

**STATE OF MICHIGAN
IN THE SUPREME COURT**

<p>CITY OF HOLLAND,</p> <p style="text-align: center;">Plaintiff-Appellee,</p> <p>v</p> <p>CONSUMERS ENERGY COMPANY,</p> <p style="text-align: center;">Defendant-Appellant.</p>	<p>Supreme Court No. 151053 Court of Appeals No. 315541</p> <p>Ottawa County Circuit Court No. 12-002758-CZ</p> <p>Hon. Edward R. Post</p>
<p>Peter H. Ellsworth (P23657) Jeffery V. Stuckey (P34648) DICKINSON WRIGHT PLLC Attorneys for Plaintiff-Appellee 215 South Washington Square, Suite 200 Lansing, Michigan 48933-1816 517.371.1730 pellsworth@dickinsonwright.com jestuckey@dickinsonwright.com</p> <p>Andrew J. Mulder (P26280) Randall S. Schipper (P40773) CUNNINGHAM DALMAN PC Attorneys for Plaintiff-Appellee 321 Settlers Road P.O. Box 1767 Holland, Michigan 49423 616.392.1821 andy@holland-law.com schipper@holland-law.com</p>	<p>John J. Bursch (P57679) Conor B. Dugan (P66901) WARNER NORCROSS & JUDD LLP Attorneys for Defendant-Appellant Consumers Energy Company 900 Fifth Third Center 111 Lyon Street, N.W. Grand Rapids, Michigan 49503-2487 616.752.2000 jbursch@wnj.com conor.dugan@wnj.com</p>

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE BASIS OF JURISDICTION AND AUTHORITY FOR FILING AMICUS BRIEF	v
STATEMENT OF QUESTION PRESENTED	vi
I. THIS COURT IN <i>GREAT WOLF LODGE OF TRAVERSE CITY, LLC V PUBLIC SERVICE COMMISSION</i> , 489 MICH 27; 799 NW2D 155 (2011), CONCLUDED THAT ONCE A REGULATED ELECTRIC UTILITY SERVED A PARCEL OF PROPERTY, ANY FUTURE OWNER OF THAT PROPERTY COULD NOT CIRCUMVENT THE REGULATED UTILITY’S RIGHT TO SERVE ALL ELECTRIC LOAD ON THE PROPERTY BY ATTEMPTING TO RECEIVE SERVICE FROM A MUNICIPAL UTILITY. SHOULD THIS COURT GRANT LEAVE AND REVERSE THE COURT OF APPEALS’ DECISION HOLDING THAT THE REGULATED UTILITY’S RIGHTS MAY BE CIRCUMVENTED BY A MUNICIPAL UTILITY FILING SUIT AGAINST THE REGULATED UTILITY?	vi
INTRODUCTION AND MECA’S STATEMENT OF INTEREST	1
I. INTRODUCTION	1
II. STATEMENT OF INTEREST	2
STATEMENT OF MATERIAL FACTS AND PROCEEDINGS	5
I. FACTUAL AND PROCEDURAL BACKGROUND.	5
ARGUMENT.....	6
I. STANDARD OF REVIEW.....	6
II. THIS COURT SHOULD GRANT LEAVE AND REVERSE THE COURT OF APPEALS BECAUSE THE COURT OF APPEALS’ DECISION IGNORED RULE 411 AND MCL 124.3, AND RENDERED THIS COURT’S <i>GREAT WOLF LODGE</i> DECISION MEANINGLESS.....	6

A. Rule 411 and MCL 124.3 protect electric utilities and minimize uneconomical duplication of electric services by preventing customers from switching utilities, entitling utilities to serve a customer’s entire electric load on a premises, and preventing municipal utilities from serving customers outside of their boundaries that are already receiving service from a utility..... 7

B. Rule 411 grants Consumers Energy the right to serve the property..... 9

C. By ignoring Rule 411’s plain language and application, the Court of Appeals rendered binding Supreme Court precedent meaningless..... 11

D. The Court of Appeals decision also violates MCL 124.3. 18

III. THE COURT OF APPEALS’ DECISION UPSETS THE CURRENT SYSTEM RELIED UPON BY ALL UTILITIES FOR DETERMINING WHICH UTILITY MAY SERVE A CUSTOMER. IT WILL RESULT IN LOST INVESTMENT FOR REGULATED UTILITIES AND INCREASED COST FOR COOPERATIVE, INVESTOR OWNED, AND MUNICIPAL UTILITIES’ CUSTOMERS. 19

CONCLUSION 23

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Apsey v Memorial Hosp,</i> 477 Mich 120; 730 NW2d 695 (2007)	9
<i>City of Romulus v Dep't of Environmental Quality,</i> 260 Mich App 54; 678 NW2d 444 (2003)	9
<i>City of Taylor v Detroit Edison Co,</i> 475 Mich 109; 715 NW2d 28 (2006)	17
<i>Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Services,</i> 431 Mich 172; 428 NW2d 335 (1998)	9, 14
<i>Gen Motors Corp v Bureau of Safety & Regulation,</i> 133 Mich App 284; 349 NW2d 157 (1984)	14
<i>Great Wolf Lodge of Traverse City, LLC v Public Service Commission,</i> 489 Mich 27; 799 NW2d 155 (2011)	<i>passim</i>
<i>Great Wolf Lodge v Cherryland,</i> 285 Mich App 26; 775 NW2d 597 (2009) <i>rev'd by Great Wolf Lodge,</i> 489 Mich 27	9, 16
<i>In the matter of the adoption of rules governing the extension of single phase electric service in areas served by two or more utilities, Case No. U-2291 (March 24, 1966)</i>	8
<i>In the matter, on the Commission's own motion, of the Revision of Order No. 1692, Regulations Governing Services Supplied by Electric Utilities, Case No. U-6400 (January 22, 1980)</i>	8
<i>In re Complaint of Rovas,</i> 482 Mich 90; 754 NW2d 259 (2008)	14
<i>Koontz v Ameritech Services, Inc,</i> 466 Mich 304; 645 NW2d 34 (2002)	18
<i>Malpass v Dep't of Treasury,</i> 494 Mich 237; 833 NW2d 272 (2013)	6
<i>People v Hill,</i> 269 Mich App 505; 715 NW2d 301 (2006)	19

