

STATE OF MICHIGAN
IN THE SUPREME COURT

CITY OF COLDWATER
Plaintiff-Appellee

Supreme Court No. 151051

Court of Appeals No. 320181

v

CONSUMERS ENERGY COMPANY
Defendant-Appellant

Branch County Circuit Court No.
13-040185-CZ

_____ /

and

CITY OF HOLLAND
Plaintiff-Appellee

Supreme Court No. 151053

Court of Appeals No. 315541

v

CONSUMERS ENERGY COMPANY
Defendant-Appellant

Ottawa County Circuit Court No.
12-002758-CZ

_____ /

**MICHIGAN PUBLIC SERVICE
COMMISSION'S CORRECTED *AMICUS CURIAE* BRIEF**

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General

Matthew Schneider (P62190)
Chief Legal Counsel

B. Eric Restuccia (P49550)
Deputy Solicitor General
Counsel of Record

Steven D. Hughey (P32203)
Lauren D. Donofrio (P66026)
Assistant Attorneys General
Attorneys for Michigan Public Service
Commission
Public Service Division
7109 West Saginaw Highway
Lansing, MI 48917
(517) 284-8140

Date: August 5, 2016

TABLE OF CONTENTS

	<u>Page</u>
Index of Authorities	iii
Counter-Statement of Questions Presented.....	v
Counter-Statement of Jurisdiction	1
Introduction and Statement of Interest.....	2
Counter-Statement of Facts and Proceedings	4
Standard of Review.....	4
Argument	5
I. Rule 411 is inapplicable in disputes between a utility and a municipal electric provider.....	5
A. The MPSC does not have jurisdiction over non-utilities except in certain limited circumstances.....	5
B. Consistent with the Commission’s lack of jurisdiction over municipally owned utilities, the Legislature has determined municipally owned utilities need not comply with Rule 411.....	8
C. <i>Great Wolf Lodge</i> is not controlling, as the Court’s statements regarding MCL 124.3 constitute obiter dictum, are distinguishable, and are otherwise wrong.	10
1. The application of MCL 124.3 was not squarely before this Court in <i>Great Wolf Lodge</i>	10
2. <i>Great Wolf Lodge</i> resolved a different question than the one at issue here.	13
3. If <i>Great Wolf Lodge</i> determined that the Commission could exercise jurisdiction over municipally owned utilities and that Rule 411 applies to these utilities, it is contrary to MCL 460.10y.....	14
D. MCL 124.3 limits Consumers Energy’s service rights granted by Rule 411.	15

II. While MCL 124.3 governs the rights and obligations of municipally owned utilities, the Court of Appeals went too far in construing the provision. 16

A. The definition of “customer” does not extend to the premises, because the terms “facility” and “premises” are not synonymous..... 17

B. Construction of new buildings or facilities, or demolition of existing ones is sufficient to constitute a break in service, but the Legislature did not provide that any de minimis break in service to be sufficient to allow a customer to switch to municipal service..... 22

Conclusion and Relief Requested..... 27

INDEX OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Apsey v Mem Hosp</i> , 477 Mich 120, 131 (2007)	26
<i>City of Holland v Consumers Energy</i> , 308 Mich App 675, 698 (2015)	16, 17, 18, 22, 23, 24
<i>Gardner v Dep't of Treasury</i> , 498 Mich 1, 6 (2015)	21
<i>Great Wolf Lodge of Traverse City, LLC v Public Service Commissio'n</i> , 489 Mich 27 (2001)	passim
<i>In re Rovas Complaint</i> , 482 Mich 90, 103–109 (2008)	9
<i>McKee v Dept of Soc Services</i> , 424 Mich 404, 417 (1985)	9
<i>Nat'l Pride at Work, Inc v Governor</i> , 481 Mich 56, 70 (2008)	20
<i>Renny v Dept of Transp</i> , 478 Mich 490, 505 n 36 (2007)	11
<i>Union Carbide Corp v Public Servervice Commissio'n</i> , 431 Mich 135, 146 (1988)	6
<i>Wold Architects & Engineers v Strat</i> , 474 Mich 223, 233 n 3 (2006)	10
Statutes	
MCL 124.3	passim
MCL 124.3(2)	passim
MCL 124.715	18
MCL 24.263	6

MCL 460.1 et seq	6
MCL 460.1007(a)	19
MCL 460.107(3)	3
MCL 460.10a	19
MCL 460.10y	2
MCL 460.10y(12)(a)	17
MCL 460.10y(2).....	16, 17, 20
MCL 460.10y(3).....	passim
MCL 460.501	19
MCL 460.54	7
MCL 460.6(1)	7
MCL 460.723(o).....	19

Other Authorities

1 Mich Pl & Pr § 2:94 (2d ed).....	11
------------------------------------	----

Rules

Mich Admin Code R 460.3411	passim
Mich Admin Code R 460.3411(11).....	passim
Mich Admin Code R 460.3411(1)(a).....	20
Mich Admin Code, R 460.3102(l).....	7
Michigan Admin Code, R 460.17701	5

Dictionaries/Books

<i>The American Heritage Dictionary</i> (5th ed).....	18
---	----

COUNTER-STATEMENT OF QUESTIONS PRESENTED

The Michigan Public Service Commission does not dispute the statements of questions presented by appellees and appellant.

