

STATE OF MICHIGAN  
IN THE SUPREME COURT

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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.

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**DEFENDANT-APPELLANT CHERRYLAND ELECTRIC COOPERATIVE'S REPLY**  
**BRIEF**

**ORAL ARGUMENT REQUESTED**

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## ARGUMENT

### **I. THE COMMISSION LAWFULLY AND REASONABLY INTERPRETED ITS RULES CONSISTENT WITH STATUTORY REQUIREMENTS. THE LODGE'S REQUESTED RELIEF COULD NOT HAVE BEEN GRANTED AS A MATTER OF LAW BY, THE COMMISSION.**

Instead of addressing and defending the actual relief it requested in this case, the Lodge hides behind unsupportable and baseless allegations regarding Cherryland's conduct. The main issue in this case is whether the Commission properly dismissed the Lodge's Complaint. A review of the Complaint and the Commission's ruling in this case makes clear that the Commission properly dismissed Count II of the Lodge's complaint as a matter of law. The Court of Appeals erroneously reversed the Commission.

#### **A. As a matter of law, the Commission could not issue an order declaring that the Lodge could choose any electric provider that the Lodge desired.**

The Lodge's Brief claims that it sought from the Commission below "a hearing to address the issue of whether Great Wolf Lodge had the ability to choose its electric supplier (from among 3 providers with facilities already on the property) at the time it purchased the vacant and unserved property on which it was to build its resort in 2002." (Lodge's Brief, p 1). But that **is not** what the Lodge requested in its Complaint—it did not ask for a choice among three providers. In Count II of its Complaint against Cherryland, the Lodge requested that the Commission approve a special Contract that allowed the Lodge "full choice of electric providers... ." (Complaint, ¶ 45). The Complaint then requested an order from the Commission declaring that the Lodge "may elect to receive all components of electric service from any provider of its choosing." (Complaint, p 10). In other words, it asked the Commission to approve an agreement whereby Cherryland would serve the Lodge, but then when that agreement expired, it could choose any electric provider in the world. Stated simply, the Lodge sought relief that the Commission could not grant under any set of circumstances.

1. **Rule 411 prevents the Commission from issuing an order declaring that a customer already receiving service from a utility can choose any provider that it desires.**

Undoubtedly, “[a]n agency is under a duty to follow its own rules.” *Detroit Base Coalition for the Human Rights of the Handicapped v Dept of Soc Serv*, 431 Mich 172, 189; 428 NW2d 335 (1988), citing *Rand v Civil Serv Comm*, 71 Mich App 581; 248 NW2d 624 (1976).

As explained in both Cherryland’s and the Commission Staff’s briefs on appeal, Rule 411(11) clearly entitles an electric utility to serve the entire electric load of a premises once a utility serves a building or facility located on that premises. *See* (“Rule 411”). Based on that provision alone, the Commission cannot, as a matter of law, issue an order **both** approving a special contract whereby an electric utility will serve certain buildings and facilities for a period of time **and** declaring that after a period of time, those buildings and facilities may switch electric providers. Such an order would, on its face, violate Rule 411(11).

In addition, Rule 411 includes several provisions limiting electric utilities from serving prospective customers. Even assuming that the Lodge’s buildings and facilities constituted a “prospective” customer, or that the Lodge had some choice in its electric utility, the Lodge could not choose **any** electric provider it desired. Rule 411(14) clearly and unambiguously provides that “a utility shall not extend service to a new customer in a manner that will duplicate the existing electric distribution facilities of another utility... .” Rule 411(14). Because the Commission must follow its own rules, *Detroit, supra*, this Rule clearly prevents a Commission order declaring that a customer can receive electric service from “any provider of its choosing.” (Complaint, p 10). An order such as that requested by the Lodge would allow it to choose any utility in the State. And there is no question that Detroit Edison, Alpena Power, Alger Delta, or any of the scores of other utilities in the State would have had to duplicate both Cherryland and Consumers Energy’s distribution facilities in order to serve the Lodge. This would be in direct

contravention of Rule 411(14)—for that reason alone, the Lodge’s request was bound to fail.