RULES

MCR 7.303(B)(2) v
MCR 7.305(B) 6
MCR 7.311 v
MCR 7.312(H) v
MPSC R. 460.3411 *passim*

STATUTES

MCL 7.302(B)(3) 1
MCL 7.302(B)(5) 1
MCL 124.3 *passim*
MCL 460.6 6
MCL 460.551 17
MCL 460.557 17

**STATEMENT OF THE BASIS OF JURISDICTION AND AUTHORITY FOR FILING
AMICUS BRIEF**

On January 6, 2015, Consumers Energy Company (“Consumers Energy” or “Consumers”) timely sought leave to appeal from the Court of Appeals’ published decision in this case. (See Exhibit A to Consumers Energy’s Application for Leave to Appeal (“Consumers Energy’s Brief”). This Court, therefore, possesses jurisdiction under Michigan Court Rule 7.303(B)(2).

The Michigan Electric Cooperative Association (“MECA”) respectfully requests that this Court accept MECA’s Amicus brief pursuant to MCR 7.312(H) and MCR 7.311. A motion to accept MECA’s brief is being filed simultaneously with this brief.

STATEMENT OF QUESTION PRESENTED

- I. THIS COURT IN *GREAT WOLF LODGE OF TRAVERSE CITY, LLC V PUBLIC SERVICE COMMISSION*, 489 MICH 27; 799 NW2D 155 (2011), CONCLUDED THAT ONCE A REGULATED ELECTRIC UTILITY SERVED A PARCEL OF PROPERTY, ANY FUTURE OWNER OF THAT PROPERTY COULD NOT CIRCUMVENT THE REGULATED UTILITY'S RIGHT TO SERVE ALL ELECTRIC LOAD ON THE PROPERTY BY ATTEMPTING TO RECEIVE SERVICE FROM A MUNICIPAL UTILITY. SHOULD THIS COURT GRANT LEAVE AND REVERSE THE COURT OF APPEALS' DECISION HOLDING THAT THE REGULATED UTILITY'S RIGHTS MAY BE CIRCUMVENTED BY A MUNICIPAL UTILITY FILING SUIT AGAINST THE REGULATED UTILITY?

Plaintiff City of Holland presumably says:	No.
Defendant Consumers Energy presumably says:	Yes.
Amicus Curiae MECA says:	Yes.

INTRODUCTION AND MECA'S STATEMENT OF INTEREST

I. INTRODUCTION

In 2011, this Court interpreted Michigan Public Service Commission (“the Commission” or the “MPSC”) Rule 411 and concluded that a regulated electric utility “first serving buildings or facilities on an undivided piece of real property [has] the right to serve the entire electric load on that property.” *Great Wolf Lodge of Traverse City, LLC v Public Service Commission*, 489 Mich 27, 39; 799 NW2d 155 (2011). That right “limit[s] the right of the owner of the premises to contract with another provider for electric service,” and a landowner “may not circumvent the limitation...by attempting to receive service from a municipal corporation not subject to PSC regulation.” *Id.* at 41-42.

Less than four years later, the Court of Appeals eviscerated the right confirmed in *Great Wolf Lodge*, finding that “[t]he *Great Wolf Court*’s note that Rule 411 limits the rights of the owner of the premises has no bearing on the case at hand where the owner of the premises is not a party to the dispute. We are not called upon to determine the rights of the premises owner. Rule 411 may well limit the rights of the premises owner, but it does not limit the rights of a municipal utility such as Holland because the PSC has no jurisdiction over it.” (COA Opinion, p 9). Thus, according to the Court of Appeals, although a regulated utility has a right to serve a property—a right that cannot be circumvented by the property owner obtaining service from a municipal utility—that right disappears if the municipal utility sues the regulated utility and does not name the property owner as a party. Such faulty reasoning cannot stand.

This Court should grant leave under both MCL 7.302(B)(3) and 7.302(B)(5). This Court has previously recognized the importance of having a definitive answer on how to

apply Rule 411 and define an electric utility's right to serve a parcel of land. The Court of Appeals' decision, however, disrupts the entire landscape. Should the Court of Appeals' decision stand, the *Great Wolf Lodge* decision—along with its plain interpretation and application of Rule 411—is rendered meaningless. The decision undoubtedly conflicts with this Court's prior precedent—in fact, the City of Holland even **acknowledges** the conflict: “Had the courts below applied literally this Court's reference in *Great Wolf Lodge* to landowners being bound by Rule 411(11), the outcome of this case might have been different.” (City of Holland's Response Brief (“City's Brief”), p 20). Respectfully, MECA knows of no other way to interpret or apply a Supreme Court holding other than “literally.” If this Court meant something different than what it said in *Great Wolf Lodge*, it would have said something different. The Court of Appeals disregarded this Court's binding precedent, and in so doing, was clearly in error. This Court should grant leave and reverse.

