

IN THE SUPREME COURT
APPEAL FROM MICHIGAN COURT OF APPEALS

In re APPLICATION OF MICHIGAN ELECTRIC
TRANSMISSION COMPANY FOR
TRANSMISSION LINE

CHARTER TOWNSHIP OF OSHTEMO,
Appellant,

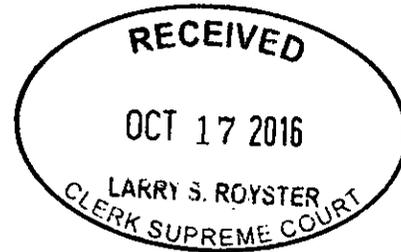
v

MICHIGAN ELECTRIC TRANSMISSION
COMPANY LLC,
Petitioner-Appellee,

and

MICHIGAN PUBLIC SERVICE COMMISSION,
Appellee.

SC: 150695
COA: 317893
MPSC No.: 00-017041



SUPPLEMENTAL BRIEF ON APPEAL

PURSUANT TO THE COURT'S ORDER OF OCTOBER 5, 2016

APPELLANT OSHTEMO CHARTER TOWNSHIP

THE APPEAL INVOLVES A RULING THAT A PROVISION
OF THE CONSTITUTION, A STATUTE, RULE OR
REGULATION, OR OTHER STATE GOVERNMENTAL
ACTION IS INVALID

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Dated: October 14, 2016

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INTRODUCTION

Appellant believes a brief explanation regarding the Michigan Electric Transmission Company (METC), its ownership, its place in the electric industry, and its control by the federal and state government would be helpful to an understanding of whether METC is a public utility for purposes of Const 1963, art 7, § 29.

In 2001, Consumers Energy Company transferred its transmission assets to a newly-formed, wholly-owned affiliate company, named Michigan Electric Transmission Company (METC). METC was incorporated under the Electric or Gas Corporations Act (EGCA); MCL 486.251, et seq. In 2002, Consumers Energy sold METC to Trans-Elect, Inc. Trans-Elect then converted METC, through a series of transactions, into a limited liability company. ITC Holdings Corp (ITC) acquired METC in 2006.

ITC is the largest independent electric transmission company in the United States. ITC Holdings is a transmission-owning member of the Mid-Continent Independent System Operator, Inc. (MISO). Based in Novi, Michigan, ITC allows generating resources to interconnect to its transmission systems throughout a number of states including Michigan.

ITC Holdings was acquired recently by Fortis, Inc. (FTS) and GIC Private Limited (GIC). That acquisition was authorized by the Federal Energy Regulatory Commission (FERC) as announced by ITC on September 26, 2016. Fortis is a North American electric and gas utility business with assets in the billions. The Corporation's regulated utilities serve more than 3 million customers across Canada, the United States and the Caribbean. Fortis, ITC and METC, are all federally regulated by FERC pursuant to the Energy Policy Act of 2005. FERC regulates the transmission and wholesale sales of electricity within interstate commerce, insuring the reliability of high-voltage interstate transmission systems, monitoring and investigating energy

markets, and using civil penalties and other means against energy organizers and individuals who violate FERC rules in the energy market. FERC is independent of the Department of Energy and composed of five commissioners who are appointed by the President and confirmed by the Senate.

One of the recent activities of FERC was to recommend voluntary formation of Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) to eliminate the potential for undue discrimination and access to the electric grid, regional and inter-regional transmission planning and cost allocation through its Landmark Order No. 1000. METC joined MISO, a RTO in 2001.

FERC has limited jurisdiction over transmission line siting. Responsibility over the construction and maintenance of power-generating plants and transmission lines primarily resides with the states' Public Utility Commissions. FERC, by contrast is organized primarily to deal with issues of inter-state commerce, but the local public service commissions deal primarily with the intra-state issues.

Under the FERC Landmark Order No. 1000, issued June 17, 2010, three requirements were established for transmission planning:

1. Each public utility transmission provider must participate in a regional transmission planning process that satisfied the transmission planning principles of Order No. 890 and produces a regional transmission plan.
2. Local and regional transmission planning processes must consider transmission needs driven by public policy requirements established by state or federal laws or regulations. Each public utility transmission provider must establish procedures to identify transmission needs driven by public policy requirements and evaluation proposed solutions to those transmission needs.

3. Public utility transmission providers in each pair of neighboring transmission planning regions must coordinate to determine if there are more efficient or cost-effective solutions to their mutual transmission needs.

In addition to the planning requirements, FERC also imposed cost-allocation reforms, non-incumbent developer reforms and compliance requirements.

Consistent with the regulations on the federal level, the State of Michigan enacted certain requirements in 2000, MCL 460.10w, among which provided that each investor-owned electric utility in in the state to either join a FERC approved multistage regional transmission system organization (or other FERC approved multi-state independent transmission organization), or to divest its interest in its transmission facilities to an independent transmission owner.

In direct response to the legislative requirements, Consumers spun off its assets to METC, and METC thereafter joined MISO, the regions interconnected transmission network. Consumers and METC clearly consider itself as a public utility for purposes of compliance with Federal and State statutory and regulatory enactments.

Appellant's point in reviewing METC's background is this: METC is part of a highly-regulated industry, both at the Federal and State level, and the same must be taken into account in the Court's analysis of what constitutes a public utility.

ARGUMENTS

- I. IN CONSTRUING CONST 1963, ART 7, SEC 29, THE COURT SHOULD ADOPT THE COMMON UNDERSTANDING OF THE TERM "PUBLIC UTILITY."