COUNTER-STATEMENT OF JURISDICTION

Amicus Michigan Public Service Commission (MPSC or the Commission)

adopts the Jurisdictional Statements set forth in the Briefs of Appellees.

INTRODUCTION AND STATEMENT OF INTEREST

This case is about whether municipally owned utilities will be allowed to compete with other utilities for the right to provide electric services to the new buildings and facilities cropping up in their suburbs. The Michigan Public Service Commission contends that the Legislature, in passing MCL 124.3 and MCL 460.10y, decided municipally owned utilities should be allowed to compete for this new business.

Consumers Energy attempts to take advantage of dicta in a previous decision by this Court to avoid the Legislature's intent and strengthen their near-monopoly in these areas. Consumers Energy would have this Court apply an administrative rule of the MPSC to parties (here municipally owned utilities and a nonprofit organization) over whom the Commission does not have jurisdiction, and when this rule is applied in this fashion, the rule conflicts with applicable statutes. Rule 411(11), Mich Admin Code R 460.3411(11), provides that once a utility serves a building or facility, the utility forevermore has the right to serve any buildings or facilities on that parcel of land – in perpetuity. But MCL 460.10y(3) provides that municipalities need not comply with Rule 411(11). Instead, municipalities that are providing electric service must comply with MCL 124.3. The Court of Appeals correctly found that MCL 124.3 instead of Rule 411(11) applied here.

The key to understanding the interplay between MCL 124.3 and Rule 411 is MCL 460.10y(3). The exclusive authority of the existing utility to provide electric services indefinitely to a customer under Rule 411 stands in contrast to the more flexible rule in MCL 124.3, which governs municipal utilities and which constrains

a municipal utility only from providing electric services to customers outside its corporate limits who are “already receiving” the service. By statute in MCL 460.107(3), a municipal utility need not comply with Rule 411 if it does not “elect” to do so.

Thwarted in their attempt to frustrate competition for electric services, Consumers Energy advocates a tortured construction of the applicable statute, MCL 124.3, which would render it identical to the conflicting administrative rule. This construction would allow municipally owned utilities to serve customers in bordering communities so long as those “customers” are not already receiving service from another utility. But such a definition of “customers,” which includes “facilities,” would require this Court to adopt an arcane definition of “facilities” that includes land. The Court of Appeals correctly ruled that the definition of customer does not encompass land.

The Court of Appeals went too far, however, in implying that any break in electrical service would be sufficient to meet the requirements of MCL 124.3. MCL 124.3 is a statute that defines the parameters of the provision of electric delivery service and limits a municipality’s ability to compete with incumbent utilities to new customers. The Court of Appeals’ interpretation would allow any suburban customer to shut off his power with his existing electrical company and switch to the municipally owned utility at his or her whim. This Court should affirm the Court of Appeals decision, but narrow the decision so that it does not have the effect of negating the purpose of the statute.

The Commission is interested in this case because it is the administrative body whose rule, Rule 411(11), Consumers Energy seeks to apply incorrectly. The Commission is well suited to assist this Court in its understanding of the interplay between the statutes and the Commission's own rules. The Commission also has an interest in the economic development of this state and its utilities. Furthermore, Consumers Energy seeks to define the words "customer" and "facility," words that are frequently used in the statutes enforced by the Commission, in a way that would not be harmonious with the statutes the Commission is responsible for administering.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Amicus MPSC adopts by reference the Statement of Facts and Procedural History set forth in the Briefs of Appellees.

STANDARD OF REVIEW

Amicus MPSC adopts by reference the Standard of Review set forth in the Briefs of Appellees.

ARGUMENT

I. Rule 411 is inapplicable in disputes between a utility and a municipal electric provider.

The Michigan Commission does not have jurisdiction over Coldwater, Coldwater Board of Public Utilities (BPU), Holland, the Holland Board of Public Works (BPW), or Benjamin's Hope. Commission Rule 411 only applies to determine the rights and obligations of parties over which the Commission has jurisdictional authority, that is, non-municipal utilities. And the Legislature in enacting MCL 460.10y(3) specifically found that municipally owned utilities are not subject to Rule 411 unless they voluntarily elect to affirmatively subject themselves to the Rule. None of the municipally owned utilities in this case have done so. Rule 411 therefore is inapplicable in determining the rights and obligations of Coldwater, Coldwater BPU, Holland, Holland BPW, and Benjamin's Hope. MCL 124.3 is the governing statute that determines the rights and obligations of these parties, and limits Consumers' rights under Rule 411.

A. The MPSC does not have jurisdiction over non-utilities except in certain limited circumstances.

In March of 2012, Consumers filed a verified request pursuant to Michigan Admin Code, R 460.17701, requesting that the Commission issue a declaratory ruling on the applicability of Rule 411(11) in conjunction with the City of Holland case. Consumers asked the Commission to declare that it had the exclusive right to serve Benjamin's Hope. The Holland BPW and Benjamin's Hope submitted a special appearance disputing the Commission's jurisdiction to adjudicate the rights

and obligations of HBPW and Benjamin's Hope. MPSC Docket No. U-17011, 12/6/12 Order, p 2. Neither HBPW nor Benjamin's Hope petitioned to intervene. *Id.* The Commission denied the request for declaratory relief, explaining:

The Commission finds that, if it were to issue a declaratory ruling in this case, it would not be binding on HBPW or Benjamin's Hope. As discussed above, HBPW and Benjamin's Hope chose not to intervene in this case, and thus are not parties to this action. In addition, pursuant to MCL 460.6, the Commission does not have jurisdiction to regulate municipally-owned utilities such as HBPW. As a result, the Commission finds that Consumers' request for declaratory relief should be denied. [MPSC Docket No. U-17011, 12/6/12 Order, pp 3-4.]