II. STATEMENT OF INTEREST

MECA is a Michigan nonprofit corporation serving as the statewide association for Michigan's rural electric distribution cooperatives, one generation and transmission cooperative, and one alternative electric supplier. Its members include: Alger Delta Cooperative Electric Association, Cherryland Electric Cooperative (“Cherryland”), Great Lakes Energy Cooperative, HomeWorks Tri-County Electric Cooperative, Midwest Energy Cooperative, The Ontonagon County Rural Electrification Association, Presque Isle Electric & Gas Co-Op, Thumb Electric Cooperative, Wolverine Power Supply Cooperative, Inc. (“Wolverine”), and Wolverine Power Marketing Cooperative (“Wolverine Power Marketing”). With the exception of Wolverine (a wholesale power supply cooperative) and Wolverine Power Marketing (an alternative electric supplier),

the cooperatives invest in and operate local distribution systems that provide electric service to more than 650,000 citizens in rural areas covering all or a part of 58 counties in Michigan's Lower and Upper Peninsulas. The electric cooperatives' distribution systems include approximately 35,750 miles of overhead lines. Wolverine's transmission system includes approximately 1,600 miles of lines. MECA's members share many important features. Most importantly, unlike an investor-owned utility, cooperatives are controlled and owned by their member-customers—there are no shareholders or investors to shoulder increased costs. For that reason, any cooperative earnings in excess of operating expenses are returned to the members and/or invested in the cooperative according to the cooperative's bylaws.

MECA has a significant interest in this proceeding because of the proceedings potentially widespread impact on MECA, its members, and the member-customers at the end of the lines for each MECA member. MECA member Cherryland was the winning Defendant-Appellant in the *Great Wolf Lodge* case. Cherryland fought this battle for a number of years and did so with the understanding that this Court's decision in *Great Wolf Lodge* would provide settled guidance on territorial disputes with municipal utilities once and for all. And MECA supported Cherryland in that dispute, because service territory issues are important to all MECA members.

All of MECA's traditional electric distribution cooperative members are expressly subject to Rule 411 and the Michigan Public Service Commission's ("MPSC" or "Commission") regulation of service territories.¹ Currently, under this Court's *Great Wolf*

¹ The term "regulated utility" is used throughout this brief. Although that term may have many different meanings within the utility industry, for purposes of this brief, "regulated utility" means a utility specifically subject to Rule 411.

Lodge holding, service areas and the ability to serve new or existing customers are well-defined concepts—electric utilities operate within an accepted and understandable standard. Present investments were made relying on this standard. Once a utility serves a building located on a parcel of land, it is entitled to serve the entire electric load of the entire parcel upon which that building sits. Unless the electric utility agrees in writing to another utility serving a customer, the customer cannot switch utilities. Under the newly announced Court of Appeals test, however, a municipally owned utility may now disrupt this entire process. No matter how long a customer has been receiving service from a utility or how long a utility has served a parcel of land, a customer may request disconnection of service from the regulated utility and seek service from a municipal utility. All a municipal utility must then do is file a declaratory ruling action in the local court, and it can steal electric loads from regulated utilities. Allowing such a standard to exist not only ignores Rule 411 and this Court’s *Great Wolf Lodge* decision; it turns the rules of the game on their head. Municipal utility poaching and the ensuing litigation will be inevitable. And the costly time-consuming litigation will be the least of the problems—the increased potential for duplication of service and all of the corresponding increased costs and safety risks to Michigan’s electric customers that will result from the Court of Appeals’ decision are obvious. Capital invested by Michigan’s electric cooperatives in rural areas of Michigan—areas that once only electric cooperatives had the courage to serve—will be wasted, with municipal utilities cherry-picking “attractive” electric loads from electric cooperatives while leaving the cooperatives to serve other residential customers in sparsely populated regions.

By failing to follow this Court's holding in *Great Wolf Lodge*, the Court of Appeals did nothing but hurt the consumer—increased litigation, costs of capital, and safety risks are in no one's best interest. MECA respectfully requests that the Court grant leave and issue an opinion reversing the Court of Appeals.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

I. FACTUAL AND PROCEDURAL BACKGROUND.

MECA adopts Consumers Energy's Statement of Facts and procedural history. Succinctly, MECA would like to emphasize the following facts, none of which appear to be in dispute:

- Consumers Energy installed facilities to serve the property at issue (the "Property") in 1939.
- Consumers Energy provided service to the Property for many years.
- Between 2004 and 2008, Consumers Energy provided service to three different entities on the Property.
- In 2008, Consumers Energy removed its facilities from the Property, and the structures previously served by Consumers Energy were removed.
- In 2011, Consumers energy provided service to a construction trailer on the Property, and billed the Property's owner—Benjamin's Hope—for the service provided.
- In January of 2012—**while Consumers Energy was still providing service to the Property**—Benjamin's Hope and the City of Holland (the "City") entered into a contract for electric service. Consumers Energy never consented to this arrangement.
- In March of 2012, the City filed a declaratory judgment action with the local circuit court seeking a declaration that it could serve the Property.
- In April of 2012, the construction trailer was removed and Consumers Energy stopped providing service in response to the demand of Benjamin's Hope. Shortly thereafter, the City began providing service.

- On March 28, 2013, the local circuit court issued a final Opinion and Order granting the City’s Motion for Summary Disposition—concluding that, despite Rule 411, the City could serve the Property. Consumers appealed that decision to the Court of Appeals.
- On January 6, 2015, the Court of Appeals issued a published decision holding that Rule 411 was “inapplicable,” noting that “Rule 411 may well limit the rights of the premises owner, but it does not limit the rights of a municipal utility such as Holland because the PSC has no jurisdiction over it.” The Court also held that MCL 124.3 did not prevent the City from serving the Property.

ARGUMENT

I. STANDARD OF REVIEW.

Granting leave to appeal, of course, is within this Court’s discretion, which is guided by MCR 7.305(B). If leave is granted, this Court would review a grant of summary judgment in favor of the City. This Court reviews grants of summary disposition under the *de novo* standard. *Malpass v Dep’t of Treasury*, 494 Mich 237, 245; 833 NW2d 272 (2013).