The rules of textual construction applicable to constitutional provisions are of primary importance in this case. As stated in *Michigan United Conservation Clubs v Sec of State*, 464 Mich 359; 630 NW2d 297 (2001):

“Each provision of a State Constitution is the direct word of the people of the State, not that of the scribes thereof,” Lockwood v. Nims, 357 Mich. 517, 565, 98 N.W.2d 753 (1959) (BLACK, J., concurring), and therefore “[w]e must never forget that it is a Constitution we are expounding,” *id.*, quoting M’Culloch v. Maryland, 4 Wheat. (17 U.S.) 316, 407, 4 L.Ed. 579 (1819).” *id.* at 373.

It is the Court’s obligation, in interpreting the Constitution, to give words their meaning consistent with the common understanding of the People at the time the Constitution was ratified. *County Road Association of Michigan v Governor*, 474 Mich 11, 15; 705 NW2d 680 (2005); *National Pride at Work v Governor of Michigan*, 481 Mich 56; 748 NW2d 524 (2008); *Goldstone v Bloomfield Tp Public Library*, 479 Mich 554, 558; 737 NW2d 476 (2007); *Schwartz v Secretary of State*, 393 Mich 42; 222 NW2d 517 (1974).

This is accomplished by applying the rule of *common understanding*:

“A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. The constitution does not derive its force from the convention which framed, but from the people who ratified it. The intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, But rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.” *In re Proposal C*, 384 Mich 390, 405; 185 NW2d 9 (1971).

Another fundamental rule requires the construction of every clause or section of the Constitution consistently with its words to protect and guard its purpose. *In re Miltenberger Estate*, 275 Mich App 47, 50; 737 NW2d 513 (2007); *National Pride at Work v Governor of Michigan*, 274 Mich App 147; 732 NW2d 139 (2007).

If one were to look at the powerlines running through Oshtemo Township at the present time and ask a person of ordinary understanding whether the electric powerlines constituted a public utility, the answer would be yes. Thus, Appellant submits that applying the common

understanding of what constitutes a public utility is fairly straightforward. Clearly, the common understanding *of the people* at the time the Michigan Constitution was ratified was that electric transmission lines were part of a public utility.

Another means of determining the common understanding is to look at how the term “public utility” has generally been defined. *McQuillin’s* has long been recognized as the preeminent treatise on municipal law. *McQuillin’s* defines a public utility under Section 34.7 of its treatise as follows:

“Am. Jur. 2d, Public Utilities §§ 1 to 12

In connection with the law relating to franchises, the term “public utilities” is often used. One of the distinguishing characteristics of a public utility is the devotion of private property by the owner to a service that is useful to the public, and that the public has the right to have rendered with reasonable efficiency and at proper charges, so long as it is continued. The term implies public use and the duty to serve the public without discrimination, as distinguished from private service. The test is whether the public utility serves the public, whether the public may enjoy its service outright or by permission only, and whether it is subject to appropriate governmental regulation. . . . the term customarily embraces enterprises engaged in by private corporations or individuals, such as supplying water and electricity to the inhabitants.” (emphasis added) (citations omitted)

Under the general definition, METC meets the distinguishing characteristics of a public utility which are:

- (a.) Devotion of private property to a service useful to the public;
- (b.) Implied use or a duty to serve the public;
- (c.) The utility serves the public; and
- (d.) The utility is subject to governmental regulations.

METC does devote private property to a service useful to the public. METC has a duty to serve the public. METC services the public, and METC is subject to governmental regulations.

II. METC DEFINES ITSELF AS A PUBLIC UTILITY IN THAT IT WAS INCORPORATED UNDER THE ELECTRIC OR GAS CORPORATIONS ACT, 1923 PA 238.

When METC filed its complaint for a condemnation against Oshtemo Charter Township on or about May 9, 2014, it specifically stated in its complaint that it was an independent transmission company as defined by the Electric or Gas Corporations Act (EGCA); MCL 486.251, et seq. Pursuant to §1 of the EGCA provides as follows:

“Sec. 1. That any number of persons not less than 3 may form a corporation, for generating, manufacturing, producing, gathering, storing, transmitting, distributing, transforming, selling and supplying electric energy or gas, either artificial or natural, or both electric energy and gas, to the public generally, or to public utilities or natural gas companies, by executing under their hands and seals, articles of incorporation in manner and form as required as to certain other profit corporations by the provisions of sections 1 to 97, inclusive, of Act No. 327 of the Public Acts of 1931, of Michigan and amendments thereto, and thereupon such corporations shall have and enjoy all the powers and privileges of corporations for pecuniary profit organized under said sections 1 to 97, inclusive, of Act No. 327 of the Public Acts of 1931 of Michigan, and amendments thereto.” (emphasis added) (citation omitted)

By incorporating under that Act, METC was agreeing that it was forming a corporation to transmit and supply electric energy to the public generally or to public utilities. By so doing, it was devoting private property to providing a service useful to the public.

METC further agreed by incorporating under 1923 PA 238 to be bound by Section 3 of the Act which provides:

“Sec. 3. (1) A corporation formed under this act shall sell to the public the electric energy it generates or transmits and the gas it manufactures, produces, stores, or transmits, upon such reasonable terms, rates, and conditions as determined by the Michigan public service commission. The Michigan public service commission may examine all books and records of the corporation and audit the corporation. Any order of the commission may be reviewed, set aside, modified, or affirmed in the manner provided by law.

(2) If 1929 PA 9, MCL 483.101 to 483.120, 1929 PA 69, MCL 460.501 to 460.506, or the electric transmission line certification act, 1995 PA 30, MCL 460.561 to 460.575, requires a certificate of necessity to be obtained from the Michigan public service commission, then the corporation shall, before commencing any condemnation proceedings, first make application to, and obtain from the commission a certificate as required under those acts.”
(emphasis added)

This section of the statute says that METC shall sell to the public electric energy it transmits upon reasonable terms, rates and conditions as determined by the Michigan Public Service Commission. By doing so, METC was agreeing that it had a duty to serve the public, and METC would serve the public, pursuant to governmental regulation. Therefore, METC is a public utility.

