions having a common purpose should be read in *pari materia*."). Moreover, it is well established that "[s]tatutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law" *See Walters v Leech*, 279 Mich App 707, 709-10; 761 NW2d 143 (2008) (*citing State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998)).

In this case, MCL 124.3(2) and MCL 460.10y both relate to the provision of electric delivery service. These statutes also share a common purpose: identification and definition of the geographic bounds within which public and municipal utilities may provide electric delivery service. In fact, MCL 124.3 cross references and was tie-barred to MCL 460.10y. Accordingly, MCL 124.3, MCL 117.4f, and MCL 460.10y are *in pari materia* and must be read together as one law. Such a uniform reading requires that the term "customer" in MCL 124.3 and MCL 117.4f be given the same meaning as the term "customer" in MCL 460.10y(2). Any different reading would result in conflicting definitions of the same term in related statutes that the law requires be read as one.

1. TCL&P Was Not Precluded From Serving The Lodge By MCL 124.3

a. Distinctions Between Rule 411 And MCL 124.3

MMEA agrees with the Court of Appeals and the Lodge that the MPSC's interpretation of Rule 411 is erroneous in several respects. However, assuming *arguendo*, that the MPSC's interpretation is correct, important differences exist between MCL 124.3 and Rule 411.

First, there is no premises rule or anything resembling it in MCL 124.3(2). It is irrelevant that another utility may have provided electric service sometime in the past to a building located somewhere on the premises. The sole issue is whether the electric service is being provided by another utility to a customer, meaning, as the Court of Appeals held, a building or facility. As the Court of Appeals observed: "[W]here there are no buildings or facilities being served, there is no customer." *Great Wolf*, 285 Mich App at 39.

Second, unlike Rule 411, MCL 124.3 (as well as MCL 460.10y(2)) precludes service to a customer only if that customer is "already receiving service" from another utility. The plain

meaning of this language is that the no switch rule is applicable only if the customer is *currently* receiving service from another utility. While brief interruptions in service may not be enough to destroy the currency of the service, lengthy interruptions of the sort which occurred here are. As the Court of Appeals correctly observed:

The phrase 'customers already receiving service' in MCL 124.3(2) describes something different than 'existing customers' in Rule 411 (2). 'Existing customer' describes a customer with a certain status, whereas 'customer already receiving service' describes a customer actively engaged in certain commerce. A customer may more logically retain the status of 'existing' over an interruption in service than may a customer deemed to be 'receiving service.'

Great Wolf, 285 Mich App at 44.¹²

b. Application Of MCL 124.3 Here

At the time TCL&P entered into a contract to provide electric service to the Lodge, Cherryland had never provided electric service to the buildings and facilities constructed by the Lodge because these buildings and facilities were not yet in existence. Moreover, Cherryland was not currently providing electric service to the demolished building for several months. Accordingly, the Lodge was not a "customer already receiving service" from Cherryland, and there was nothing to preclude TCL&P from providing service to it.

¹² In its brief, the MPSC argues that MCL 124.3(2) should be given the same construction that the MPSC has given Rule 411. (*See* MPSC 6/7/10 Br at 24.) This cannot be done given the significant textual differences between MCL 124.3(2) and Rule 411, and the complete absence of anything like the premises rule in MCL 124.3(2).

2. This Court Should Remand This Case To The MPSC But Not For The Purpose Of Adjudicating Whether The Lodge May Obtain Electric Service From TCL&P

a. The MPSC Has No Jurisdiction Or Authority To Interpret Or Apply MCL 124.3 To The Facts In This Case

The Court of Appeals ordered the remand of this case to the MPSC for an evidentiary hearing to include, among other things, whether the Lodge was a customer already receiving service from Cherryland at the time it requested service from TCL&P. The Court of Appeals apparently did not consider—and no party before this Court has addressed—the question of whether the MPSC has jurisdiction or authority to consider this issue. It does not.

An administrative agency has only that authority which is conferred upon it by the legislature. *See Attorney Gen v MPSC (In re Detroit Edison Co)*, 483 Mich 993, 996-97 (2009) (*citing Consumers Power Co v MPSC*, 460 Mich 148, 155; 596 NW2d 126 (1999)) ("The PSC possesses only the authority granted by the Legislature."). Here, the MPSC has been given no authority to administer or apply MCL 124.3. Moreover, instructing the MPSC to determine whether the Lodge may lawfully receive service from TCL&P or, conversely, whether TCL&P may provide such service would violate the statutory edict that "[T]he commission does not have jurisdiction over a municipally owned utility." MCL 460.10y(11). Furthermore, any order issued by the MPSC on that question would have no binding effect on TCL&P and would, therefore, for all practical purposes, be a nullity.

To the extent there may be a dispute over whether TCL&P may serve the Lodge, that dispute can be resolved only by a court.

b. This Case Should Be Remanded To The MPSC For A Determination As To

**Whether The Lodge Should Be Restored
To Its Position Before It Was Forced To
Take Service From Cherryland**

The Lodge was not given the opportunity by the MPSC to present evidence of Cherryland's misconduct in forcing it to break its contract with TCL&P and accept service from Cherryland. The MPSC merely declared that under its interpretation of Rule 411, Cherryland is forever "entitled" to serve the premises upon which the Lodge is situated, to the exclusion of all other utilities, including TCL&P. As discussed above, the MPSC's conclusion in this respect was wrong and was properly overturned by the Court of Appeals.

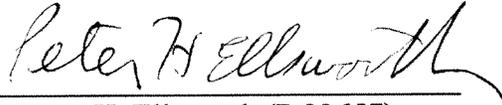
The Lodge should be given an opportunity to present its case. But the issue should be whether Cherryland should be allowed to profit from its wholly unjustified actions in refusing to honor its customer's request to detach its distribution lines in order to allow the Lodge's project to proceed.

III. RELIEF REQUESTED

Amicus Curiae Michigan Municipal Electric Association respectfully requests that this Court affirm the decision of the Court of Appeals, but direct the MPSC to consider whether Cherryland should be allowed to profit from its wholly unjustified actions in refusing to honor its customer's request to detach its distribution lines in order to allow the Lodge's project to proceed.

Respectfully submitted,

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