II. THIS COURT SHOULD GRANT LEAVE AND REVERSE THE COURT OF APPEALS BECAUSE THE COURT OF APPEALS’ DECISION IGNORED RULE 411 AND MCL 124.3, AND RENDERED THIS COURT’S *GREAT WOLF LODGE* DECISION MEANINGLESS.

The Court of Appeals concluded that neither Rule 411 nor MCL 124.3 applied to the current situation. It discharged the notion of Rule 411’s application by reasoning that the MPSC lacks jurisdiction over municipal utilities. *City of Holland*, pp 6-7 (citing MCL 460.6). And it concluded that MCL 124.3—which prevents a municipal utility from serving a customer outside the municipal boundaries that is “already receiving” service from another utility unless the serving utility consents in writing—did not apply because Consumers Energy turned off service before the City began serving the property. *Id.* pp 5-6. In reaching these conclusions, the Court of Appeals ignored Rule 411 and MCL

124.3's plain language and interpreted MCL 124.3 in a manner that defeats the protections afforded to utilities under Rule 411. In so doing, the Court of Appeals rendered meaningless this Court's *Great Wolf Lodge* decision. For those reasons, this Court should grant leave and reverse the Court of Appeals.

A. Rule 411 and MCL 124.3 protect electric utilities and minimize uneconomical duplication of electric services by preventing customers from switching utilities, entitling utilities to serve a customer's entire electric load on a premises, and preventing municipal utilities from serving customers outside of their boundaries that are already receiving service from a utility.

Brief explanations for Rule 411 and MCL 124.3 provide the proper context for this appeal. Rule 411, entitled "Extension of electric service in areas served by 2 or more utilities," protects investments by utilities made to extend facilities to serve customers:

(1) As used in this rule:

(a) "Customer" means the buildings and facilities served rather than the individual, association, partnership, or corporation taking service.

* * *

(2) Existing customers shall not transfer from one utility to another.

* * *

(11) The first utility serving a customer pursuant to these rules **is entitled to serve the entire electric load on the premises of that customer** even if another utility is closer to a portion of the customer's load.

R. 460.3411(1), (2), and (11) (emphasis added). As the above language makes clear, once an electric utility is serving a customer—which is defined as buildings and facilities on the property—that customer **cannot** switch utilities. Nor may that customer have another utility serve a portion of an electric load located on the same premises as other

buildings and facilities receiving service. Furthermore, once a utility serves a customer on a property, the utility is entitled to serve that property. These protections eliminate situations where a customer could simply switch utilities and require the duplication of utility lines, facilities, related construction, and all the necessary corresponding investment in these assets and activities.

Rule 411's origins are rooted in several disputes between MECA's members and investor-owned utilities such as Consumers Energy. Seeking to minimize the uneconomical duplication of electric services, the Commission in 1966 adopted Rule 411's predecessor, "Rules Governing the Extension of Single-Phase Electric Service in Areas Served by Two or More Utilities." See Case No. U-2291, *In the matter of the adoption of rules governing the extension of single phase electric service in areas served by two or more utilities*, (March 24, 1966). Similar to Rule 411, these initial rules prohibited existing customers from transferring from one utility to another and allowed the first utility serving a customer to serve the entire electric load on the premises of that customer, even if another utility was closer. Later iterations of similar rules kept the same philosophy. See Case No. U-6400, *In the matter, on the Commission's own motion, of the Revision of Order No. 1692, Regulations Governing Services Supplied by Electric Utilities*, (January 22, 1980).

MCL 124.3(2) further protects a utility's right to serve customers by preventing municipally owned utilities from taking existing customers away from other utilities:

(2) A municipal corporation shall not render electric delivery service for heat, power, or light to customers outside its corporate limits already receiving the service from another utility unless the serving utility consents in writing.

MCL 124.3(2). As this plain language makes clear, if a customer is “already receiving service from another utility,” a municipal corporation may not serve that customer unless that customer’s current utility consents in writing.

B. Rule 411 grants Consumers Energy the right to serve the property.

Michigan’s appellate courts consistently hold that statutory construction principles are applicable when construing administrative rules. See, e.g., *Detroit Base Coalition for the Human Rights of the Handicapped v Dep’t of Social Services*, 431 Mich 172, 185; 428 NW2d 335 (1998) (Courts apply principles of statutory construction in construing administrative rules). Indeed, the last time this Court interpreted Rule 411 it noted that “[p]rinciples of statutory interpretation apply to the construction of administrative rules.” *Great Wolf Lodge*, 285 Mich App at 34, quoting *City of Romulus v Dep’t of Environmental Quality*, 260 Mich App 54, 65; 678 NW2d 444 (2003). And the hallmark of statutory construction is to give effect to the Legislature’s (in this case the MPSC’s) intent. *Apsey v Memorial Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007). The most powerful indicator of that intent is a regulation’s plain and unambiguous language.

Subsection (11) of Rule 411 unambiguously provides that the first utility serving a customer under the Commission’s rules is “entitled to serve the entire electric load on the premises of that customer.” R 460.3411(11). In order to determine whether Rule 411 entitles Consumers Energy to serve the property, then, it simply is necessary to determine whether Consumers Energy served a “customer” on the premises. If it did, Consumers Energy is entitled to serve the entire electric load on that “customer’s” premises.

A “customer” under Rule 411 “means the buildings and facilities served rather than the individual, association, partnership, or corporation taking service.” R 460.3411(2). There is no dispute in this case that Consumers first installed electric facilities in 1939 to serve the property, or that it provided electric service to facilities owned by at least three separate entities on the property between 2004 and 2008. (Consumers Energy 3/29/12 Req to Pub Serv Comm’n for Declaratory Ruling ¶ 4.) Then, in 2011, Consumers started serving a construction trailer on the property while the development that currently sits on the property was being constructed. (*Id.* ¶ 5.) And the owner of the development—Benjamin’s Hope—received and paid all the bills. (*Id.*) Thus, there is no question—and in fact no one to this case disputes—that Consumers Energy served buildings and facilities on the property well before the City provided electric service to the property. In other words, it is undisputed that a “customer” under Rule 411 began receiving service from Consumers Energy well before 2012.