III. METC HAS EXERCISED THE POWER OF EMINENT DOMAIN, AND THEREFORE, MUST BE INTERPRETED TO BE A PUBLIC UTILITY.

Const 1963, art 10, § 2 provides for the taking (eminent domain) of private property for a public use with just compensation. As set forth earlier in Appellant’s argument, METC was incorporated under the Electric or Gas Corporations Act, 1923 PA 238, MCL 486.251 et seq. Pursuant to § 2 of that Act, every corporation organized thereunder was granted certain powers including:

“Fifth, To condemn all lands and any and all interests therein, easements, rights of way, and other property other than lands lying within a known mineral zone of iron ore, copper, or coal, which may be necessary to generate, transmit, and transform electric energy for public use in, upon, or across private property.”
(emphasis added)

Consistent with the definition of a public utility, the EGCA refers to public use when granting condemnation powers to these entities which do so to transmit electric energy. The Uniform Condemnation Procedures Act, 1980 PA 87, MCL 213.51 et seq does not “confer the power of eminent domain,” MCL 213.52, and the authority to condemn must be found elsewhere, which, in this case, is set forth above. However, the Uniform Condemnation Procedures Act was coupled with the provision in ETLCA to give METC unrivaled authority.

Section 10 of the ETLCA, MCL 460.570, provides that “In eminent domain or other related proceedings arising out of or related to a transmission line for which a certificate is issued, a certificate issued under this Act is conclusive and binding as to the public convenience and necessity for that transmission line” Not only has State law given METC the power of eminent domain, but it has further provided, if approval of the MPSC is sought under the ETLCA, that the CPCN is conclusive, thereby not subject to further challenge.

Given this authority and in light of the provisions of the Michigan Constitution, one has to ask, if METC is not a public utility how can METC exercise the power of eminent domain? The simple answer to that question is, METC cannot. **In order to have eminent domain powers, METC must be a public utility.**

In the case of *Dome Pipeline Corp v Public Service Com'n*, 176 Mich App 227; 439 NW2d 700 (1989), an appeal was taken from the order of the Public Service Commission denying the pipeline’s application for a pipeline extension. Plaintiff argued it was not supplying

gas for a “public use.” However, the Court of Appeals rejected that argument, citing a long line of cases for the majority opinion that sales of gas, to even a few select customers, constituted service to the public and rendered a gas company a public utility subject to regulation.

In that case, the Court of Appeals rejected the cases put forth by Plaintiff and held:

“In rejecting that approach, other courts have noted that is merely one way of defining a public utility, but that a public utility also embraces any business which is affected with a public interest. As noted by the United States Supreme Court in *Munn v. Illinois*, 94 U.S. 113, 126, 24 L.Ed. 77 (1876):

‘Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.’

In *Munn*, the Court held that grain elevators can be regarded as public utilities, subject to regulation, because they are serving a public interest. The decision was based upon the necessity of the service to the community, together with the existence of a virtual monopoly.” *id* at 235-6. *Dome, supra*.

While the Court held that Dome Pipeline was a public utility due to the public interest involved, it did not rely solely upon the fact that it served a public interest with a virtual monopoly. The Court went further and held:

“Moreover, as Dome Pipeline acknowledges, in 1972 it was granted permission to construct its pipelines under the power of eminent domain. See M.C.L. § 483.2; M.S.A. § 22.1342 and M.C.L. § 483.102; M.S.A. § 22.1312. The exercise of the right of eminent domain may be enough to constitute a distributor of either gas or electricity a public utility, even though it engages strictly in wholesale and not in retail distribution. *Salisbury & Spencer R. Co. v. Southern Power Co.*, 179 N.C. 18, 101 S.E. 593, 12 ALR 304 (1919); *People’s Natural Gas Co. v. Public Service Comm.*, 279 Pa. 252, 123 A. 799 (1924); *North Carolina Public Service Comm. v. Southern Power Co.*, 282 F. 837, 33 ALR 626 (C.A. 4, 1922), cert dis. 263 U.S. 508, 44 S.Ct. 164, 68 L.Ed. 413 (1924). The theory behind these decisions is that the state cannot confer the power of eminent domain to seize private property for private use. The force of that reasoning is fully accepted in Michigan. See *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 304

N.W.2d 455 (1981); City of Center Line v. Chmelko, 164 Mich.App. 251, 416 N.W.2d 401 (1987). (emphasis supplied)

Thus, we hold that Dome Pipeline is a utility and is transporting gas for public use. Accordingly, Dome Pipeline is not exempt from regulation by the PSC.” *id* at 236-7.

Therefore, under the reasoning set forth in *Dome Pipeline Corp v Public Service Com'n* and *Poletown Neighborhood Council v Detroit*, 410 Mich 616; 304 NW2d 455 (1981), METC must be a public utility. If METC is not a public utility, then this Court would have to strike down its authority to exercise the power of eminent domain. If so ruled, Appellant would respectfully request that METC return all the easements it took under eminent domain, remove its property from said easements and vacate the Township.

IV. METC IS A PUBLIC UTILITY AS DETERMINED BY THE MICHIGAN COURTS.

The Michigan Constitution uses the term “public utility” in numerous provisions of its articles and subsections. Some constitutional sections use the term broadly, and others in a more limiting way. However, the Michigan courts’ interpretations of these various provisions all shed light on the question at hand and support the conclusion that METC is a public utility under Const 1963, art 7, § 29.