The Commission also noted that "[t]he usefulness of a declaratory ruling is often limited by the fact that the ruling is binding only on the person requesting it and the agency issuing it." *Id.* at 3, citing MCL 24.263.

As this Court stated in *Union Carbide Corp v Public Service Commission*, 431 Mich 135, 146 (1988), "The Public Service Commission possesses no "common law" powers. As a creature of the Legislature, the commission possesses only that authority bestowed upon it by statute." Section 6 of the Public Service Commission act, MCL 460.1 *et seq.*, outlines the Commission's power and jurisdiction. *Id.* It expressly excludes municipally owned utilities from the Commission's authority:

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 such public utilities. The Public Service Commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of all public utilities, including electric light and power companies, whether private, corporate, or cooperative,

gas companies, water, telephone, telegraph, oil, gas and pipeline companies, motor carriers, and all public transportation and communication agencies other than railroads and railroad companies. [MCL 460.6(1) (emphasis added).]

In short, not only does the statute not grant the Commission general jurisdiction over individuals or companies, it specifically prohibits regulation of a municipally owned utility. *Id.* The Commission has general jurisdiction to bind only public utilities, which are defined as “an electric company, whether private, corporate, or cooperative, that operates under the jurisdiction of the commission.” Mich Admin Code, R 460.3102(l).

There are, however, certain circumstances wherein the Commission has jurisdiction to bind non-utilities. For example, MCL 460.54 allows a municipality or municipally owned utility to *voluntarily* submit any question regarding its rates or terms of service to the Commission, at which time the Commission obtains jurisdiction, for that limited proceeding, over the municipality or municipally owned utility. Likewise, when a corporation or person *voluntarily* files a complaint against a public utility at the Commission, the Commission obtains jurisdiction to adjudicate the rights and obligations of that complainant for the limited subject matter of that particular dispute. Thus, it is only when a municipality, municipally owned utility, or entity like Benjamin’s Hope *voluntarily* submits to the jurisdiction of the Commission, that the Commission has any jurisdiction over them. It is for this reason that a public utility cannot obtain a judgment from the Commission finding that a customer owes the utility money. The utility must go to the district

or circuit courts for such relief, because the Commission has no general jurisdiction to adjudicate the rights and liabilities of the customer.

B. Consistent with the Commission’s lack of jurisdiction over municipally owned utilities, the Legislature has determined municipally owned utilities need not comply with Rule 411.

For utilities regulated by the Commission, they are subject to Rule 411(11), which determines the broad authority of the first utility providing electric services to continue to do so indefinitely:

The first utility serving a customer pursuant to these rules is entitled to serve the entire electric load on the premises of that customer....
[Mich Admin Code R 460.3411(11).]

Significantly, the Legislature, in passing MCL 460.10y(3), expressly provided that a municipality that owns utilities is “not required” to comply with Rule 411. MCL 460.10y(3) provides:

With respect to any electric utility regarding delivery service to customers located outside of the municipal boundaries of the municipality that owns the utility, *a governing body of a municipally owned utility may elect to operate in compliance with R 460.3411 of the Michigan administrative code*, as in effect on June 5, 2000. However, compliance with R 460.3411(13) of the Michigan administrative code is **not required** for the municipally owned utility. Concurrent with the filing of an election under this subsection with the commission, the municipally owned utility shall serve a copy of the election on the electric utility. *Beginning 30 days after service of the copy of the election, the electric utility shall, as to the electing municipally owned utility, be subject to the terms of R 460.3411 of the Michigan administrative code* as in effect on June 5, 2000. The commission shall decide disputes arising under this subsection subject to judicial review and enforcement. [MCL 460.10y(3) (emphasis added).]

As such, the Legislature has specifically stated that a municipality or municipally owned utility is only subject to Rule 411 thirty days after that municipally owned

utility has *elected* to be bound by Rule 411 by filing and serving an election under the statute. Consumers Energy does not claim that Coldwater BPU or Holland BPW have filed or served an election under MCL 460.10y(3). The plain meaning of the language in MCL 460.10y(3) is clear – municipalities and their utilities are not subject to Rule 411, unless they voluntarily chose to be so bound. As neither municipally owned utility in the consolidated cases chose to be bound by Rule 411, Rule 411 may not be made to apply to them. MCL 460.10y(3).

Interpreting its own regulation, it is the opinion of the Commission that Rule 411 does not apply to alter the rights or obligations of a municipally owned utility. While not binding on this Court, an agency's interpretation of its own regulations – as contrasted with the interpretation of a statute – is entitled to deference by the courts. Compare *McKee v Dept of Soc Services*, 424 Mich 404, 417 (1985) (“an agency's interpretation of its own regulations is entitled to deference by the courts”) with *In re Rovas Complaint*, 482 Mich 90, 103–109 (2008) (an agency's interpretation of a statute is entitled to “respectful consideration”).