The fact that Consumers once served facilities and buildings located on the property leads to the undeniable conclusion that Consumers Energy is entitled to serve Benjamin’s Hope’s entire electric load on that property. Rule 411(11)’s plain and unambiguous language provides that the first electric utility serving a customer “is entitled to serve the entire electric load on the premises of that customer.” R 460.3411(11). Here, Consumers Energy was serving a “customer” as far back as 1939, and as recently as 17 days before the City began serving the Property. Under Rule 411(11)’s plain language, Consumers was “**entitled**” to serve the entire electric load on the premises. Benjamin’s Hope sits on that premises. This means that Consumers

Energy is “**entitled**” to serve Benjamin’s Hope’s entire electric load. This should be the end of the analysis, because the application of the undisputed facts in this case to Rule 411’s plain language creates a clear result—Consumers Energy served a building and facilities on the property before any other utility, so it is entitled to serve the entire electric load of any buildings or facilities located on the property.

C. By ignoring Rule 411’s plain language and application, the Court of Appeals rendered binding Supreme Court precedent meaningless.

To avoid Rule 411’s undeniable result (i.e. that Consumers Energy is entitled to serve the Property) the Court of Appeals noted that the Commission “cannot impose its rules upon Holland.” (Opinion, p 6). The Court of Appeals held, therefore, that Rule 411 did not apply:

Again, a municipal utility does not, by statute, operate under the jurisdiction of the commission. Thus, a municipal utility such as Holland would never, according to Rule 411, meet the definition of utility and would thus never, ever, be the first utility to serve a customer under any circumstances.

(Opinion, p 7). Based on this reasoning, the Court of Appeals concluded that because the dispute “is between a public utility and a municipal utility,” it affirmed the trial court and concluded that Rule 411 did not prohibit the City from serving the property. (*Id.* at p 8-9). These conclusions disregard this Court’s analysis and holdings from *Great Wolf Lodge*.

In *Great Wolf Lodge*, MECA-member Cherryland had provided electricity to a building beginning in the 1940s. 489 Mich at 32. That building, which was eventually torn down, ended up being located on the property where Great Wolf Lodge built a large water-park and hotel resort. During the planning stages, Great Wolf Lodge solicited a bid from a municipal utility. *Id.* Great Wolf Lodge asked Cherryland to remove its

electrical facilities on the subject property. *Id.* Eventually, a dispute arose between Cherryland and Great Wolf Lodge, and the Lodge filed a complaint at the Commission seeking the ability to obtain service from another utility—namely, Traverse City Light and Power. *Id.* While Cherryland won at the Commission, the Court of Appeals remanded the case to determine whether Cherryland was providing electric service to an existing building at the time the Lodge bought the property where its resort sat. *Id.* at 37. This Court granted leave and reversed.

In reversing the Court of Appeals, the *Great Wolf Lodge* Court addressed whether the involvement of a municipal utility prevented Rule 411’s application, and held that the involvement of a municipal utility was “irrelevant”:

Given that Cherryland is entitled to the benefit of the first entitlement in Rule 411(11), **it is irrelevant that TCLP is a municipal corporation not subject to PSC regulation.** It grants a right of first entitlement to Cherryland **while limiting the right of the owner of the premises to contract with another provider for electric service.**

Great Wolf Lodge, 489 Mich at 41-42 (emphasis added). Carrying this holding to its logical conclusion, this Court noted that, even assuming there were no statutory prohibitions (such as MCL 124.3’s prohibition discussed herein) on Traverse City Light and Power’s ability to contract with the Lodge, “Rule 411(11) restricts [the Lodge] from seeking that service **from any entity** other than Cherryland.” (*Id.* at 42 (emphasis added)). This Court concluded that the Lodge “may not circumvent the limitation of Rule 411(11) by attempting to receive service from a municipal corporation subject to PSC regulation.” *Id.* As these statements make clear, the *Great Wolf Lodge* Court specifically dismissed the notion that the existence of a municipal utility changes the Rule 411 analysis.

The Court of Appeals' decision claims that *Great Wolf Lodge* is “factually distinguishable.” (Opinion, p 7). First, the Opinion notes that in *Great Wolf Lodge*, “the plaintiff did enter into a three-year contract to have Cherryland provide electrical services to its newly constructed buildings...” as opposed to the instant dispute, where “Benjamin’s Hope did not enter into a contract with Consumers for electrical services, receive the services for two years, and then seek to switch providers.” (*Id.*) While this “factual distinction” between the two cases is true, it is irrelevant. Rule 411 gives a right to the regulated utility **first serving** a building or facility on the property. The *Great Wolf Lodge* decision did not hinge on Cherryland’s provision of service under the contract mentioned by the Court of Appeals—it hinged on Cherryland’s provision of service to a barn on the property in the 1940s:

In this case, is it [sic] undisputed that Cherryland was the first utility to provide electric service to buildings and facilities on the Oleson farm. Once Cherryland did so, Rule 411(11) gave it the right to serve the entire electric load on the premises. That right was unaffected by subsequent changes in the ‘customer,’ because **the right extends to the ‘premises’ of the ‘buildings and facilities’ that existed at the time service was established.**

Great Wolf Lodge, 489 Mich at 41 (emphasis added). Thus, the Court of Appeals’ first factual distinction is meaningless—it is undisputed that Consumers Energy first served buildings and facilities on the Property many years ago. The existence (or non-existence) of a contract with Consumers Energy when the City of Holland began negotiating or serving Benjamin’s Hope is not relevant to the Rule 411 analysis in any manner.

