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**STATE OF MICHIGAN
IN THE SUPREME COURT**

In re Application of CONSUMERS ENERGY COMPANY
For Reconciliation of 2009 Costs.

TES FILER CITY STATION LIMITED
PARTNERSHIP

Supreme Court No. 150395

Appellant,

Court of Appeals No. 305066

v

Michigan Public Service Commission
Case No. U-15675-R

MICHIGAN PUBLIC SERVICE
COMMISSION AND ATTORNEY
GENERAL,

Appellees.

**REPLY BRIEF OF APPELLANT TES FILER CITY STATION LIMITED
PARTNERSHIP RESPONDING TO THE BRIEF FILED BY APPELLEE MICHIGAN
PUBLIC SERVICE COMMISSION**

150395
reply

Respectfully submitted by

Dated: December 29, 2014

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. THE STANDARD OF REVIEW IS *DE NOVO*, BUT IF THE COURT CONSIDERS AN AGENCY'S OPINION AS TO WHEN THE MDEQ RULES WERE IMPLEMENTED, IT SHOULD CONSIDER THE OPINION OF THE MDEQ, RATHER THAN THE MPSC 1

III. ARGUMENT 2

A. AN IMPLEMENTATION PLAN IS A PLAN FOR IMPLEMENTATION 2

B. THE MICHIGAN LEGISLATURE SPECIFICALLY INTENDED THAT TES SHOULD RECOVER THE COSTS AT ISSUE IN THIS APPEAL 3

C. THE MOST PRINCIPLED WAY TO DEFINE "IMPLEMENTED" IS NOT TO INVENT A NEW DEFINITION, BUT RATHER TO FOLLOW THE PRINCIPLE OF STARE DECISIS 5

D. THE MPSC'S PRIMARY ARGUMENT IS INCONSISTENT AND ILLOGICAL 8

E. THE MDEQ'S UNAMENDED 2007 RULES WERE NOT IN EFFECT AT THE TIME WHEN TES INCURRED ITS COSTS, SO TES COULD NOT HAVE INCURRED ITS COSTS "DUE TO" THOSE RULES 9

IV. RELIEF REQUESTED 10

APPENDICES

- Appendix A: MDEQ Statement that TES was not subject to the NOx emission rules until October 19, 2009; Exhibit BMP-11, MPSC Case No. U-16045-R.
- Appendix B: Excerpt from the Sworn Testimony of Joe Tondu in MPSC Case No. U-17095-R explaining why the word "implemented" was used in MCL 460.6a(8).

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MICHIGAN
48933

INDEX OF AUTHORITIES

Cases

Gaalla v Citizens Medical Center, 2010 WL 5387610, *1-2 (SD Tex 2010)..... 6
Hadix v Johnson, 66 F3d 325 (6th Cir 1995) 6
North Carolina v EPA, 531 F3d 896, on rehearing in part, 550 F3d 1176 (DC Cir 2008) 4
Robinson v City of Detroit, 462 Mich 439; 613 NW2d 307 (2000) 7
North Carolina v EPA, 531 F3d 896, 901, on rehearing in part, 550 F3d 1176 (DC Cir
2008)..... 4
US v Hammer, 121 FSupp2d 794 (MD Pa 2000)..... 6
US v State of Michigan, 940 F2d 143 6th Cir 1991) 6

Statutes

Affordable Care Act 7
MCL 460.6a(8) passim

Rules

2005 Clean Air Interstate Rule 4
MCR 2.404(D)..... 7
MCR 2.410(F) 7
MCR 3.218(2)(1)..... 7
MCR 7.212(G)..... 1
MCR 7.302(E) 1

Other Authorities

<http://efile.mpsc.state.mi.us/efile/docs/17095-R/0051.pdf>..... 3
<http://kff.org/interactive/implementation-timeline/> 7

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P.C.
WYERS
ANSING,
CHIGAN
48933

I. INTRODUCTION

Two different Appellees filed briefs in response to TES's Application. Pursuant to MCR 7.302(E) and 7.212(G), Appellant TES is filing a separate reply brief in response to each Appellee. This Reply Brief is directed at the brief filed by the Michigan Public Service Commission ("MPSC"). Not surprisingly, there is some overlap between the arguments raised in the briefs filed by the two Appellees. To avoid needless duplication, Appellant TES will address each argument only once. Thus, arguments that both of the Appellees raise in their briefs will be addressed in only one of the Reply Briefs. With respect to such redundant arguments, Appellant TES hereby incorporates by reference the reply arguments set forth in its other Reply Brief.