2. **Because Cherryland served buildings and facilities on the Lodge’s premises and never relinquished its rights to serve, Rule 411(11) entitles Cherryland to serve the entire electric load of all buildings and facilities on the Lodge’s premises.**

Even if the Lodge had actually requested the relief as it now mischaracterizes on appeal, it could not obtain the relief sought. Under Rule 411(11), “[t]he **first** utility servicing a customer...is **entitled to serve the entire electric load on the premises of that customer...**” Rule 411(11) (emphasis added). A “customer” is the buildings and facilities served, not the owner of the property. Rule 411(2). As admitted by the Lodge, Cherryland once served buildings and facilities on the Lodge’s premises. (Lodge’s Brief, p 3). Once that service occurred, Cherryland was “entitled” to serve the “entire electric load” on the premises where the buildings and facilities were situated. In other words, once Cherryland placed its distribution facilities on the premises and distributed electricity to buildings on the property, it obtained the right to serve the electric load on that property. Under Rule 411, Cherryland maintains that right no matter whether an owner demolishes buildings, sells the property, or takes actions to increase the electric load. As a result, Cherryland was entitled to serve the Lodge’s entire electric load when the Lodge purchased the premises and requested electric service.

As noted by the Commission in its Order, the Commission may only order “a utility to transfer distribution services to another utility...to restore the customer’s service to the distribution utility **that was entitled to provide service under [Rule 411].**” (Dkt. 51, p 17 (emphasis added)). Here, Cherryland was the utility entitled to provide service. The Lodge wanted a declaration from the Commission that the Lodge could choose someone else. Rule 411(11)’s plain and unambiguous language prevented the Commission as a matter of law from granting the Lodge relief. The Lodge tries to avoid this undeniable conclusion in two ways: (1)

by claiming that it was not an “existing” customer when it purchased the premises; and (2) by claiming that MCL 124.3 allowed the Lodge to switch customers. Those arguments read words into Rule 411(11), and simply contradict MCL 124.3’s plain language.

The Lodge relies upon Rule 411(2), which provides, “existing customers shall not transfer from one utility to another.” Rule 411(2). From this provision, the Lodge reasons that the only way that Rule 411 prevents it from switching electric utilities is if it were an “existing customer,” and if it transferred “from one utility to another.” (Lodge’s Brief, p 15). The Lodge contends that Rule 411(11) “simply does not apply unless Rule 411(2) applies.” (Lodge’s Brief, p 17). And that “Rule 411(11) applies only where there is an existing customer, not to where there once was a customer.” (*Id.*). Finally, the Lodge contends, “the issue of whether Cherryland ever served a customer is irrelevant.” (*Id.* at p 18). There simply is no basis for these arguments. In fact, Rule 411’s plain language contradicts the Lodge’s assertions.

It is axiomatic that a court must give effect to every word, phrase, and clause in a statute (or rule). *People v Hill*, 269 Mich App 505, 515; 715 NW2d 301 (2006). In addition, a court must avoid construing a statute (or in this case, a rule) in a manner that renders parts of that statute or rule nugatory or surplusage. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). The Lodge’s arguments claiming that only Rule 411(2) applies in this instance do not give effect to Rule 411’s language, and render rule 411(11) meaningless. Rule 411(11) states that a first-serving utility is entitled to serve the entire electric load on the premises of the customer served by the utility. Rule 411(11). Concluding that there must be an “existing customer” and that it is irrelevant if Cherryland ever served a customer on the premises destroys Cherryland’s entitlement under Rule 411(11) without explanation. There is nothing in Rule 411(11) that limits a utility’s entitlement to serve a premises of “existing” customers. Had

the Commission desired such a limitation, it could have done so—this fact is clear because it used the term “existing” in Rule 411(2). The Commission’s decision not to use the same terminology in Rule 411(11) must be respected and enforced, despite the Lodge’s efforts to ignore such decision. Therefore, the Lodge’s first argument fails.

The Lodge’s second argument that a municipal utility’s involvement allows the Lodge to switch utilities must also fail. First, it is critical to note that the Lodge sought a declaration that it could receive service from any provider it desired—not just a municipal provider. Since Rule 411 prevents such an order as it relates to regulated utilities, the analysis should stop there—regardless of the presence of a municipal utility. If the Commission cannot grant the order, the presence of a municipal utility is irrelevant—it is not the Commission’s duty to transform the relief sought by the Lodge. Furthermore, the statute addressing whether a municipal utility may extend service outside its territory (as in this case) prevents municipal utilities from extending service outside its territory to a customer already receiving service “unless the serving utility consents in writing.” MCL 124.3(2). There is no question that Cherryland was serving the Lodge when it asked the Commission to declare that the Lodge could switch providers. In fact, the parties were on their **third** agreement for electric service. And at no point in this case has anyone ever alleged that Cherryland gave written permission to Traverse City Light & Power (“TCL&P”) to serve the Lodge. As such, the Lodge’s arguments must fail.