In this case, Rule 411 is inapplicable in determining whether a municipally owned utility may provide service to itself or to someone else (i.e. Benjamin's Hope). Rule 411 is also inapplicable in determining whether a municipality, municipally owned utility, or anyone else may accept service from a municipally owned utility. These questions must be decided according to the controlling statute, MCL 124.3.

Simply put, Rule 411 can only apply to bind the actions of a party the Commission has jurisdiction over. The Commission did not have jurisdiction over

Coldwater, Coldwater BPU, Holland, Holland BPW, or Benjamin's Hope, so Rule 411 is not applicable. This Court should determine who has the right to serve Coldwater and Benjamin's Hope under MCL 124.3.

C. *Great Wolf Lodge* is not controlling, as the Court's statements regarding MCL 124.3 constitute obiter dictum, are distinguishable, and are otherwise wrong.

Appellees argue this Court's decision in *Great Wolf Lodge of Traverse City, LLC v Public Service Commission*, 489 Mich 27 (2001) controls the outcome of this case. The Court of Appeals distinguished *Great Wolf Lodge*. The Court of Appeals need not have distinguished the case, as this Court's statements regarding MCL 124.3 were obiter dictum, and did not consider MCL 460.10y(3). In the alternative, *Great Wolf Lodge* is distinguishable on its facts. If this Court concludes that *Great Wolf Lodge* did address the question at issue here, the decision was wrong and should not be followed.

1. The application of MCL 124.3 was not squarely before this Court in *Great Wolf Lodge*.

"Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand, are, however illuminating, but *obiter dicta* and lack the force of an adjudication." *Wold Architects & Engineers v Strat*, 474 Mich 223, 233 n 3 (2006) (emphasis in original) (internal citations omitted). Statements about the law that are not essential to determination of the case, for example, after a court has fully determined the controversy, or where the court could have decided the case on a

narrower ground, are dicta. 1 Mich Pl & Pr § 2:94 (2d ed)(internal citations omitted). These statements do not constitute binding precedent and do not bind the court in a subsequent case that squarely presents the particular issue. *Id.* This Court has explained that it “will not elevate dicta above the plain language of a statute.” *Renny v Dept of Transp*, 478 Mich 490, 505 n 36 (2007).

In *Great Wolf Lodge*, the plaintiff, Great Wolf Lodge, filed a complaint before the MPSC arguing that its current electric provider, Cherryland Electric Cooperative, had violated its services contract and that the Lodge should be able to receive electric service from whatever provider it chose. *Great Wolf Lodge*, 489 Mich at 34. This Court, in a four-to-three decision, resolved three issues, only one of which is relevant here. This Court identified the issue as “whether a utility’s right of first entitlement to provide electrical service to ‘the entire electric load on the premises’ of a ‘customer’ ceases when the ‘customer’ on the property changes.” *Id.* at 31. It was not essential to the determination of this issue what electric provider the lodge might have chosen as an alternative. The Court’s focus in *Great Wolf Lodge* was on the meaning of the administrative rule, Rule 411(11), and on the meaning of the word “customer” and not on the meaning of MCL 124.3. See *Great Wolf Lodge*, 489 Mich at 42 (“MCL 124.3 has no application to the instant dispute.”). This Court assumed for purposes of argument that MCL 124.3 did not restrict the municipal utility from providing service, but did not reach a decision on the issue. *Id.* (“Assuming arguendo that MCL 124.3 does not restrict [the municipal utility]

from contracting with [the private business] to provide electric service”). Any comments this Court made regarding MCL 124.3 constitute dicta.

In Count II of the complaint in *Great Wolf*, Great Wolf Lodge requested that the Commission declare that after the termination of its agreement with Cherryland, the Lodge could elect to receive all components of its electrical service from any provider it chose. The Lodge also requested that the Commission require Cherryland to cooperate in the transfer of distribution and transmission facilities to a new provider and that the Commission order Cherryland to execute a contract with Great Wolf Lodge reflecting the requirements in the Commission’s order. MPSC Docket No. 14593, 5/25/06 Opinion at p 3. The Commission found that it could only order Cherryland to transfer distribution facilities if Cherryland (a regulated utility) had violated Rule 411, which it had not. *Id.* at 17. The Commission also determined it did not have legal authority to grant the Lodge’s request for a declaratory ruling that it could elect to receive all components of its electrical service from any provider it chose. This was because (1) the Commission cannot order a choice of transmission provider, which is a component of electrical service (transmission service being regulated by the Federal Energy Regulatory Commission), and (2) under MCL 124.3, the Lodge was a current customer of Cherryland and there is no provision in the statute that provided a basis for an exception to this provision of MCL 124.3. *Id.* at 16-17. The Commission explained: “Moreover, to the extent that this dispute centers on [Great Wolf Lodge]’s right to seek service from TCL&P, Rule 411 is not directly applicable. Rule 411 does not

purport to alter the rights or obligations of a non-jurisdictional utility.” *Id.* at 17. Thus Rule 411 governs the behavior of a regulated utility (e.g. Cherryland), but MCL 124.3 governs the behavior of a municipally owned utility.

2. *Great Wolf Lodge* resolved a different question than the one at issue here.