In *Schurtz v City of Grand Rapids*, 208 Mich 510; 175 NW 421 (1919), Plaintiff challenged the City’s acquisition of a hydraulic company (water plant) without a three-fifths vote of the electors of the City of Grand Rapids. The Court ruled that the City had violated Michigan’s Constitution, state law and its own charter, holding:

“In our opinion the action of the city commission was an attempt to acquire a public utility—a privately owned public utility. We think that the term ‘public utility’ means every corporation, company, individual, association of persons, their trustees, lessees, or receivers, that may own, control, or manage, except for private use any equipment, plant, or generating machinery in the operation of a

public business or utility. Utility means the state or quality of being useful. Was this plant one useful to the public? If so, it was a public utility. We think it was such.” *id* at 524

In the present case, METC is operating a business for the public’s use; a business useful to the public and is therefore a public utility.

In *Bruce Tp v Gout*, 207 Mich App 554; 526 NW2d 40 (1994), the Township brought an action to require Lakeville Gas Associates to remove its underground pipelines, which pipelines had been installed in the public right-of-way without township approval. The Court of Appeals stated in the first sentence of its opinion that “This case involves the definition of a public utility.” *id*. The Court of Appeals then held:

“A township has the right to exercise reasonable control over the use of its highways, streets, alleys, and public places. Const.1963, art. 7, § 29; Union Twp. v. Mount Pleasant, 381 Mich. 82, 90, 158 N.W.2d 905 (1968). A public utility has a right to occupy a public right of way, and the township’s consent to such use by a public utility may not be arbitrarily and unreasonably withheld. M.C.L. § 247.183; M.S.A. § 9.263; Union Twp., supra at 89-90, 158 N.W.2d 905.

The term “public utility” means every corporation, company, individual, or association that may own, control, or manage, except for private use, any equipment, plant, or generating machinery in the operation of a public business or utility; utility means the state or quality of being useful. Schurtz v. Grand Rapids, 208 Mich. 510, 524, 175 N.W. 421 (1919).

We agree with the trial court’s conclusion on remand that there was no dispute that defendant Lakeville was a public utility under the above definition: it was in the business of producing, transporting, processing, and selling natural gas; all of the natural gas it produced was sold to a public utility (Michigan Consolidated Gas Company) for distribution to the public; and it did not use any of the natural gas for its own purposes, or sell it to anyone else. Clearly, defendant’s pipe line was useful to the public. Schurtz, supra.” *id* at 558-9. (emphasis added)

In the present case, METC was in the business of transmitting and selling electricity to public utilities for distribution to the public. METC's transmission line is useful to the public, and therefore, pursuant to the definition in *Schurtz and Bruce Tp, supra*, METC is a public utility.

In the case of *White v City of Ann Arbor and Detroit Edison Company*, 406 Mich 554; 281 NW2d 283 (1979), the Court addressed the issue whether a cable television operator was a public utility. The Court held that, for purposes of art. 7 § 25, cable television was *not* a public utility. However, for purposes of the Subdivision Control Act, cable television was a public utility. The Court held that cable television was not a public utility for purposes of art. 7, § 25 because the public utilities requiring at-will revocation and approval of the voters were limited to those public utilities furnishing light, heat or power. *id* at 573-4.

In holding that the cable television was a public utility for purposes of the Subdivision Control Act, the Court specifically looked at how the Subdivision Control Act defined a public utility, the Court cited MCL 560.102 as follows:

“Public utility’ means all persons, firms, corporations, copartnerships or municipal **289 or other public authority providing gas, electricity, water, steam, telephone, sewer, or other services of a similar nature.” *id* at 572. (emphasis added)

Based upon the phrase, “services of a similar nature,” the Court found that cable television was similar to telephone service and held:

“Although cable television service is not identical to telephone service, we conclude that it is a “similar service” within the meaning of the Subdivision Control Act.

Accordingly, we hold that cable television is a “public utility” as that term is defined for the purposes stated in the Subdivision Control Act of 1967.” *White, supra*, p 574.

This phrase, “services of a similar nature,” will prove important later in Appellant’s Brief when analyzing the controlling statutory provisions.

Of particular importance in the *White* case is Justice Moody’s concurring opinion because it sheds tremendous light on the Supreme Court’s analysis of what constitutes a public utility. In that case, Justice Moody stated:

“MOODY, Justice (concurring).

I concur with the analysis and result reached by Chief Justice Coleman in *Detroit Edison*. I concur in the result reached in *City of Ann Arbor* but write separately to elaborate on certain important considerations *575 left unaddressed in Chief Justice Coleman’s opinion.

Const. 1963, art. 7, s 25 reads:

“No city or village shall acquire any public utility furnishing Light, heat or power, or grant any public utility franchise which is not subject to revocation at the will of the city or village, unless the proposition shall first have been approved by three-fifths of the electors voting thereon. No city or village may sell any public utility unless the proposition shall first have been approved by a majority of the electors voting thereon, or a greater number if the charter shall so provide.” (Emphasis added.)

It is evident from the plain meaning of the words of this provision and from a review of the Official Record of the 1961 Michigan Constitutional Convention that the definition of the term “public utility” is limited to those utilities furnishing light, heat or power. Thus, for art. 7, s 25 purposes, cable television is not a public utility.

Although this limited constitutional definition of public utility excludes cable television, it is imperative to recognize on a practical level that cable television possesses all the attributes of a public utility. While the term “public utility” has eluded precise definition, this Court has defined the term as follows:

‘Utility means the state or quality of being useful.
Was this plant (waterworks company) one useful to

the public? If so, it was a public utility.” Schurtz v. Grand Rapids, 208 Mich. 510, 524, 175 N.W. 421, 426 (1919).’

A Federal District Court has given a similar, if somewhat more expansive, definition by defining a public utility as a business which offers services for which the public has such a need as to constitute *576 a practical necessity and which by its very nature is an economic monopoly. Greater Fremont, Inc. v. Fremont, 302 F.Supp. 652, 664-665 (N.D. Ohio, 1968).” *White, supra*, p 574-575.

