

STATE OF MICHIGAN  
IN THE SUPREME COURT

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CITY OF HOLLAND,

Plaintiff-Appellee,

v

CONSUMERS ENERGY COMPANY,

Defendant-Appellant.

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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

Supreme Court No. \_\_\_\_\_

Court of Appeals No. 315541

Ottawa County Circuit Court  
No. 12-002758-CZ

Hon. Edward R. Post

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

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**CONSUMERS ENERGY COMPANY'S  
APPLICATION FOR LEAVE TO APPEAL**

**ORAL ARGUMENT REQUESTED**

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## STATEMENT OF APPELLATE JURISDICTION

The Court of Appeals issued its published opinion on January 6, 2015. This Court has jurisdiction under MCR 7.301(A)(2) to grant leave to appeal.

### JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Consumers Energy Company seeks leave to appeal from a published decision of the Court of Appeals (Exhibit A) declining to apply this Court's decision in *Great Wolf Lodge of Traverse City, LLC v Public Service Commission*, 489 Mich 27, 41–42; 799 NW2d 155 (2011), to an analogous but admittedly different set of facts. Both *Great Wolf Lodge* and the present case involve Michigan Public Service Commission Rule 411(11), which “grants the utility first serving buildings or facilities on an undivided piece of real property the right to serve the entire electric load on that property.” *Great Wolf Lodge*, 489 Mich at 39. This first-serve right applies notwithstanding any “subsequent changes in the customer” or the “[l]ater destruction of the buildings and facilities on the property.” *Id.* at 41.

In *Great Wolf Lodge*, it was the electric *customer* that filed suit seeking to switch electric service to a municipal utility. In the present dispute, it was the *municipal utility* that filed suit. Based on that difference, the Court of Appeals held *Great Wolf Lodge* inapplicable.

As a practical matter, the Court of Appeals' published decision renders *Great Wolf Lodge* meaningless. According to the Court of Appeals' logic, if *Great Wolf Lodge* had refrained from filing suit and instead asked the municipal utility to file a declaratory-judgment action, the Lodge would have prevailed. That result cannot possibly be right. Accordingly, Consumers Energy respectfully requests that this Court grant the application for leave and reverse. Alternatively, Consumers Energy asks that the Court reverse the Court of Appeals summarily and direct that summary disposition be entered in favor of Consumers Energy.

## STATEMENT OF QUESTIONS PRESENTED

1. This Court in *Great Wolf Lodge of Traverse City, LLC v Public Service Commission*, 489 Mich 27; 799 NW2d 155 (2011), interpreted Michigan Public Service Commission Rule 411 to prohibit a municipal utility from providing electric service to the premises of a customer first served by a Commission-regulated public utility. *Great Wolf Lodge* arose in the context of a lawsuit filed by an electric customer. Does the *Great Wolf Lodge* holding also apply when it is the municipal utility that files suit?

Court of Appeals says:	No
Trial court says:	No
Plaintiff City of Holland says:	No
Defendant Consumers Energy Company says:	Yes

2. MCL 124.3(2) prevents a municipal utility from “render[ing] electric delivery service . . . to customers outside its corporate limits already receiving the service from another utility unless the serving utility consents in writing.” Can a customer and municipal utility avoid MCL 124.3(2)’s prohibition based on a brief break in service?

Court of Appeals says:	Yes
Trial court says:	Yes
Plaintiff City of Holland says:	Yes
Defendant Consumers Energy Company says:	No

## STATUTES AND RULES INVOLVED

MCL 124.3(2) states:

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).]

MCL 460.10y states, in relevant part:

### **Municipally owned utilities; alternative electric suppliers; delivery services**

\* \* \*

(2) Except with the written consent of the municipally owned utility, a person shall not provide delivery service or customer account service to a retail customer that was receiving that service from a municipally owned utility as of June 5, 2000, or is receiving the service from a municipally owned utility. 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.

(3) 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.]

Michigan Administrative Code Rule 460.3411 (Rule 411) states:

**Extension of electric service in areas served by 2 or more utilities.**

Rule 411. (1) As used in this rule:

(a) “Customer” means the buildings and facilities served rather than the individual, association, partnership, or corporation served.