In the alternative, *Great Wolf Lodge* is distinguishable. In *Great Wolf Lodge*, the Lodge filed a declaratory action against Cherryland before the MPSC. As such, the Lodge submitted itself to the jurisdiction of the MSPC, which would not normally have jurisdiction over a non-utility corporation. As this Court noted, “Plaintiff put that limitation directly at issue by seeking a declaratory ruling that it is free to contract for electric service with any electricity provider.” *Great Wolf Lodge*, 489 Mich at 42. Neither the City of Holland, Holland BPW, Benjamin’s Hope, Coldwater BPU, nor the City of Coldwater, have submitted to the jurisdiction of the MPSC. Nor did *Great Wolf Lodge* involve a situation where the customer itself was a municipality. Furthermore, *Great Wolf* involved a situation where MCL 124.3 itself would have prohibited a municipally owned utility from providing service to the Lodge. *Great Wolf Lodge* is thus distinguishable, and does not bind the Court’s decision in this matter.

3. **If *Great Wolf Lodge* determined that the Commission could exercise jurisdiction over municipally owned utilities and that Rule 411 applies to these utilities, it is contrary to MCL 460.10y.**

In its cursory dicta about Rule 411's applicability in dealing with a municipally owned utility in *Great Wolf Lodge*, this Court did not address MCL 460.10y(3). The interpretation of the applicability of Rule 411 to the Lodge in *Great Wolf Lodge*, when applied not in the context of a claim that the Lodge could switch to *any* other provider, but rather when applied specifically to a dispute about whether a customer could switch from a public utility to a municipally owned utility, robs MCL 460.10y(3) and MCL 124.3 of their intended effects. In dicta in *Great Wolf Lodge*, this Court stated that MCL 124.3, which governs when a municipally owned utility may provide service outside its borders, was irrelevant in determining whether the Lodge could opt to take service from the provider of its choice, including a municipally owned utility. But the Court did not consider MCL 460.10y(3).

In enacting MCL 460.10y(3), the Legislature decided that municipalities were not bound by Rule 411 (unless they chose to be). This Court's dicta, if applied here, is diametrically opposed to the statute insofar as it would make municipally owned utilities subject to the effects of Rule 411 even when they did not so elect. See MCL 460.10y(3) ("a governing body of a municipally owned utility may elect to operate in compliance with R 460.3411 of the Michigan administrative code"). If, as this Court suggested in dicta in *Great Wolf Lodge*, Rule 411 binds the behavior of every potential customer, see *Great Wolf Lodge*, 489 Mich at 41–42 ("Rule 411(11) both

grants and limits rights . . . [i]t grants a right of first entitlement to [a utility] while limiting the right of the owner of the premises to contract with another provider for electric service”), then no municipally owned utility could ever provide service to a potential customer that would be prohibited by Rule 411, but is not prohibited by MCL 124.3. Thus, in one fell swoop, this Court’s dicta regarding the applicability of Rule 411 to all potential customers robs both MCL 460.10y(3) and MCL 124.3 of their plain meaning. This was certainly not the intent of the Commission in promulgating Rule 411. And, given that this Court’s dicta regarding MCL 124.3 did not consider MCL 460.10y(3), this Court could not have intended to contradict the Legislature’s express exemption of municipal utilities in MCL 460.10y(3) of being required to comply with Rule 411.

D. MCL 124.3 limits Consumers Energy’s service rights granted by Rule 411.

As set out more fully above, the Commission is a creature of statute, and only has those powers granted by statute. In promulgating Rule 411, the Commission granted certain rights to Consumers Energy and other utilities. As always, however, the Commission’s power to grant these rights is constrained by the Legislature’s statutory power. Thus, when the Legislature passed MCL 460.10y(3), which specifically provides Rule 411 does not apply to municipalities unless they so elect, this statute constrained, or in other words limited, the rights Rule 411 conferred on utilities. This is because the Commission cannot confer any rights on utilities that are outside the scope of the Commission’s authority. And the

Commission does not have the authority to bestow by rule a right that conflicts with another right conferred by statute. The rule must yield to the statute where the two conflict.

II. While MCL 124.3 governs the rights and obligations of municipally owned utilities, the Court of Appeals went too far in construing the provision.

MCL 124.3 provides that a municipal corporation shall not render electric delivery service to “customers” outside its corporate limits “already receiving the service from another utility unless the serving utility consents in writing.” MCL 124.3(2). The term “customer” means the “buildings” and “facilities” served, MCL 460.10y(2), and does not extend to vacant land. Once all buildings and facilities are demolished, and the property is returned to its natural state, there are no longer any customers on the property, and any new buildings or facilities later erected or placed on the property are not bound to use any particular service provider. The Court of Appeals should be affirmed on this ground.

The Court of Appeals also focused on the statute’s use of the present tense to determine whether a customer exists, such that any break in service however infinitesimal, would be sufficient to allow a provider switch. See *City of Holland v Consumers Energy*, 308 Mich App 675, 698 (2015) (“The prior owner of the property had requested that electric service be discontinued to the property. . . [before the sale]. Therefore, at the time Coldwater acquired the property and sought to demolish the pole barn and provide electric service to new buildings, there was no customer (buildings or facilities) already receiving (present tense) the service from

Consumers.”). This portion of the Court of Appeals opinion goes too far. This interpretation of MCL 124.3 deprives the statute of any meaningful purpose, and that interpretation is not required by the statute’s language. In context, “already receiving” does not mean any break in service constitutes not receiving service. After all, even when the power is turned off, the utility is still serving the property by maintaining its lines for the future provision of power. Consistent with the proper understanding of “facilities,” there is a break in service, i.e., no longer a customer “already receiving service,” where the property is divided or all buildings and facilities demolished.