II. THE STANDARD OF REVIEW IS *DE NOVO*, BUT IF THE COURT CONSIDERS AN AGENCY'S OPINION AS TO WHEN THE MDEQ RULES WERE IMPLEMENTED, IT SHOULD CONSIDER THE OPINION OF THE MDEQ, RATHER THAN THE MPSC.

The applicable standard of review in this appeal is *de novo*, but if the Court is inclined to consider an administrative agency's opinion as to when the MDEQ first implemented the regulations in question, it would be more logical to consider the opinion of the MDEQ, itself, rather than the opinion of the MPSC, which possesses no expertise whatsoever in such matters. In this regard, the Court may wish to take judicial notice of an exhibit filed in a subsequent MPSC proceeding wherein a senior MDEQ official responsible for drafting, amending and enforcing the rules unequivocally supports TES's position, stating that, "prior to October 19, 2009, TES Filer City Station was not subject to the Part 8 NOx emission trading requirements." That exhibit is attached as Appendix A.

Recall that the majority below concluded that, "At issue in this case is ... on what date TES Filer was affected by the NOx emission rules." If the issue is the date when TES was

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48933

affected by the MDEQ rules, then it is certainly relevant to note that the MDEQ agrees with TES that TES was first subject to those MDEQ rules on October 19, 2009.

III. ARGUMENT

A. AN IMPLEMENTATION PLAN IS A PLAN FOR IMPLEMENTATION.

The MPSC acknowledges that the MDEQ rules at issue are officially known as a State Implementation Plan.¹ Inexplicably, however, the MPSC refuses to acknowledge the obvious fact that an implementation plan is a plan for implementation. The title of the MDEQ rules accurately reflects the fact that the rules are inherently a plan to implement regulatory changes at various times in the future. With respect to the imposition of new NOx emission requirements on "newly affected" electric generating units, the plan specifies an initial implementation date in 2009. So, the fundamental question presented is rather simple: Was the MDEQ's implementation plan "implemented" on the implementation date specified in the implementation plan?

Defying both common sense and the plain wording of the statute, the majority below held that the MDEQ's implementation plan was implemented when it was first promulgated, rather than on its implementation date. In other words, the majority held that the rules were supposedly "implemented" at a time when they had no effect on TES and, in fact, were still subject to possible revision or repeal before they were ever carried out.² The majority's decision is not only illogical, but it flies in the face of the governing statute. If the Legislature had intended to say that the cap shall not apply with respect to costs incurred due to the enactment or promulgation of changes in laws or rules after October 6, 2008, it certainly could have done so easily. The fact

¹ MPSC Brief at pp. 6, 21, 22, 23, 24, 25, 26 & 28.

² In fact, the 2007 rules were subsequently nullified and then revised and approved by the EPA in 2009, which provides an alternative basis for reversal, as explained on pages 39-45 of TES's Application for Leave to Appeal.

is, however, that the Legislature made no reference whatsoever to "promulgation", "enactment", or any similar words, such as "made" or "adopted". Instead, the Legislature specifically stated that the determinative date would be the date when legal or regulatory changes are actually "implemented". In accordance with all relevant precedent, the date when changes are implemented is the date when the changes are actually carried out; i.e., on the implementation date specified in the implementation plan.