Second, the Court of Appeals notes that the *Great Wolf Lodge* decision was the result of an appeal from a Commission order, claiming that the “review in *Great Wolf*

Lodge was thus deferential and limited and it reinstated the PSC decision, whereas our review here is de novo.” (Opinion, p 8). Again, while it is true that the *Great Wolf Lodge* decision was an appeal of an MPSC order, that fact does not allow the Court of Appeals to ignore the *Great Wolf Lodge* holdings. No reading of the *Great Wolf Lodge* decision leads to a conclusion that the Supreme Court somehow gave improper deference to the Commission. The *Great Wolf Lodge* decision gave the MPSC order “respectful consideration” as is required under *In re Complaint of Rovas*, 482 Mich 90, 108; 754 NW2d 259 (2008), but went on to note that “[i]n construing administrative rules, courts apply principles of statutory construction.” *Great Wolf Lodge*, 489 Mich at 37, quoting *Detroit Bas Coalition for Human Rights of the Handicapped v Dep’t of Soc Sevs*, 431 Mich 172, 185; 428 NW2d 335 (1988), citing *Gen Motors Corp v Bureau of Safety & Regulation*, 133 Mich App 284; 349 NW2d 157 (1984). The fact is that the *Great Wolf Lodge* Court interpreted Rule 411’s plain language. That it was an appeal from the MPSC does not change the interpretation. The Court of Appeal’s second distinguishing factor therefore, is also irrelevant.

Third, after noting that the *Great Wolf Lodge* Court stated that Rule 411’s purpose was to avoid unnecessary duplication, the Court of Appeals claims that “it could be argued that there would be no unnecessary duplication of electrical facilities” in this instance. (Order, p 8). The Court of Appeals then points out that Consumers Energy was going to charge for installation of facilities. (*Id.*) The Court of Appeal’s analysis in this respect is especially troubling. The analysis should be grounded in Rule 411 and MCL 124.3’s plain language, as interpreted by this Supreme Court. And there is nothing in either the Rule or the statute that discusses some other exception for

instances where a utility will charge for new facilities or if there is another utility willing to serve. In short, the Court of Appeal's third distinguishing factor is meaningless in every conceivable manner.²

Fourth, and perhaps most importantly, the Court of Appeals notes that the current dispute was filed by the City, and that “[t]he *Great Wolf Court's* note that Rule 411 limits the rights of the owner of the premises has no bearing on the case at hand where the owner of the premises is not a party to the dispute.” (Order, p 9). The Court of Appeals then concludes that “Rule 411 may well limit the rights of the premises owner, but it does not limit the rights of a municipal utility such as Holland because the PSC has no jurisdiction over it.” So the Court of Appeals concluded that a procedural difference in the case—that the municipality sued the utility claiming it could serve the customer instead of the customer suing the utility claiming the municipality could serve the customer—leads to a **different** result. The Court of Appeal's conclusion that Rule 411 prevents a customer from taking service from a municipal utility but nothing prevents the municipal utility from providing service to a customer cannot logically be reconciled. And it was previously rejected by this court.

The *Great Wolf Lodge* Court did not make a “note” about whether a municipal utility could serve a customer on a property once served by a regulated utility as stated by the Court of Appeals. Instead, **the Supreme Court made a holding directly on point on the issue:**

² It is also worth noting that the Court of Appeals just casts aside that the City's facilities were approximately 1,000 feet away, and the City would have to spend \$65,050 to even get the facilities to the Property. (Koster Aff ¶ 6). Again, although this is irrelevant to analyzing the law, it demonstrates that the Court of Appeals went to great lengths to find anything that could “distinguish” *Great Wolf Lodge*.

Given that Cherryland is entitled to the benefit of the first entitlement in Rule 411(11), it is irrelevant that TCLP is a municipal corporation not subject to PSC regulation. Rule 411(11) both grants and limits rights. It grants a right of first entitlement to Cherryland while limiting the right of the owner of the premises to contract with another provider for electric service. 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 41-42. In fact, a review of the Court of Appeals' order that the *Great Wolf Lodge* decision reversed clearly demonstrates that the Supreme Court dispelled the very notion the Court of Appeals relied upon in this case. The Court of Appeals' decision reversed by the Supreme Court in *Great Wolf Lodge* included the following statement: "Because the regulatory scheme at issue includes a detailed definition of 'utility,' which excludes such municipal providers as Great Wolf's choice for its own needs, TCL&P [a municipal utility] and Rule 411(2) and (11) impose limitations on only utilities as defined, **neither Rule 411(2) Rule 411 [sic] prevents Great Wolf from contracting with TCL&P for its electrical needs.**" *Great Wolf Lodge v Cherryland*, 285 Mich App 26, 36-37; 775 NW2d 597 (2009) *rev'd by Great Wolf Lodge*, 489 Mich 27 (emphasis added). The Supreme Court overruled the order containing this statement. The Plaintiff in *Great Wolf Lodge* sought a declaration that it could receive service from any provider it wanted—including a municipal provider. The Court of Appeals held that Rule 411 did not prevent the customer from contracting with a municipal provider. This Court considered that issue and reversed the Court of Appeals. That should constitute binding precedent on this issue.