While Justice Moody was quick to point out that the limited definition of public utilities under art 7, § 25 excluded cable television, the term “public utility” was much broader than provided for under that section of Const 1963. Justice Moody was also wise in his reference to the Federal District Court’s analysis on this issue in the case of *Greater Fremont, Inc. v City of Fremont, et al*, 21 Ohio Misc 127; 302 F.Supp 652, (1968).

The Federal Court for N.D. Ohio, Western Division addressed the issue of what constitute a public utility. In its holding, the Court accepted the following definition of a public utility as:

“A public utility to the extent of its capacity is bound to serve those of the public who need the service and are within the field of its operations, at reasonable rates and without discrimination. * * * This duty does not permit such a public service corporation to pick out good portions of a particular territory, serve only selected customers and refuse service (which it alone can give) to the remaining portions of the territory and to other users. * * * Yet it is not a controlling factor that the corporation supplying service does not hold itself out to serve the public generally. It has been held that a business may be so far affected with a public interest that it is subject to regulation as to its rates and charges even though the public does not have the right to demand and receive service. Industrial Gas Co. v. Public Util. Comm’n of Ohio, 135 Ohio St. 408, 413, 21 N.E.2d 166, 168 (1939).

The essential characteristics of this definition are that the public has a great interest and need to receive the services of the corporation or person and that for *665 reasons of practical

necessity, the operation of this type of business must occupy a monopolistic or oligopolistic position in the market.” *Greater Fremont, Inc., supra* p 665. (emphasis added) (citation omitted)

Unlike the *White* case, *supra*, there are no limitations in Const 1963, art 7, § 29 as to which the type of public utility this provision of the Michigan Constitution applies. It applies to all public utilities. In this case, METC is a public utility because the public has a great interest and need to receive the service of the corporation for reasons of practical necessity, and METC occupies a monopolistic or oligopolistic position in the market.

The Court of Appeals dealt with the issue of cable television again in the case of *Charter Tp of Meridian v Roberts*, 114 Mich App 803; 319 NW2d 678 (1982). The Court was not dealing with the limiting language of Const 1963, art 7, §25 considered in *White, supra*, and specifically stated that:

“The principal distinguishing factor between art. 7, § 25, considered by the Supreme Court in *White*, and art. 7, § 29 before us here, is that the latter constitutional provision contains no such limiting language.” *id* at 809

Because the Court was not under the limiting provisions of art 7, § 25, but was, in fact, looking at art 7, § 29, it took a much broader approach to the definition of public utility. The same approach should be followed here since we are dealing with the same provision of the Michigan Constitution and its definition of a public utility under art 7, § 29.

In *Charter Tp of Meridian, supra*, the Court held:

“Thus, the language used by the *White* Court strongly suggests that cable television systems may not operate in this state without having been granted a franchise. In light of the strong public policy considerations noted by the Court in *White*, we concur. Therefore, because defendants’ cable television system is a public utility within the meaning of art. 7, § 29, it is subject to regulation by the plaintiff township and cannot operate without a franchise. The circuit judge’s contrary ruling is reversed.” *id* at 810.

It is also interesting to note in the case of *Charter Tp of Meridian v Roberts, supra*, the

Court made direct reference to an AG Opinion as follows:

“OAG 1973–1974 No. 4808, p. 130 (April 25, 1974). The attorney general opined that cable television systems were public utilities within the meaning of the Michigan Constitution. Specifically, he relied on art. 7, § 29 and interpreted the term “public utility” to include cable communication systems in light of Const. 1963, art. 7, § 34, which provides that sections of the 1963 constitution as well as state statutes that set forth the powers and limitations of counties, townships, cities, and villages “shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution.” *id* at 807-8.

Liberally construing the term “public utility” in favor of the Township, Appellant believes METC constitutes a public utility, in that METC:

- (a.) Provides a service useful to the public;
- (b.) Has a duty to serve the public;
- (c.) Serves the public or public interest; and
- (d.) Is subject to governmental regulation.

V. METC IS A PUBLIC UTILITY FOR PURPOSES OF 1925 PA 368, HIGHWAY OBSTRUCTION AND ENCROACHMENT ACT.

Michigan Highway law, specifically, 1925 PA 368, Section 13; MCL 247.183 provides in pertinent part as follows:

“Sec. 13. (1) Except as otherwise provided under subsection (2), telegraph, telephone, power, and other public utility companies, cable television companies, and municipalities may enter upon, construct, and maintain telegraph, telephone, or power lines, pipe lines, wires, cables, poles, conduits, sewers or similar structures upon, over, across, or under any public road, bridge, street, or public place, including, longitudinally within limited access highway rights-of-way, and across or under any of the waters in this state, with all necessary erections and fixtures for that purpose.

A telegraph, telephone, power, and other public utility company, cable television company, and municipality, before any of this work is commenced, shall first obtain the consent of the governing body of the city, village, or township through or along which these lines and poles are to be constructed and maintained.” (emphasis added)

Thus, this statute uses a very broad definition of “public utility” which includes companies like METC which establish power lines and, also, requires local government consent for the establishment of such lines in a public place or right-of-way. This definition not only reinforces the general definition of “public utility,” but in reinforces the consent requirement as provided in Const 1963. art 7, § 29.

Under Subsection (2), certain utilities, as defined by 23 CFR 645.105m, are allowed to enter upon, construct and maintain utility lines and structures within limited access highway rights-of-way or any public road or street that intersects the limited access highway, but only in accordance with the standards approved by the State Transportation Commission and the Michigan Public Service Commission, and under those circumstances, is not required to obtain consent from the governing body of the city, village or township. However, this exemption only applies where utility lines and structures or pipes can be maintained longitudinally within a limited access highway or a road which intersects with a limited access highway, which is not the case in the present matter. Therefore, Appellant would argue that all of these utilities, including METC, are public utilities subject to the consent provisions, and therefore, should be treated as any other public utility, except in the limited circumstances of operating within a limited access highway right-of-way.