B. THE MICHIGAN LEGISLATURE SPECIFICALLY INTENDED THAT TES SHOULD RECOVER THE COSTS AT ISSUE IN THIS APPEAL.

At the beginning of its brief, the MPSC characterizes TES's position as an attempt to exploit a "loophole" in MCL 460.6a(8) that was "never intended by the Legislature."³ Notably, the MPSC offers no support for this bald assertion regarding the Legislature's intent. One of the owners of TES, on the other hand, was directly involved in the drafting of the legislation and knows exactly why the word, "implemented", was used in the statute. Attached as Appendix B to this Reply Brief is an excerpt from the sworn testimony of Mr. Joe Tondu which was admitted into the record of a later MPSC proceeding.⁴ As explained by Mr. Tondu, the statutory wording was selected for the specific purpose of allowing TES to recover the costs at issue in this case and other similar costs to be incurred in the future. To be clear, this testimony is not a part of the record in the instant case. There was no need for such testimony in this case because, at the time when the record closed, no party had raised any issue as to the implementation of the MDEQ's State Implementation Plan. In fact, the MPSC's own Staff witness testified in support of TES's

³ MPSC Brief at p 2.

⁴ MPSC Case No U-17095-R. Appendix B contains the relevant excerpt from 2 Tr. pp. 237-241. The complete transcript of Mr. Tondu's testimony is available at this link: <http://efile.mpsc.state.mi.us/efile/docs/17095-R/0051.pdf> at 2 Tr. pp. 215-252.

request for uncapped recovery of its environmental costs.⁵ Only after the record closed did the MPSC Staff's attorney flip flop on the issue by inserting a few lines in her brief raising, for the very first time, a question of whether the MDEQ's implementation plan was implemented on its implementation date or on the date when the plan was first promulgated.

The MPSC now speculates in its brief to this Court that the amount of the statutory cap "was presumed sufficient to cover known and anticipated additional costs incurred by [the BMPs] ... under state and federal environmental laws and regulations in place at the time [when MCL 460.6a(8) was enacted]."⁶ There is, however, no support whatsoever for the MPSC's speculation that the Legislature supposedly set the statutory cap based, in part, on "anticipated" future costs associated with laws and rules that were "in place" at that time, but not yet implemented. To the contrary, as Mr. Tondu has explained, the legislative drafters knew that the EPA and the DEQ had already promulgated various rules which might eventually generate additional costs in the future, but it was not possible to quantify the costs that the BMPs might incur when and if the rules were eventually implemented in the future.⁷ In fact, due to federal litigation that was pending at that time, the Legislators could not be certain that the rules would ever be implemented.⁸ As Mr. Tondu explained, "to deal with all of this uncertainty, we agreed to set the cap based on current costs, and then provide for full uncapped recovery of all future

⁵ Testimony of Alan Droz, as adopted by Elizabeth Rakowski, 2 Tr., p. 679, line 15 & p. 680, line 11.

⁶ MPSC Brief, at p. 2.

⁷ Mr. Tondu's testimony is Appendix B to this Reply Brief. The 2005 Clean Air Interstate Rule provided for the implementation of new emissions standards in 2009, 2010 and 2015. Future costs are unknown for several reasons. For example, the final allocation formulas and the future prices of allocation allowances are unknown.

⁸ See *North Carolina v EPA*, 531 F3d 896, 901, on rehearing in part, 550 F3d 1176 (DC Cir 2008).

costs incurred due to the implementation of changes in environmental laws and regulations after the date when PA 286 was enacted."⁹

Given the importance of this issue and the Appellees' unsupported assertions and speculations regarding the Legislature's intent, this Court may wish to take judicial notice of Mr. Tondu's unrebutted testimony which is now in the official record of a related MPSC proceeding. If not, the Court should at least bear in mind that there is no evidence whatsoever to support the MPSC's unfounded assertion that TES is supposedly attempting to exploit a "loophole" that "was never intended by the Legislature". Nor is there any support for the MPSC's speculation that the Legislature intended the cap to cover the unknown and unknowable costs of complying with rules that had not yet been implemented and were still subject to possible revision, repeal or judicial nullification.