Here, the City sued Consumers seeking an order that the City could serve a customer that was limited by Rule 411 in the same way as the plaintiff in *Great Wolf Lodge*. It does not matter who sued whom, the legal issue is exactly the same as that

previously considered by this Court: whether Rule 411 prevents a customer from taking service from a municipal utility if a regulated utility is entitled to serve the entire electric load of premises on which the customer sits. This Court has already held that the answer is “yes.” The procedural posture of the case does not change the outcome—the legal issue remains the same, and the answer should as well. For this reason, the Court’s fourth “distinguishing” factor is also irrelevant.³

In summary, the Court of Appeal’s decision ignores Rule 411’s plain language and this Court’s interpretation of that plain language. The Court attempts to “distinguish” *Great Wolf Lodge*, but none of the distinguishing factors have any meaningful impact on the *Great Wolf Lodge* holding. On the other hand, if the Court of Appeals’ decision stands, the *Great Wolf Lodge* decision will have no meaning. Instead of the customer suing a regulated utility claiming it can obtain service from a municipal utility, the municipal utility will simply sue claiming it can serve the customer. Concluding that a customer cannot take electric service from a municipal utility but that the municipal utility may provide the service to the same customer who is limited by

³ The City attempts to support the Court of Appeal’s reasoning by arguing that since the MPSC has no regulatory jurisdiction over the City, Rule 411 cannot impact the City. The City is wrong. As noted by Consumers Energy, the Michigan Public Service Commission’s has the power to promulgate for “the proper discharge of its functions under” Michigan’s Transmission of Electricity Act. MCL 460.557. Those functions expressly include “the rules and conditions of service under which [] electricity shall be transmitted and distributed.” MCL 460.551. Rule 411 falls within this broad grant of power. Other MPSC rules reflect this principle. Indeed, this Court has previously issued orders in cases where MPSC rules were impacting municipalities. For instance, in *City of Taylor v Detroit Edison Co*, 475 Mich 109, 112; 715 NW2d 28 (2006), this Court recognized that the MPSC had primary jurisdiction to interpret its own rules related to who pays for electric distribution line relocation. In that case, the interpretation and application of the rules at issue would determine whether the City of Taylor was required to pay for line relocation. *Id.* Clearly, then, MPSC rules may impact non-regulated entities.

Rule 411 is absurd. It ignores binding precedent, and violates Rule 411. For those reasons, this Court should grant leave and reverse the Court of Appeals.

D. The Court of Appeals' decision also violates MCL 124.3.

As noted, MCL 124.3 also protects a utility's right to serve customers by preventing municipally owned utilities from taking existing customers away from other utilities:

(2) A municipal corporation shall not render electric delivery service for heat, power, or light to customers outside its corporate limits already receiving the service from another utility unless the serving utility consents in writing.

MCL 124.3(2). As this plain language makes clear, if a customer is "already receiving service from another utility," a municipal corporation may not serve that customer unless that customer's current utility consents in writing.

Consumers never consented to the City providing service in this instance. The Court of Appeals focused on MCL 124.3's use of "already receiving," and noted that the statute "does not, however, prohibit Holland from providing electrical delivery service to customers who 'have received' or 'had received' the service from another utility at some point in time." (Order, p 5). But this analysis ignores what happened here—Consumers Energy was providing service to property so that buildings and facilities could be built. While that was going on, the owner of the property executed an agreement with the City. Then the owner told Consumers to stop service. Then the owner started receiving service from the City.

It is axiomatic that a court must avoid construing a statute in a manner that renders nugatory or surplusage any part of the statute. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). In fact, a court must give effect to every

word, phrase, and clause in the statute. *People v Hill*, 269 Mich App 505, 515; 715 NW2d 301 (2006). Yet MCL 124.3's requirement for written consent is rendered nugatory if a customer may negotiate a contract **while receiving service from a regulated utility**, then request shut off, and then take service from a municipal utility. A customer could always—by that customer's own choice—be a customer who “has received” or “had received” service from the regulated utility, instead of a customer “currently receiving.” The Legislature would not have required written consent from the serving utility if all that was required to avoid such consent was the customer requesting that service be shut off. For these reasons, the Court of Appeals' opinion also violates MCL 124.3, and should be reversed.

III. THE COURT OF APPEALS' DECISION UPSETS THE CURRENT SYSTEM RELIED UPON BY ALL UTILITIES FOR DETERMINING WHICH UTILITY MAY SERVE A CUSTOMER. IT WILL RESULT IN LOST INVESTMENT FOR REGULATED UTILITIES AND INCREASED COST FOR COOPERATIVE, INVESTOR OWNED, AND MUNICIPAL UTILITIES' CUSTOMERS.

In addition to violating statutory construction rules and binding Supreme Court precedent, the Court of Appeals' reasoning in this case creates bad public policy because it disrupts well settled expectations and destroys Rule 411's essential purpose. Rule 411's purpose is to prevent duplication of electric facilities. (See, e.g., MPSC Case Nos. U-14193 and U-13764). Such duplication proves costly, and in some cases, dangerous. If customers may freely transfer to municipal utilities, any property where a customer switches service will have at least two sets of facilities on site. Or worse, after already losing its investment in extending services to a building or facility, a Commission-regulated utility will be forced to incur removal costs. Utilities will be forced pass such costs from service to other customers, which will in turn drive up the price of providing electric service. The Court of Appeals specifically pointed out that the City of

Holland did not charge Benjamin's Hope for extending its lines. It was apparently lost on the Court of Appeals that line extensions are not free—the City simply made all of its other customers subsidize that extension. Such actions make no sense when Consumers Energy had already served the Property in years past and had the legal right to serve the property under Rule 411. Rule 411—as interpreted by this Court—recognizes that it is bad public policy to allow existing customers to switch from one provider to another.⁴

The conclusion that Rule 411 prevents a municipal utility from poaching a customer of a Commission-regulated utility is consistent with the utility industry's (both regulated and non-regulated utilities) reasonable expectations. Before the *Great Wolf Lodge* decision, Commission-regulated utilities believed that they were bound by Rule 411 and protected by Rule 411(11). The *Great Wolf Lodge* decision confirmed these beliefs after years of litigation. And municipal utilities were aware that Rule 411 binds and protects Commission-regulated utilities. Indeed—after this Court issued the *Great Wolf Lodge* opinion, the Michigan Municipal Electric Association (“MMEA”) filed a motion supporting the Lodge's Motion for Rehearing. In that Motion, the MMEA—