Despite how it now characterizes what it is seeking, the Lodge filed a complaint in this case seeking relief that it could not obtain, regardless of the facts it presented. Rule 411 prevents the Commission from declaring that a customer can choose any provider that it likes. As noted by the Commission in its Order, the Lodge provided the Commission with no legal authority to grant the extraordinary relief requested. (Dkt. 51, p 17). The Lodge has yet to provide such

authority, because none exists. Regardless, even taking the Lodge's request as formulated on appeal, **Cherryland is entitled to serve the lodge under Rule 411.** As admitted by the Lodge, at some point in time, Cherryland served buildings and facilities located on the premises where the Lodge's buildings and facilities now sit and never relinquished the right to provide service. No other utility has ever provided service to the premises. Under those circumstances, Rule 411(11)'s plain language entitles Cherryland to serve the entire electric load. Reaching any other conclusion ignores Rule 411.

**B. Because the Lodge could not win as a matter of law, it was not entitled to an evidentiary hearing.**

Several times in its brief, the Lodge points out that there was no evidentiary hearing in this matter. (*See, e.g.*, Lodge's Brief, pp 1, 9, 16). The Lodge made the same arguments at the Court of Appeals. The Court of Appeals, in announcing its new and subjective test for determining whether an electric utility is entitled to serve the entire electric load on a premises, apparently agreed and remanded this case back to the Commission. As explained *supra*, however, there was no factual scenario under which the Commission could grant the relief requested. The Commission dismissed the Lodge's Complaint as a matter of law, because the Commission lacked the legal authority to issue an order declaring that the Lodge was free to choose any electric utility in the world. "The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law." *Shepherd Montessori Ctr v Ann Arbor Chrt Twp*, 259 Mich App 315, 318; 675 NW2d 271 (2004).

**II. THE LODGE MISCHARACTERIZES THE EFFECT THAT THE COURT OF APPEALS' DECISION WILL HAVE ON THE UTILITY INDUSTRY.**

The Lodge contends that no "poaching" of electric customers will occur under the Court of Appeal's decision. (Lodge's Brief, p 27). Addressing the Court of Appeals' test for whether a

municipal utility may serve a customer, the Lodge claims that the Court of Appeals' test requires "1) a complete change in use of the parcel, 2) together with demolition or removal of all existing buildings and replacement with a new structure, and 3) a [municipal] provider is eligible to provide service to the same area, results in an end to the customer relationship under MCL 124.3." (*Id.*). But this is not what the Court of Appeals held, which is evidenced by the quote cited by the Lodge in its next sentence, which the Lodge admits is "phrased...somewhat differently" by the Court of Appeals. (*Id.*).

"Phrased differently" indeed. The Court of Appeals held 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. *Great Wolf Lodge v Pub Service Comm*, 285 Mich App 26, 44; 775 NW2d 597 (2009). This does not require the demolition of a building, the replacement of facilities, or a complete change in the use of the parcel, as the Lodge contends. Under the test announced by the Court of Appeals, a residential homeowner could request a utility shut-off, sell her home, and the new owner would be able to select a municipal electric provider in lieu of the prior-serving regulated utility. If such a test stands, and 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. And despite what the Lodge contends, the erosion of electric service territory at the hands of municipal utilities will begin.

In addition to the newly announced test for municipal utilities, the Court of Appeals also announced a new test under Rule 411, which not only ignores Rule 411's plain language, but also, contrary to the Lodge's assertions, will cause multiple disputes within the industry. The Court of Appeals, in overturning what was once a bright-line test, announced the following as

the new test for whether a regulated utility is entitled to serve buildings and facilities on a premises:

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.

*Great Wolf Lodge*, 285 Mich at 40. The Lodge never actually quotes this test in full, but instead merely dances around it.<sup>1</sup> But the ramifications are real. It is a test that entirely ignores Rule 411(11), which entitles a utility to serve the entire load on a premises once it serves a building or facility on that premises. Now, instead of a bright line test that any utility can objectively apply and sort out in a matter of minutes, utility companies will be forced to make several subjective determinations when attempting to determine whether they can serve a building or facility. Contrary to the Lodge's claims, such a test will lead to attempted poaching, because where a subjective test exists, lines can become blurred. This test clearly should not stand, especially because it strays so far from Rule 411(11)'s plain language.