VI. METC IS A PUBLIC UTILITY PURSUANT TO THE MPSC'S RULINGS.

In *Re Wabash Valley Power Association, Inc.*, MPSC Case No. U-7963, 1986 WL 1300975; 76 PUR 4th 68, June 26, 1986, the MPSC filed a petition to assert jurisdiction over Wabash Valley Power Association, Inc. and its sales to Fruit Belt Electric Cooperative. Wabash filed a reply objecting and Fruit Belt Electric Cooperative intervened.

Wabash argued that the Commission did not have authority to assert jurisdiction over its operation. Wabash claimed it was not a public utility. The MPSC, in its decision, stated that consideration of whether the Commission can assert jurisdiction over Wabash depends on Wabash meeting the criteria necessary to establish it as a public utility and an electric light and power company. In its decision, the MPSC held that:

“The Commission agrees with Fruit Belt and the Staff that the term “electric light and power company” appears to be fairly straightforward. As used in M.C.L.A. 460.6, it seems clear that the term refers to a company which is in the business of supplying electricity for lighting and power.

The Commission likewise agrees with Fruit Belt and the Staff that the term “public utility” is somewhat more difficult to define; in fact, various definitions have been provided of just what constitutes a public utility. The Michigan courts have offered only very broad general definitions of the term. For example, in *Schurtz, supra*, the court addressed the use of the term as used in § 25 of the 1908 Michigan Constitution, thusly:

“We think that the term public utility means every corporation, company, individual, association of persons, their trustees, lessees or receivers that may own, control or manage, except for private use, any equipment, plant or generating machinery in the operation of a public business or utility. Utility means the state or quality of being useful. Was this plant one useful to the public? If so, it was a public utility.”

The Legislature has also defined public utility in the statute governing the issuance of a certificates of convenience and public necessity:

“The term public utility when used in this act means persons and corporations other than municipal corporations, their lessees, trustees and receivers now or hereafter owning or operating in this state, equipment or facilities for producing, generating, transmitting, delivering or furnishing gas or electricity for the production of light, heat or power to or for the public for compensation.” (M.C.L.A. 460.501)

Additionally, Black’s Law Dictionary defines a public utility as:

“A business or service which is engaged in regularly supplying the public with some commodity or service which is of public consequence and need, such as electricity, gas, water, transportation, or telephone or telegraph service....

The parties all attest to the fact that Wabash is organized as a public utility under the Indiana Not-For-Profit Corporation Act. Further, in its Articles of Incorporation, Wabash has specifically stated its intent to carry on the general business of the manufacture, transmission, distribution, purchase and sale, at wholesale rates, of electric *87 energy to members of its corporation. Likewise, it has indicated that it was organizing as a corporation for the purpose of carrying on all other purposes incidental to the manufacture, transmission, distribution, purchase and sale of electric energy. In addition to the manifestations in its Articles of Incorporation, Wabash has in the past characterized itself as a public utility to the IPSC. The IPSC, in turn, has acknowledged the fact that Wabash is a public utility and has granted Wabash authority to operate as an electric utility on that basis. It, therefore, cannot be denied that Wabash is a public utility.”

Once the MPSC concluded that Wabash was a public utility and an electric light and power company, it was subject to the jurisdiction of the Michigan Public Service Commission. That authority was asserted under the provisions of 1939 PA 3, MCL 460.1 to 460.10cc and 1909 PA 106, MCL 460.551 through 460.559.

Appellant understands that, under the Electric Transmission Line Certification Act, METC does not constitute “electric utility,” and that as an independent transmission company, it would be subject to the ETLCA rather than the Electric Transmission Act, 1909 PA 106, MCL 460.551 et seq. However, that does not change the fact that METC must first be defined as a

public utility in order to be found subject to MPSC's jurisdiction. Again, the ETLCA only defines an electric utility separate from affiliated independent transmission companies for purposes of eliminating those small electric utilities with less than 50,000 residential customers from being subject to the Act. The Act applies to all affiliated transmission companies or independent transmission companies. However, no one would logically argue that an independent transmission company or an affiliated transmission company is not a public utility because to do so would alleviate them from complying with MPSC regulations, except as required under the ETLCA.

It is also important to note that Wabash was subject to the provisions of MCL 460.501, which requires utilities to obtain a certificate of public convenience and necessity under certain circumstances as pointed out by the MPSC itself:

“Under the terms of this statute, only public utilities that meet the definition provided at M.C.L.A. 460.501 are required to secure such a certificate:

The term ‘public utility’ when used in this act means persons and corporations other than municipal corporations, or their lessees, trustees and receivers now or hereafter owning or operating in the state equipment or facilities for producing, generating, transmitting, delivering or furnishing gas or electricity for the production of light, heat or power to or for the public for compensation.

As Wabash points out, this definition must be read in conjunction with M.C.L.A. 460.502, which states as follows:

No public utility shall hereafter begin the construction or operation of any public utility plant or system thereof nor shall it render any service for the purpose of transacting or carrying on a local business either directly, or indirectly, by serving any other utility or agency engaged in such local business, in any municipality in this state where any other utility or agency is then engaged in such local business and rendering the same sort of service, or where such municipality is receiving service, of the same sort, until such public utility shall first obtain from the commission a certificate

that public convenience and necessity requires or will require such construction, operation, service, or extension.