A. The definition of “customer” does not extend to the premises, because the terms “facility” and “premises” are not synonymous.

MCL 124.3(2) provides that “a municipal corporation shall not render electric delivery service . . . to customers outside its corporate limits already receiving the service from another utility unless the serving utility consents in writing.” Electric delivery service is defined as “the providing of electric transmission or distribution to a retail customer.” MCL 460.10y(12)(a). At issue in both of these consolidated appeals is the meaning of the undefined term “customer” in MCL 124.3. MCL 460.10y(2) states, “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.” “Building” is likewise not defined, nor is “facilities.” The Court of Appeals applied the dictionary definition of building as “[s]omething that is built, as for human habitation; a structure.” *City of*

Holland v Consumers Energy Co, 308 Mich App 675, 686 (2015), citing *The American Heritage Dictionary* (5th ed). The Court of Appeals also applied the dictionary definition of “facilities.” “‘Facilities’ is the plural of facility, which is defined as something ‘designed to serve a particular function.’” *Id.*

Though Consumers Energy advocates a far less common definition of “facilities” that includes vacant land, the more common definition adopted by the Court of Appeals is in line with the meaning of the terms facility and facilities in other statutes enforced by the Commission. In fact, the definition used by the Court of Appeals is harmonious with all other usages in chapter 124, and the various public utilities statutes administered by the Commission.

For example, MCL 124.715 of the Metropolitan Councils Act states:

(d) “*Facilities* and programs” means structures, fixtures, and activities provided by a tax exempt entity that has been in existence for at least 18 consecutive months before becoming eligible for funding under sections 67 through 79. *Facilities* and programs may include a public broadcast station as defined by section 397 of subpart E of part IV of title III of the communications act of 1934, [47 U.S.C. 397](#), whether or not the public broadcast station is affiliated with an institution of higher education; a museum or historical center; a performing arts center; an orchestra; chorus; chorale; opera theater; and a ballet, dance, or theater company. *Facilities* and programs do not include professional sports arenas or stadiums, labor organizations, political organizations, libraries, or public, private, or charter schools. [Emphasis added.]

This definition of “facilities” is consistent with the Court of Appeals’ general definition of something “designed to serve a particular purpose,” *City of Holland*, 308 Mich App at 686, but would not be harmonious with a definition that includes land. No one would think of land as being designed for a particular purpose.

The Miss Dig Underground Facility Damage Protection Act defines facility as:

“Facility” or “underground facility” means an underground or submerged conductor, pipe, or structure, including, but not limited to, a conduit, duct, line, pipe, wire, or other device and its appurtenances used to produce, store, transmit, or distribute a utility service, including communications, data, cable television, electricity, heat, natural or manufactured gas, oil, petroleum products, steam, sewage, video, water, and other similar substances, including environmental contaminates or hazardous waste. [MCL 460.723(o) (emphasis added).]

This definition of facility also aligns with the Court of Appeals’ definition:

“something ‘designed to serve a particular function’” but Consumers Energy’s proposed definition, which would include barren land, does not. And MCL 460.10a, while it does not define facility, refers to “any new facility constructed,” which is harmonious with the concept of something that is designed. MCL 460.501 refers to “facilities for producing, generating, transmitting, delivering or furnishing gas or electricity for the production of light,” which comports with the Court of Appeals’ definition of facility.

The Clean, Renewable and Efficient Energy Act defines a “Gasification facility” as: “Gasification facility includes the transmission lines, gas transportation lines and facilities, and associated property and equipment specifically attributable to such a facility.” MCL 460.1007(a). Again, this definition is harmonious with “something ‘designed to serve a particular function’” but not harmonious with a definition that can mean barren, unimproved land.

Consumers Energy fails to give the word “facility” its ordinary meaning in an effort to duplicate the result of Rule 411. This could not have been the Legislature’s

intent, or there would have been no need for MCL 460.10y's provision that Rule 411(11) does not apply to municipally owned utilities. If MCL 124.3 and Rule 411(11) meant exactly the same thing, there would have been no need for the Legislature to pass a statute exempting municipal utilities from one, but not the other. "[A]n interpretation that renders language meaningless must be avoided." *Nat'l Pride at Work, Inc v Governor*, 481 Mich 56, 70 (2008).

Nor is Consumers Energy's definition of facilities even consistent with the definition of "customer" in Rule 411(11). Rule 411(11) states: "The first utility to serving a customer pursuant to these rules is entitled to serve the entire electric load on the premises of that customer. . . ." Rule 411(11), often referred to as the "premises rule," does not apply to land based on the definition of "customer." Rule 411(1)(a) defines "customer" as "the buildings and facilities served rather than the individual, association, partnership, or corporation served." Notably, this definition of "customer" is nearly identical to that found in MCL 460.10y(2). Rule 411(11) refers separately to "premises" outside the definition of "customer." If the definition of "customer" includes "facilities," and "facilities" include the land itself, then there would have been no reason for the Commission in promulgating Rule 411 to extend the exclusive right to "the premises of that customer." Rule 411(11). If you import the definition of "customer" from Rule 411(1)(a) into Rule 411(11), it reads to "the premises of that [building or facility]." The Rule also makes sense if you insert the definitions adopted by the Court of Appeals here:

The first utility serving a [building or something designed to serve a particular function] is entitled to serve the entire electric load on the

premises of that [building or something designed to serve a particular function] even if another utility is closer to a portion of the [building's or something designed to serve a particular function's] load.