⁴ ABATE's Amicus Brief in this matter discusses at length the “policy” of allowing electric choice and ABATE's perception that Consumers Energy is attempting to eliminate choice and retain a complete monopoly in all areas. (ABATE Brief, pp 10-11). ABATE's arguments miss the mark. First, electric choice, as ABATE refers to it but does not explain, **is nothing like what is at issue in this case**. Under electric choice, the incumbent utility still makes the investment in the distribution facilities serving the customer. The customer then finds electricity on the open market that is supplied by an alternative electric supplier. But the electricity is delivered on the incumbent utility's system. The current situation, and the new law created by the Court of Appeals' decision is much different, and will lead to lost investment in distribution facilities as well as duplication. There is nothing “antiquated” about Rule 411. This is not an “absolute monopoly” argument as claimed by ABATE. Enforcing Rule 411 as written provides certainty and decreases costs to customers. Second, it is also important to point out the irony in ABATE's position—ABATE claims that it is state and federal policy to allow for choice, yet fails to mention that **not one municipal utility in the State allows for electric choice, even though every regulated utility does**.

represented by the same counsel now representing the City of Holland made the following statements to this Court:

Thus, according to the majority, Rule 411 prohibits the customer (the landowner) from obtaining electricity from any other utility. And because the customer (the landowner) is not permitted by virtue of Rule 411 to obtain service from a municipal utility, neither (according to the majority) is the municipal utility able to extend its service to the customer.

(See Exhibit A, pg 5, attached hereto, of the Brief in Support of the Motion). This clearly indicates that the municipal utility industry understood what this Court held in *Great Wolf Lodge*. The entire industry operated within these parameters. But if the Court of Appeals' decision stands, those parameters all change.

If not reversed, the Court of Appeals' decision grants to municipal utilities a broad-stroke authority to take Commission-regulated utilities' customers when the Commission-regulated utilities are bound by and (purportedly) protected by Rule 411. This invites municipal utilities to encourage customers to switch service. This is especially troubling to MECA and its members, who serve customers in rural areas of the state and in many instances, are directly adjacent to municipal utilities.

It is important to remember that we are dealing with situations in which a municipal utility decides to serve a customer outside of its service territory—a customer sitting on property that already has been served by a regulated utility. This is a situation that the regulated utilities in most instances cannot replicate. There are currently 41 municipal utilities in the state, and they border on every single regulated electric utility's service territory. Before the Court of Appeals' decision in this case, those 41 municipal utilities were bound by the industry standard—i.e., if an “existing customer” under Rule 411 existed, the municipal utility could not serve the premises upon which

that customer sat unless it obtained a written waiver from the electric utility with an entitlement to serve. But the Court of Appeals has eviscerated that standard. This will inevitably lead to a new practice whereby any seller of property will request a shut-off before sale, thus allowing any purchaser of property to have a choice of electric providers. Or, they will just request a shut off if a municipal utility goes door-to-door claiming lower prices. This will likely be especially widespread for properties located in areas identified for high-growth or with large customers. But this will not happen just with large customers or in development areas—it will also happen with residential customers as well. There are literally thousands of Cherryland residential customers, for example, that could now be switched to Traverse City Light & Power with little effort. Every house in a neighboring subdivision could now be “up for grabs” by a municipal utility, even if another electric utility has been serving that house for 30 years and is currently serving every other house in the neighborhood. Electric cooperatives who expanded into rural areas to serve—areas that municipal utilities **would not** expand into previously—could now be punished by municipal utilities cherry picking and poaching customers.

The results could be devastating to any electric utility, but especially to non-profit electric cooperatives. Utility planning becomes nearly impossible when a utility does not know that it will be able to serve a customer without another utility swooping in and taking the customer away. The vast erosion of service territories throughout the State and the enormous costs associated with that erosion would not only negatively impact electric utilities, but it would also affect electric consumers. Stated simply, if the Court of Appeals’ decision is allowed to stand, there will be a sea of change in the way each

utility operates. Extensions of service in areas bordering municipal utilities will become risky ventures that will increase costs, will lead to duplication of facilities, and lost investment. In addition, there is sure to be litigation involved with these issues—each time a shut off is requested, utilities will challenge the reasons behind the request or refuse to stop serving; each time a municipal utility tries to take an “existing customer,” there will be challenges to their actions; each time a new development is proposed, there will be litigation to determine rights. In sum, there will be voluminous litigation where there used to be none. Essentially, before the Court of Appeals’ decision in this case, the electric utility industry operated within an understanding. With that understanding gone, the potential for disputes will increase significantly. For policy reasons alone, the Court of Appeals’ decision must be reversed.

CONCLUSION

The Plaintiff-Appellee in this case admits that had the Court of Appeals “applied literally” the *Great Wolf Lodge* holding, the outcome would likely be different. MECA believes that Michigan Supreme Court opinions should be “applied literally.” All of the issues contested in this case were raised in *Great Wolf Lodge* and decided accordingly. Rule 411 entitles Consumers Energy to provide service in this case, and the City cannot circumvent that right. This Court should grant leave and reverse the Court of Appeals.

Respectfully submitted,

DYKEMA GOSSETT PLLC

By: /s/ Shaun M. Johnson

Shaun M. Johnson (P69036)

Gary P. Gordon (P26290)

Attorneys for *Amicus Curiae*

Michigan Electric Cooperative Association

201 Townsend Street, Suite 900

Lansing, MI 48933

(517) 374-1900