### **III. THE LODGE MAKES SEVERAL UNSUPPORTABLE AND MISLEADING STATEMENTS ABOUT CHERRYLAND.**

The Lodge's brief contains several misrepresentations. Since the Lodge could prove no set of facts under which it could obtain its relief, its factual misrepresentations are nothing more than an attempt to cast Cherryland in a bad light. Such statements deserve attention so that the

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<sup>1</sup> Curiously, although this is an appeal from the Court of Appeals opinion, the Lodge spends little time addressing that opinion. It instead spends much of its time attempting to re-characterize the relief it actually sought from the Commission and re-arguing its case.

Court is not misled.

**A. Cherryland did not engage in “illegal,” “coercive,” or any other type of wrongful conduct toward the Lodge.**

The Lodge repeatedly claims that Cherryland “forced,” the Lodge into certain actions, subjected the Lodge to “great duress,” and took “illegal” actions. (*See, e.g.*, Lodge’s Brief, pp 6, 16, 19). These type of inflammatory remarks have no place in appellate briefing, especially on a case where the accuser lost at the trial level as a matter of law. The Commission never made such findings, and there is nothing in this record that would support the Lodge’s assertions. Indeed, the Commission’s decision, which concluded, “it appears Cherryland did not violate Rule 411,” suggests just the opposite. Since Rule 411(11) entitled Cherryland to serve the premises where the Lodge’s buildings and facilities were located, Cherryland was actually acting properly and well within the law. The Lodge’s attempt to cite the Administrative Law Judge’s (“ALJ”) proposal for decision to help support its claims demonstrates the Lodge’s desperation in this regard. An ALJ’s proposal for a decision is nothing more than that—a proposal for a decision. Like courts, the Commission speaks through its orders. The ALJ’s proposal for decision is not the Commission’s decision.<sup>2</sup>

In addition, the Lodge’s unsupported allegations have no bearing on the issue on appeal. There are three issues in this appeal: (1) whether the Court of Appeals holding, which now allows a corporation receiving electric service to unilaterally terminate the customer-utility relationship, should be reversed; (2) whether Cherryland owes any interest on a repayment to the Lodge even though no statute requires such interest; and, (3) whether Cherryland should be fined in an instance where the Commission determined that no fine was warranted. None of those

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<sup>2</sup> It is interesting that the Lodge cites the ALJ’s proposal for decision as supporting the Lodge, yet fails to mention that the ALJ also determined that Rule 411 prevented the Lodge from obtaining the relief sought in Count II of its Complaint.

issues has anything to do with the Lodge’s repeated inflammatory remarks.

**B. No Court “found” that TCL&P and the Lodge had an enforceable contract.**

The Lodge also contends that an agreement between TCL&P and the Lodge was “found to be valid and enforceable in the Grand Traverse County Circuit Court in its adoption of a case evaluation award in Case No. 02-22514.” (Lodge’s Brief, p 5). It also insinuates that such a finding “became the judgment of the Court.” (*Id.* at p 6). First, this just is not true. Parties’ acceptance of a case evaluation award does not constitute a judgment on the merits. *Hoover Corners, Inc v Conklin*, 230 Mich App 567, 575; 584 NW2d 385 (1998). If it did, it would defeat the entire reason behind case evaluations. Second, these representations again have nothing to do with whether the Commission properly interpreted Rule 411’s plain language and dismissed Count II of the Lodge’s Complaint as a matter of law. Regardless of any case evaluation award between Cherryland and TCL&P, the Lodge could not obtain an order from the Commission declaring that the Lodge can choose any electric provider in the State.

**C. Cherryland never “trespassed” on the Lodge’s premises.**

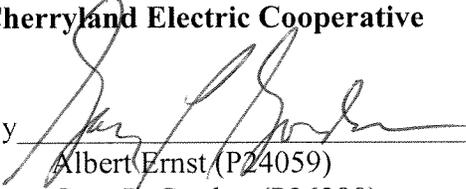
The Lodge also claims that Cherryland was a an “illegal trespasser” on the Lodge’s premises. (Lodge’s Brief, pp 21-22). This argument is disingenuous at best. Cherryland did not commit a trespass because it had a legal right under Rule 411 to serve the Lodge’s premises. It extended its services to a prior property owner under Rule 411 and a blanket easement. A new owner cannot purchase the property and request removal of Cherryland’s facilities in such a circumstance, because Cherryland had a license coupled with an interest for the distribution service lines. A license coupled with an interest is not revocable at will. 5 Restatement Property, § 513, p 3121; *Forge v Smith*, 458 Mich 198, 210; 580 NW2d 876 (1998).

**CONCLUSION**

For the reasons stated herein, the Court of Appeals should be reversed.

Respectfully submitted,

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