Conversely, Rule 411 does not make sense if you import Consumers Energy's proposed definition:

The first utility serving a [building or land] is entitled to serve the entire electric load on the premises of that [building or land] even if another utility is closer to a portion of the [building's or land's] load.

A definition of "facilities" that includes land not only renders the word premises unnecessary, but also the word "building." Because, by necessity, extending service to a building would always be extending service to the land the building is built upon. This Court eschews such constructions. *Gardner v Dep't of Treasury*, 498 Mich 1, 6 (2015) ("no word should be treated as surplusage or rendered nugatory"). So if the definition of the word "customer" includes land, it would have been far simpler to merely state that the first utility to serve a parcel of land is entitled to serve the entire electric load on that land. Rather, in construing Rule 411, this Court should conclude that the Commission did not intend to build multiple redundancies into its rule. The Commission did not define the word "customer," in promulgating its rules, to include land.

The Court of Appeals was right to apply the common and straightforward meaning of the term "facility," rather than the obscure definition espoused by Consumers, which would render the entire statutory provision of MCL 460.10y(3) unnecessary, and would not harmonize with other uses of the term facilities in other statutes and rules enforced by the Commission. MCL 124.3 and Rule 411(11) mean different things and this Court should resist Consumers Energy's view, which would

contradict the plain meaning and frustrate the purpose of MCL 460.10y(3) by interpreting MCL 124.3 to provide for the exact same thing as Rule 411(11). The definition of the word “customer” as used in MCL 124.3 does not include the land itself. The Court of Appeals should be affirmed on this ground.

B. Construction of new buildings or facilities, or demolition of existing ones is sufficient to constitute a break in service, but the Legislature did not provide that any de minimis break in service to be sufficient to allow a customer to switch to municipal service.

Given that the Legislature did not intend the word “customer” to mean the land itself, MCL 124.3 does not merely duplicate the premises rule. The Court of Appeals next turned to the question of what the phrase “already receiving service” in MCL 124.3 means. In construing its meaning, the Court of Appeals placed great weight on the Legislature’s use of the present tense “already receiving . . . service.”

The Court of Appeals explained:

As indicated in MCL 124.3(2), Holland may not provide electric delivery service to customers “already receiving the service from another utility unless the serving utility consents in writing.” Notably, the phrase “already receiving” is in the present tense. “Already” is defined in *The American Heritage Dictionary of the English Language* (5th ed.) as “[b]y this or a specified time[.]” “Receiving” is the present participle of the verb “receive,” which, in turn, is defined by the same source as “[t]o take or acquire (something given or offered); get or be given[.]” *Id.* [*City of Holland*, 308 Mich App at 684 (2015).]

* * *

In this case, employing the dictionary definitions and the relevant tense to the terms used in the statute, MCL 124.3(2) prohibits Holland from providing electric delivery service to customers presently taking or getting the service from another utility. The statute does not, however, prohibit Holland from providing electric delivery service to customers who “have received” or “had received” the service from another utility at some point in time. [*Id.* at 685.]

Concerning the City of Holland, the Court of Appeals ruled that at the time the Holland BPW began service to Benjamin's Hope, Consumers Energy was not currently providing retail service to a customer (i.e., building or facility).

Consumers Energy provided a single-phase service drop to a construction trailer parked on the property from September 2011 until April of 2012. Benjamin's Hope entered into a contract for permanent three-phase electrical service with Holland BPW in January of 2012. Because the Court of Appeals determined that the definition of "customer" was limited to buildings or facilities and did not extend to the land itself, Holland BPW did not violate MCL 124.3 in providing electric service. Unlike Rule 411(11), MCL 124.3 does not extend the right to serve to the entire "premises of the customer." As the buildings and facilities ultimately served by Holland BPW did not exist at the time of contracting, Consumers Energy could not have been currently providing service to them. *Id.* at 686. It was irrelevant that Consumers Energy had a different customer, the construction trailer (i.e. a facility), on the same property. The Court of Appeals' conclusion that Benjamin's Hope was not "already receiving" service is confirmed by the fact that Consumers Energy gave Benjamin's Hope a quote for \$35,000 for installation of three-phase service to its proposed buildings and facilities, which it would not have had to do if it were already providing service to those buildings and facilities. *Id.* at 686, 691.

Regarding the City of Coldwater, it purchased a parcel of land in Coldwater Township at a public auction in July of 2011, which at the time of purchase had a vacant pole barn with a Consumers Energy service drop to it. *City of Holland*, 308

Mich App at 698. The previous owner of that parcel had electric service turned off approximately three weeks before the sale was finalized. (Consumers Energy Application p 5.) Coldwater bought the property for the purposes of constructing a water tower, waste water lift station, and electric substation on the property for use of Coldwater BPU. (Consumers Energy Application p 1.) Coldwater intended to demolish the pole barn. *City of Holland*, 308 Mich App at 698. Like in the case of Benjamin's Hope, since the term "customer" does not include the land itself, and MCL 124.3 does not extend to the "premises of the customer" like Rule 411 does, Coldwater BPU could serve new buildings and facilities erected on the premises. Coldwater BPU did not violate MCL 124.3 because these new buildings and facilities were not, and never had been, receiving service from another utility.