(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.

\* \* \*

(14) Regardless of other provisions of this rule, except subrule (9), a utility shall not extend service to a new customer in a manner that will duplicate the existing electric distribution facilities of another utility, except where both utilities are within 300 feet of the prospective customer. Three-phase service does not duplicate single-phase service when extended to serve a 3-phase customer. [Mich Admin Code, R 460.3411.]

## INTRODUCTION AND REASONS FOR GRANTING LEAVE

Judge Shapiro, in his concurring opinion below, noted that to the extent the panel's opinion is inconsistent with this Court's decision in *Great Wolf Lodge of Traverse City, LLC v Public Service Commission*, 489 Mich 27; 799 NW2d 155 (2011), this Court will have to "take appropriate action." *City of Holland v Consumers Energy Co*, 2015 WL 71823, \_\_ Mich App \_\_; \_\_ NW2d \_\_ (2015) (slip op concurrence at 2). Such action is warranted.

*Great Wolf Lodge* asked whether a municipal utility could start providing electric service to a parcel already served by a utility regulated by the Public Service Commission over the regulated utility's objection. Interpreting the Commission's Rule 411(11), this Court answered that question no: when a regulated utility "was the first utility to provide electric service to buildings and facilities" on a parcel, the regulated utility has "the right to serve the entire electric load on the premises." 489 Mich at 41. Moreover, the regulated utility's "right" is "unaffected by subsequent changes in the customer," and also unaffected by "destruction of the buildings and facilities" to which the utility first provided electricity. *Id.*

In *Great Wolf Lodge*, it was the electric customer that filed suit against the regulated utility. Here, it is the municipal utility that filed suit. It is undisputed that Consumers Energy first installed electric facilities in 1939 along Riley Street in Park Township, Ottawa County, Michigan, to serve the subject parcel, and it was still serving the parcel shortly before the City of Holland displaced Consumers Energy. Yet, on the basis that it was the City of Holland that filed this declaratory-judgment action rather than the customer, Benjamin's Hope, the Court of Appeals held *Great Wolf Lodge* inapplicable and sanctioned Holland's poaching of Consumers Energy's customer. That result misinterprets *Great Wolf Lodge*, Public Service Commission Rule 411, and MCL 124.3(2). It also warrants this Court's review, for multiple reasons.

To begin, this case presents an issue of jurisprudential significance. MCR 7.302(B)(3). Indeed, in granting leave in *Great Wolf Lodge*, this Court necessarily recognized the jurisprudential importance of defining Rule 411's meaning and scope. Having resolved the question of Rule 411's application when an electric *customer* sues a Commission-regulated utility, the Court should now grant leave and extend the *Great Wolf Lodge* holding to the context of a *municipal utility* that sues the regulated utility whose customer the municipal utility is trying to poach. Resolving this question will affect countless utilities, municipalities, and electric customers.

The Court of Appeals' published opinion also conflicts with *Great Wolf Lodge's* reasoning. MCR 7.302(B)(5). This Court in *Great Wolf Lodge* could not have been clearer. A "Plaintiff may not circumvent the limitations of Rule 411(11) by attempting to receive service from a municipal corporation not subject to PSC regulation." 489 Mich at 42. A contrary result would leave "the utility's right of first entitlement . . . subject to unilateral abrogation by property owners." *Id.* at 40 n 22. But the Court of Appeals allowed that very result here simply because it was the municipal utility that filed suit rather than the customer. In other words, under the Court of Appeals' reasoning, any electric customer that wants to avoid this Court's *Great Wolf Lodge* holding need only ask the competing municipal utility to file suit rather than the customer. That result, set forth in a published opinion, renders *Great Wolf Lodge* a nullity and will sow confusion among utilities, their customers, and the lower courts.

The Court of Appeals' decision is also clearly erroneous and will cause material injustice. MCR 7.302(B)(5). Consumers Energy's Rule 411(11) "right" to continue serving its customer has been completely nullified, as has its right of first refusal under MCL 124.3(2). And the decision adversely affects Consumers Energy's many millions of Michigan rate payers, who have been deprived of their investment in the electric facilities that connected the property.