TES was directly involved in drafting MCL 460.6a(8) and Mr. Tondu has personal knowledge of the fact that the word, "implemented" was inserted in the statute for the specific purpose of allowing TES to be reimbursed for the very same costs at issue in this appeal. Unsupported assertions to the contrary should be disregarded and the Court should be guided by the words that the Legislature actually used in the statute, especially the word, "implemented".

C. THE MOST PRINCIPLED WAY TO DEFINE "IMPLEMENTED" IS NOT TO INVENT A NEW DEFINITION, BUT RATHER TO FOLLOW THE PRINCIPLE OF STARE DECISIS.

On page 15 of its brief, the MPSC cites approvingly the statement of the majority opinion below that "the most principled way to determine when a rule or law has been 'implemented' is to refer to the effective date thereof." Neither the MPSC nor the lower court, however, even attempt to explain which "principle" supposedly supports this novel and misguided definition of

⁹ Appendix B to this Reply Brief, at p. 25.

"implemented". Certainly, it was not the principle of *stare decisis*. TES cited numerous court decisions explaining that the accepted definition of "implemented" is not when a rule, plan or order becomes effective, but rather when the actions provided for in the rule, plan or order are actually carried out.

For example, in *US v Hammer*, 121 FSupp2d 794 (MD Pa 2000), a death sentence was legally effective when it was imposed by the court, but was not deemed to have been "implemented" until the punishment was actually carried out. Similarly, in *Gaalla v Citizens Medical Center*, 2010 WL 5387610, *1-2 (SD Tex 2010), a board resolution was legally effective when it was passed, but was not "implemented" until defendants actually engaged in conduct that carried out the terms of the resolution. Again, in *Hadix v Johnson*, 66 F3d 325 (6th Cir 1995), a treatment plan for prisoners was legally effective when it was adopted, but was not "implemented" until it was carried out by actually providing treatment. Also, in *US v State of Michigan*, 940 F2d 143 (6th Cir 1991), a classification plan was effective, but was not "implemented" until it was carried out by actually "placing individual inmates in accordance with their classification profiles."

In all, TES cited 24 court decisions and 15 dictionary definitions showing that a change is not implemented when a rule, plan or order becomes effective, but rather when it is actually carried out, fulfilled, accomplished or performed. Shockingly, the majority below made no attempt whatsoever to distinguish any of these court decisions. In fact, the majority adopted its novel definition without even mentioning the overwhelming precedent in favor of TES's position. Instead, the majority simply made up a new definition of its own.

The legal error inherent in the majority's decision is compounded by the fact that its new definition of "implemented" runs directly counter to common sense and the accepted usage of

that word in the English language. For example, news reports and websites regularly observe that the Affordable Care Act will be "implemented" in multiple steps, with the last change to be "implemented" in 2018, well after the Act became effective.¹⁰ Similarly, the Michigan Court Rules direct judges to "implement" certain rules after the effective dates of the rules.¹¹

To say that the majority's decision is ripe for peremptory reversal is an understatement. In light of the overwhelming weight of the law and common sense, it would constitute a travesty of justice to allow the majority's opinion to stand. As explained by Judge Whitbeck in his dissenting opinion, courts "may not assume that the Legislature inadvertently made use of one word or phrase instead of another."¹² Judge Whitbeck also correctly observed that:

"Here, if the Legislature had meant "implemented" to have the meaning of the word "promulgated," the Legislature would have used the word "promulgated." We must presume that the Legislature was aware that the term existed. Indeed, it was defined in another statute: the Administrative Procedures Act, an act that sets out the procedures for rulemaking. Thus, promulgation is defined in a statute that bears directly on the subject of MCL 460.6a.

But here the Legislature did not choose to use the word promulgated. Instead, the Legislature used the general term "implemented." We may not presume that this choice was an error. Accordingly, I conclude that the Legislature did not mean MCL 460.6a to apply on the basis of when a rule was promulgated, but rather intended it to apply on the basis of when the rule was implemented."¹³

In accordance with the governing precedent, as well as the common and accepted use of the word, "implemented", the regulatory change at issue in this appeal was "implemented" when

¹⁰ *E.g.*, <http://kff.org/interactive/implementation-timeline/>

¹¹ *E.g.*, MCR 2.404(D), MCR 2.410(F) & MCR 3.218(2)(1).