M.C.L.A. 460.502 clearly applies to Wabash since Wabash is rendering electric service for the purpose of transacting or carrying on a local business. While Wabash is not doing this in a direct manner, it is doing so in an indirect manner by serving Fruit Belt in municipalities where Fruit Belt is engaged in such local business. The Commission also believes that Wabash meets the definition of public utility set forth at M.C.L.A. 460.501. Although the majority of Wabash's equipment and facilities are located in *91 Indiana, Wabash nevertheless owns substantial load management facilities which are located in Michigan. Moreover, Wabash controls these facilities. Since either ownership or operation of facilities in this state meets the criteria established at M.C.L.A. 460.502, Wabash clearly fits this aspect of the statute."

In this same context, METC is doing exactly what Wabash was doing in providing electricity for the purpose of transacting or carrying on the wholesaling of electricity to its members, and therefore met the definition of public utility under MCL 460.501. METC was operating a public utility system within the State of Michigan, and it was transmitting electricity to or for the public for compensation. The only difference in this case is that the MPSC is asserting its authority through the Electric Transmission Line Certification Act, rather than the Electric Transmission Act, but this does not change the fact that METC meets the definition of a public utility.

VII. READING STATE STATUTES, IN PARI MATERIA, METC IS A PUBLIC UTILITY AS DEFINED BY MICHIGAN STATUTE.

When analyzing the Michigan statutes regarding the electric utilities and the oversight of such utilities by the Michigan Public Service Commission, Appellant believes the statutes must be read in *pari materia*, 22 Mich Civ Jur Statutes § 178:

"Statutes in *pari materia* are those which relate to the same subject or which have a common purpose. Statutes relate to the same

subject if they relate to the same person or thing or the same class of persons or things. Although an act may incidentally refer to the same subject as another act, it is not in pari materia if its scope and aim are distinct and unconnected. Where statutes relate to the same subject matter, they should be read, construed, and applied together to distill the legislature's intent. In arriving at the intent of the legislature in enacting a statute, not only must the whole statute and every part of it be considered but also where there are several statutes in pari materia they are all, whether referred to or not, to be taken together and one part compared with another in the construction of any material provision." (citations omitted)

Appellant would argue that we must read the following statutes together, in pari materia, in order to arrive at the legislative intent.

1939 PA 3, MCL 460.1 et seq	Public Service Commission Act
1919 PA 419, MCL 460.54 et seq	Public Utilities Commission Act
1929 PA 69, MCL 460.501 et seq	Certification of Convenience of Necessity Act
1909 PA 106, MCL 460.551, et seq	Transmission of Electricity Act
1995 PA 30, MCL 460.561 et seq	Electric Transmission Line Certification Act

When one reads these statutes in pari materia, it becomes clear that the scope and intent of the statutes are to regulate the electric industry in Michigan. This includes the generation, transmission and distribution of electricity as an industry for the benefit of the citizens of the state.

The MPSC was organized pursuant to 1939 PA 3, MCL 460.1 et seq. Under that Act, the authority of the Michigan Public Service Commission was established as follows:

"Sec. 6. (1) The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state except a municipally owned utility, the owner of a renewable resource power production facility as provided in section 6d, and except as otherwise restricted by law. The public service

commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities." (emphasis added) (citation omitted)

The MPSC was created to oversee all public utilities. **If METC is not a public utility -- is it exempt from MPSC jurisdiction? Yes, but such an assertion would be absurd so METC must be a public utility.**

The Public Utility Commission, whose authority now rests with the MPSC, was established pursuant to 1919 PA 419, MCL 460.54 et seq to oversee all public utilities as set forth in MCL 460.54.

"Sec. 4. In addition to the rights, powers and duties vested in and imposed on said commission by the preceding section, its jurisdiction shall be deemed to extend to and include the control and regulation, including the fixing of rates and charges, of all public utilities within this state, producing, transmitting, delivering or furnishing steam for heating or power, or gas for heating or lighting purposes for the public use." (emphasis added) (citations omitted)

If METC is not a public utility -- are its rates subject to MPSC regulation? No, but such an assertion would be absurd, and therefore, METC must be a public utility.

In addition to the power granted to the Michigan Public Utility Commission to control and regulate rates and charges of all public utilities, the Public Utility Commission was given the authority to issue certificates of public convenience and necessity pursuant to 1929 PA 69, MCL 460.501. Under that Act, the term "public utility" is defined as follows:

"The term "public utility", when used in this act, means persons and corporations, other than municipal corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for producing, generating, transmitting, delivering or furnishing gas or electricity for the production of light, heat or power to or for the public for compensation.

METC receives a CPCN – if it is not a public utility? No, therefore, METC is a public utility.

The Public Utility Commission, now the Public Service Commission, was given the authority to regulate the transmission of electricity pursuant to 1909 PA 106, MCL 460.551 et seq.

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

Before the ETLCA, was not METC required to comply with 1909 PA 106? Yes, therefore, METC is a public utility.

When the Electric Transmission Line Certification Act, 1995 PA 30, MCL 460.562, et seq was adopted, the intent was to oversee the planning and development of major transmission lines within the state.

“Sec. 4. (1) If an electric utility that has 50,000 or more residential customers in this state, affiliated transmission company, or an independent transmission company plans to construct a major transmission line in this state in the 5 years after planning commences, the electric utility, affiliated transmission company, or independent transmission company shall submit a construction plan to the commission. An electric utility with fewer than 50,000 residential customers in this state may submit a plan under this section. A plan shall include all of the following:

(a) The general location and size of all major transmission lines to be constructed in the 5 years after planning commences.

(b) Copies of relevant bulk power transmission information filed by the electric utility, affiliated transmission company, or

independent transmission company with any state or federal agency, national electric reliability coalition, or regional electric reliability coalition.

(c) Additional information required by commission rule or order that directly relates to the construction plan.”