For all these reasons, and those explained in more detail below, Consumers Energy respectfully requests that the Court grant this application and reverse the Court of Appeals. Alternatively, Consumers Energy asks this Court to summarily reverse and direct that judgment be entered in Consumers Energy's favor as a matter of law.

## **STATEMENT OF FACTS**

### **The parties and the action**

The City of Holland, acting by and through its Holland Board of Public Works, filed a declaratory-judgment action against Consumers Energy, on March 20, 2012, in Ottawa County Circuit Court. In the suit, Holland sought a declaratory judgment finding the City to be authorized to provide electric service to the Riley Street property, in Ottawa County's Park Township outside of the City's boundaries. Both Consumers Energy and the Holland Board of Public Works have franchises in Park Township. Benjamin's Hope is a non-profit corporation that is building a multi-unit facility in Park Township, outside of the City limits, to provide residential housing and other accommodations for children with autism.

### **History of electric supply to 15468 Riley Street**

Consumers Energy first installed electric facilities in 1939 along Riley Street in Park Township to serve the property at issue here. (Consumers Energy 3/29/12 Req to Pub Serv Comm'n for Declaratory Ruling ¶ 4 ("Request for Dec Ruling"), attached as Ex B.) Between 2004 and 2008, Consumers Energy provided electric service to at least three separate entities under different account numbers at the property. (*Id.*) On March 3, 2008, Consumers Energy removed its energized facilities at the address. (*Id.*) Shortly thereafter, the existing house and accessory buildings were removed. (*Id.*) In 2011, after the premises were deeded to Benjamin's Hope, its contractor, CL Construction, requested that Consumers Energy resume electric service

to the property, so Consumers began providing electric service to a construction trailer on the premises on September 6, 2011. (*Id.* ¶ 5.) As instructed, Consumers Energy placed the service in the name of Benjamin's Hope and mailed the monthly electric bills to Benjamin's Hope at its office address of 895 Ottawa Beach Road, Holland, Michigan 49424. (*Id.*; 3/28/13 Op & Order at 3, attached as Ex E.) From September 6, 2011 through April 13, 2012, Consumers Energy read the meter and sent monthly bills to Benjamin's Hope. (5/9/12 Aff of Holland Bd of Pub Works Gen Manager David G. Koster ¶ 13, attached as Ex C.)

Despite the fact that Benjamin's Hope was a current customer of Consumers Energy, sometime in January 2012, Holland contacted Benjamin's Hope and offered to provide electric service to the Riley Street property. (*Id.*) Holland's offer appeared to provide Benjamin's Hope a financial advantage over its relationship with Consumers Energy. (*Id.* ¶ 8.) Benjamin's Hope and Holland entered into a contract on January 25, 2012 for the City to provide electric service to the facilities at the Riley Street property. (*Id.* ¶ 6.) It is undisputed that Consumers Energy never consented to this change in service.

On April 13, 2012, CL Construction removed its trailer from the property and requested that Consumers Energy terminate its service. (*Id.* ¶ 13.) Ten days later, Consumers Energy removed its service drop and pulled its meter. (*Id.* ¶ 14.) Seven days later, on April 30, 2012, Holland began providing electric service to the property through a meter located on one of the six residential units under construction for Benjamin's Hope on the site. (*Id.* ¶ 16.)

## **Trial court and MPSC proceedings**

In March 2012, after Holland had signed a contract with Benjamin's Hope but before it had started providing electric service to the Riley Street property, the City brought this action. Holland sought a declaratory judgment because Consumers Energy long had been providing electricity to the property. Switching utility providers posed a legal problem for two reasons. According to Michigan Public Service Commission Rule 411, the "first utility serving a customer . . . 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." And under MCL 124.3, 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." Consumers Energy obviously did not consent.

Nine days after Holland filed its declaratory action, Consumers Energy filed a request for a declaratory ruling at the Public Service Commission, asking the Commission to apply Rule 411 and to determine that Consumers Energy, not Holland, had the exclusive right to provide electric service to Benjamin's Hope, and to also determine that Benjamin's Hope could not seek electric service from any utility other than Consumers Energy.