The Court of Appeals reached the right conclusion, but the supporting analysis extends beyond what was necessary for its conclusion. The Court of Appeals stated:

The prior owner of the property had requested that electric service be discontinued to the property (which contained a pole barn) on June 28, 2011. Therefore, at the time Coldwater acquired the property and sought to demolish the pole barn and provide electric service to new buildings, there was no customer (buildings or facilities) already receiving (present tense) the service from Consumers. [*City of Holland*, 308 Mich App at 698.]

In this way, the Court of Appeals states that by the act of the former owner requesting service termination immediately prior to the sale, at the time of the sale there was no customer being served by another utility. This determination was unnecessary. The buildings served by BPU are newly constructed, and there is no argument that those new buildings and facilities were not being served by another

utility, because they did not previously exist. The Court of Appeals did not need to decide whether Consumers Energy was providing service to the pole barn, since MCL 124.3 does not extend to all of the “premises of the customer,” as does Rule 411(11).

The Commission supports affirmance of the Court of Appeals opinion, but on the narrower ground that because the new buildings and facilities were not already receiving service from another utility, Coldwater BPU was not in violation of MCL 124.3 in providing electric delivery service to them. This Court need not reach the question whether the pole barn was already receiving service from Consumers Energy.

If this Court decides to address the question whether Consumers Energy was already serving the pole barn, this Court should emphasize that the determination cannot be made by a bright line rule such that any break in service, however short, is sufficient to allow a switch to a municipal utility. The determination should be made on a case-by-case basis, according to the facts of each case. This is because the Legislature did not address the circumstance in which a building owner calls his service provider, terminates service, hangs up the phone, and then proceeds to request service from a municipally owned utility that same day. If this were the meaning of not “already in service,” the Legislature could have merely said that a municipally owned utility could serve any customer subject to the other locational requirements of MCL 124.3. In fact, if this interpretation holds, there is no reason for MCL 124.3(2) at all.

MCL 124.3(2) is a limiting statute. It states: “A municipal corporation shall not render electric delivery service . . . to customers . . . already receiving the service from another utility[.]” This provision is rendered void if a building or facility owner merely has to call his current provider and shut off his service in order to switch to the municipal provider that same day. This Court has said, “a reviewing court should not interpret a statute in such a manner as to render it nugatory. A statute is rendered nugatory when an interpretation fails to give it meaning or effect.” *Apsey v Mem Hosp*, 477 Mich 120, 131 (2007) (internal citations omitted).

Another interpretation, which would give meaning and effect to MCL 124.3 is that “already receiving service” refers to the presence of another utility’s service drop to the particular building or facility. Thus, if existing customers (i.e. buildings or facilities) cease to exist (i.e. are demolished), they would not be receiving service, and a municipally owned utility could then provide service. This circumstance stands in contrast to a mere telephone call to the utility to shut off service associated, for example, with a change in ownership, under MCL 124.3. This is because even when the power is turned off, the utility is still providing a service – it is maintaining its lines and electrical facilities so that power may be restored at the customer’s request. As long as the utility maintains its service to the building or facility, even if power is not actively flowing across the lines, the utility is still serving the customer (“already in service”) by standing ready and able to flip the switch on demand. Thus, and consistent with this Court’s conclusion in *Great Wolf*

Lodge, a mere change in ownership of a building or facility is also insufficient to constitute a termination of service.

CONCLUSION AND RELIEF REQUESTED

MCL 124.3 allows municipally owned utilities to provide service outside their boundaries to new customers seeking service. The Michigan Public Service Commission's Rule 411(11), which governs utilities' rights to serve properties, is inapplicable when the utility is municipally owned. MCL 124.3 cannot be construed to have the exact same meaning as Rule 411(11), or this would negate MCL 460.10y(3), which specifically states that Rule 411(11) is only applicable to municipally owned utilities if they officially elect to be so bound. Also, the definition of "customer" in Rule 411 cannot be interpreted to mean the land itself. But MCL 124.3 also cannot be interpreted to allow a customer to switch at will to a municipal provider, because such an interpretation does not comport with the phrase "already in service" under MCL 124.3(2), which operates to limit the circumstances when a municipal utility may provide electric service. Any infinitesimal break in service is insufficient. Rather, for example, a utility is serving a customer so long as the utility maintains service lines to the building or facility.

The Michigan Public Service Commission requests this Court affirm the Court of Appeals decision, but on other grounds regarding the issue of the meaning of "already receiving service," as set out above.

Respectfully submitted,

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

Matthew Schneider (P62190)
Chief Legal Counsel

/s/Lauren D. Donofrio
Steven D. Hughey (P32203)
Lauren D. Donofrio (P66026)
Assistant Attorneys General
Attorneys for Michigan Public Service
Commission
Public Service Division
7109 West Saginaw Highway
Lansing, MI 48917
(517) 284-8140

Dated: August 5, 2016
Consolidated 151051 & 151053/Corrected Amicus Brief