In establishing the ETLCA, the Legislature determined which public utilities were to be regulated by the Act. MCL 460.564 limits the Act to three types of public utilities, which plan for or wish to construct major transmission lines in this state. Those three public utilities are:

- (a.) An electric utility which has 50,000 or more residential customers;
- (b.) An affiliated transmission company; or
- (c.) An independent transmission company.

The ETLCA limits the Act to transmission companies and electric utilities as **defined by the Act**.

The ETLCA defines these three public utilities as follows.

“Electric utility” means a person, partnership, corporation, association, or other legal entity whose transmission or distribution of electricity the commission regulates under 1909 PA 106, MCL 460.551 to 460.559, or 1939 PA 3, MCL 460.1 to 460.10cc. Electric utility does not include a municipal utility, affiliated transmission company, or independent transmission company.” (emphasis added)

“Affiliated transmission company” means a person, partnership, corporation, association, or other legal entity, or its successors or assigns, which has fully satisfied the requirements to join a regional transmission organization as determined by the federal energy regulatory commission, is engaged in this state in the transmission of electricity using facilities it owns that were transferred to the entity by an electric utility that was engaged in the generation, transmission, and distribution of electricity in this state on December 31, 2000, and is not independent of an electric utility or an affiliate of the utility, generating or distributing electricity to retail customers in this state.” (emphasis added)

“Independent transmission company” means a person, partnership, corporation, association, or other legal entity, or its successors or assigns, engaged in this state in the transmission of electricity using facilities it owns that have been divested to the entity by an

electric utility that was engaged in the generation, transmission, and distribution of electricity in this state on December 31, 2000, and is independent of an electric utility or an affiliate of the utility, generating or distributing electricity to retail customers in this state.” (emphasis added)

Does the ETLCA redefine the term “public utility?” No, the ETLCA merely defines which public utilities are subject to the Act.

It is clear then when one analyzes the ETLCA, that the purpose of separating electric utilities regulated under 1909 PA 106, MCL 460.551 through 460.559 and 1939 PA 3 of, MCL 461 through 460.10CC, within the context of the ETLCA, was to exempt out those smaller electric utilities already regulated under 1909 PA 106 and 1939 PA 3 for transmission line certification purposes as being exempt from the ETLCA. Please note that Section 4, MCL 460.564, says if you are an electric utility which has 50,000 or more residential customers, you are still subject to the ETLCA, or if you are an affiliated transmission company or an independent transmission company, the only purpose in this definition is to limit those subject to the ETLCA. To argue otherwise would exempt independent transmission companies or affiliated transmission companies from all of the provisions of 1939 PA 3, thereby exempting them from virtually all of the MPSC’s regulatory authority. This would result in an absurd result that cannot be accepted.

CONCLUSION

METC meets the general definition of a public utility in that:

- (a.) It devotes private property to provide a service useful to the public;
- (b.) It has a duty to serve the public;
- (c.) It serve the public or public interest;
- (d.) It is subject to governmental regulations;

METC was incorporated under 1923 PA 238 as a public utility.

METC has exercised the power of eminent domain and therefore must be a public utility.

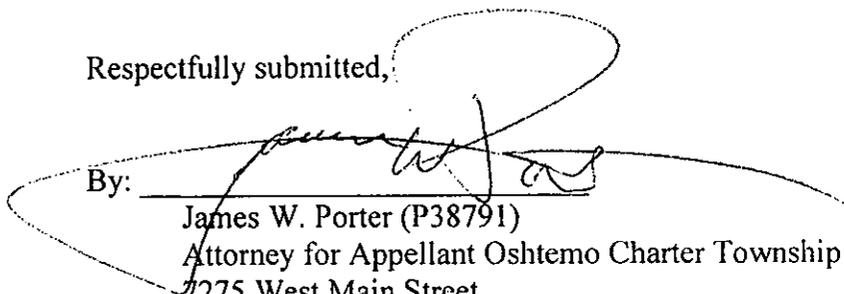
METC meets the definition of a public utility as determined by the Michigan Courts.

METC is a public utility under Michigan highway law.

METC meets the definition of a public utility as determined by the MPSC.

METC is a public utility under the Michigan statutes.

Respectfully submitted,

By: 

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Dated: October 14, 2016

IN THE SUPREME COURT
APPEAL FROM MICHIGAN COURT OF APPEALS

In re APPLICATION OF MICHIGAN ELECTRIC
TRANSMISSION COMPANY FOR
TRANSMISSION LINE

CHARTER TOWNSHIP OF OSHTEMO,
Appellant,

v

MICHIGAN ELECTRIC TRANSMISSION
COMPANY LLC,
Petitioner-Appellee,

and

MICHIGAN PUBLIC SERVICE COMMISSION,
Appellee.

SC: 150695
COA: 317893
MPSC No.: 00-017041



PROOF OF SERVICE



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October 17, 2016

HAND DELIVERED

Clerk of the Court
Michigan Supreme Court
Michigan Hall of Justice
925 W. Ottawa
P. O. Box 30052
Lansing, MI 48909

Re: *In re* Application of Michigan Electric Transmission Company For Transmission Line

*Charter Township of Oshtemo v Michigan Electric Transmission Company, LLC, and
Michigan Public Service Commission*
Supreme Court Case No. 150695
Court of Appeals Case No. 317893
MPSC Case No. U-17041

Dear Clerk:

Enclosed for filing please find 14 copies of Appellant Oshtemo Charter Township's Supplemental Brief on Appeal Pursuant to the Court's Order of October 5, 2016, in the above-referenced matter. In addition, enclosed are two unbound copies for the convenience of the Court.

Thank you for your assistance.

Very truly yours,

James W. Porter
Township Attorney

JWP/kkb

Enclosures

c: Shaun M. Johnson, w/encs.
Alan T. Ackerman, w/encs.
Jon R. Robinson, w/encs.
Lauren D. Donofrio, w/encs.
Michigan Court of Appeals, w/encs.