At about the same time, the parties filed cross-motions for summary disposition in the Ottawa County Circuit Court. On June 13, 2012, the circuit court issued an opinion holding both parties' motions in abeyance. (6/13/12 Op.) The court determined that the Public Service Commission should first decide the issues presented. The circuit court acknowledged that the interpretation of MCL 124.3(2) was a matter for it to decide, but it chose to wait until after the Commission's decision. The court also indicated that if the Commission determined that Consumers Energy had a right of first entitlement under Rule 411, Benjamin's Hope would be unable to purchase power from Holland. (6/13/12 Op at 5.)

On July 5, 2012, Holland filed a Motion for Reconsideration. And on August 3, 2012, the circuit court issued an opinion in which it granted in part and denied in part Holland's Motion. The circuit court reaffirmed its earlier decision to hold the parties' summary disposition motions in abeyance pending the outcome of the Public Service Commission proceeding. But the court revoked that portion of its opinion that said it would follow the Commission's ruling if the Commission determined that Consumers Energy had a right of first entitlement. The court left open the question whether it was bound to follow the Commission's decision.

On December 6, 2012, the Commission issued an order declining to issue a declaratory ruling regarding Rule 411's application. The Commission expressed full confidence that the circuit court could decide both of the issues presented in light of "controlling law [that] has been set forth by the Michigan Supreme Court" in *Great Wolf Lodge*. (Dec 6, 2012 Pub Serv Comm'n Order at 4, attached as Ex D.)

On March 28, 2013, the circuit court issued its final Opinion and Order in this case, granting Holland's Motion for Summary Disposition and denying Consumers Energy's Motion for Summary Disposition. Consumers Energy timely appealed.

### **Court of Appeals' proceedings**

The Court of Appeals consolidated this case with a separate Consumers Energy appeal involving the City of Coldwater, COA Case No 320181. See Consolidation Order.<sup>1</sup> The Court of Appeals held that neither Public Service Commission Rule 411 nor MCL 124.3(2) was applicable in these circumstances, so the City of Holland could poach Consumers Energy's customer without reproach.

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<sup>1</sup> This application for leave involves only the City of Holland case.

With respect to Rule 411(11), the Court of Appeals acknowledged that the Rule gives a first-serving utility like Consumers Energy the right “to serve the entire electric load on the premises of th[e] customer.” *City of Holland*, slip op at 6 (quoting Rule 411(11)). But rather than upholding Consumers Energy’s right, the Court of Appeals said there was no ground to enforce it against the City of Holland because the Public Service Commission lacks jurisdiction over municipal utilities. *Id.* at 6–7 (citing MCL 460.6).

The Court of Appeals then distinguished this Court’s decision in *Great Wolf Lodge* on four grounds: (1) that the customer in *Great Wolf Lodge* had entered into an electric-services contract, whereas Benjamin’s Hope had no contract with Consumers Energy; (2) *Great Wolf Lodge* was an appeal from a Public Service Commission decision, so appellate review was deferential, whereas in this case it is not; (3) *Great Wolf Lodge* noted the policy behind Rule 411—avoiding the unnecessary duplication of electric facilities—whereas here there would be no unnecessary duplication; and (4) the plaintiff in *Great Wolf Lodge* was the customer, and here it is the competing municipal utility. *Id.* at 7–8. Judge Shapiro, concurring, suggested that this Court might have to “take appropriate action,” if the panel’s interpretation was inconsistent with *Great Wolf Lodge*. Slip op concurrence at 2.

The Court of Appeals also rejected Consumers Energy’s reliance on MCL 124.3(2), which says that a municipal utility shall not provide electric service outside its corporate limits (as is the case here) to a customer “already receiving” service from another utility unless the other utility consents in writing. The court said that the phrase “already receiving” means the other utility must be *presently* delivering electric service. Because of the brief (17-day) break in service here, Holland did not need to seek Consumers Energy’s consent.