¹² Dissenting Opinion of the Honorable William C. Whitbeck, at p. 4, citing *Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). (Dissent attached as Appendix B to TES's Application for Leave to Appeal)

¹³ Dissenting Opinion of the Honorable William C. Whitbeck, at p. 4 (attached as Appendix B to TES's Application for Leave to Appeal) (emphasis in original).

the change was actually carried out; i.e., when the rules first applied to "newly affected" generators such as TES.

D. THE MPSC'S PRIMARY ARGUMENT IS INCONSISTENT AND ILLOGICAL

The fundamental issue in this case how to define "implemented" as that word is used in MCL 460.6a(8). In particular, the question is when were certain changes to the MDEQ's State Implementation Plan implemented. At page 15 of its brief, the MPSC correctly observes that the accepted definition of the word, "implement", is "to fulfill, carry out or put into effect according to a definite plan or procedure". So far, so good; the MPSC is acknowledging that changes are "implemented" when they are carried out according to a plan. Given this acknowledgment, logic dictates that the MPSC should also acknowledge that changes in environmental regulations are "implemented" when they are carried out according to a State Implementation Plan.

At page 24 of its brief, however, the MPSC contradicts itself by arguing that "carrying out a plan or procedure is not at issue". Similarly, the MPSC asserts that MCL 460.6a(8) "does not ask when a plan or procedure was carried out." Oddly, the MPSC seems completely oblivious to the inherent conflict between acknowledging that the terms, "implementing" and "carrying out" are synonymous, while simultaneously arguing that implementing changes in the MDEQ's rules is not the same thing as carrying out the changes in those rules. Contrary to the MPSC's assertion, MCL 460.6a(8) does, in fact, ask when the changes to the MDEQ's implementation plan were carried out. This is true because the statute does not make TES's rights dependent on the date when the regulatory changes were made, but rather on the date when the regulatory changes were "implemented"; i.e., carried out.

E. THE MDEQ'S UNAMENDED 2007 RULES WERE NOT IN EFFECT AT THE TIME WHEN TES INCURRED ITS COSTS, SO TES COULD NOT HAVE INCURRED ITS COSTS "DUE TO" THOSE RULES.

In addition to its primary argument based on the meaning of the word, "implemented", TES has presented an alternative basis for deciding this appeal. TES's alternative argument is based on the fact that MCL 460.6a(8) authorizes TES to recover certain environmental costs if they are incurred "due to" the implementation of regulatory changes after October 6, 2008. TES has explained that it incurred its costs in 2009 "due to" the MDEQ's revised 2009 rules. The MPSC, however, argues that this Court should ignore the fact that the original 2007 rules were not in effect when TES incurred its NOx costs. According to the MPSC, the EPA's approval of the *revised* version of the rules in 2009 somehow magically resurrected the original *unamended* rules that were promulgated in 2007.¹⁴ As Judge Whitbeck correctly noted in his dissent below, however, "the Environmental Protection Agency approved the July 10, 2009 submittal in conjunction with the July 16, 2007 submittal, and declined to revisit the July 16, 2007 submittal on its own."¹⁵ As Judge Whitbeck recognized, the unamended 2007 rules were not in effect when TES purchased its NOx allowances and, therefore, TES could not have incurred its costs "due to" the 2007 rules.

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¹⁴ MPSC Brief, at p 28.

¹⁵ Dissenting Opinion below, at p. 5 (Appendix B to TES's Application for Leave to Appeal).

IV. RELIEF REQUESTED

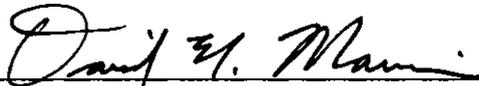
For the reasons set forth above, Appellant TES Filer City Station, L.P. hereby respectfully requests that this Honorable Court grant the relief described in its Application for Leave to Appeal.

Respectfully submitted,

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