## STANDARD OF REVIEW

This Court reviews de novo a grant of summary disposition. *Malpass v Dep't of Treasury*, 494 Mich 237, 245; 833 NW2d 272 (2013). The Court also reviews questions of statutory interpretation de novo. *Rambin v Allstate Ins Co*, 495 Mich 316, 325; 852 NW2d 34 (2014).

## ARGUMENT

- I. **The Court should grant leave and hold that *Great Wolf Lodge* applies to a proposed change in electric service regardless of the identity of the plaintiff seeking a declaratory judgment.**
  - A. **This Court in *Great Wolf Lodge* correctly held that a first-serving electric utility has a “right” to continue providing electric service to a customer’s parcel.**

The Court of Appeals gave dispositive weight to the fact that the dispute here “is between a public utility and municipal utility,” rather than between a public utility and its customer. *City of Holland*, slip op at 8. That holding was erroneous and for all practical purposes overrules *Great Wolf Lodge*.

In *Great Wolf Lodge*, the first-serving electric utility, Cherryland Electric, had provided electricity to the subject property since the 1940s. 489 Mich at 32. Beginning in 2001, when the last farming tenant left the parcel, the parcel owner, Great Wolf Lodge, continued to pay “a minimum monthly bill” to keep open the option of having service provided, but Cherryland did not actually provide any electricity. *Id.*

When the Lodge began planning to build a water park, it solicited bids for electric service from three different utilities. *Id.* Traverse City Light & Power (“TCLP”), a municipal utility, submitted the winning bid. The Lodge asked Cherryland to remove its service line so demolition could proceed, but Cherryland said it would do so only on condition that it would continue to be the parcel’s electric provider. The Lodge agreed and the parties entered into a three-year contract for Cherryland to provide electric service. *Id.* at 32–33.

Later, after a rate dispute, Great Wolf Lodge filed a complaint with the Public Service Commission seeking authority to seek electric service from a different utility, such as TCLP. *Id.* at 34. The Commission rejected that request, the trial court affirmed, and the Court of Appeals reversed. *Id.* at 35. The Court of Appeals held that the Public Service Commission’s Rule 411 defined “customer” as the “buildings and facilities served” by an electric provider. *Id.* at 36. It remanded the case so the Commission could determine whether Cherryland was providing electric service to an existing building at the time Great Wolf Lodge acquired the property. *Id.* at 37. This Court granted leave to appeal and reversed the Court of Appeals.

The Court began with Rule 411’s core purpose: “to avoid unnecessary and costly duplication of facilities and to provide objective standards for extension of electric service.” 489 Mich at 38 (quotation omitted). The Court then turned to the meaning of the word “customer” and confirmed that it meant “the buildings and facilities served rather than the individual, association, partnership, or corporation served.” *Id.* at 39 (quoting Rule 411(1)(a)). Reading that definition of “customer” in the context of Rule 411, this Court reached three conclusions:

1. “Rule 411(1) grants the utility first serving buildings or facilities on an undivided piece of real property the right to serve the entire electric load on that property.” *Id.* at 39.
2. “The right attaches at the moment the first utility serves ‘a customer’ and applies to the entire ‘premises’ on which those buildings and facilities sit.” *Id.*

3. “The later destruction of all buildings on the property . . . does not extinguish or otherwise limit the right.” *Id.*

In other words, “nothing in Rule 411 or elsewhere in the PSC rules indicates that this right of first entitlement terminates if the initial customer, the initial ‘buildings and facilities served,’ changes.” *Id.* at 40. It was “undisputed that Cherryland was the first utility to provide electric service to buildings and facilities” on the subject parcel. 489 Mich at 41. As a result, Cherryland had “the right to serve the entire electric load on the premises,” a right “unaffected by subsequent changes in the ‘customer.’” *Id.*

Significantly, the Court held it “irrelevant” that TCLP, the competing utility, was “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.” *Id.* at 41–42. A customer “may not circumvent the limitation of Rule 411(11) by attempting to receive service from a municipal corporation not subject to PSC regulation.” *Id.* at 42. Any other approach “leaves the utility’s right of first entitlement undefined, wholly outside the control of the utility and the PSC, and subject to unilateral abrogation by property owners.” *Id.* at 40 n 22.

Although this case arises under an admittedly different factual scenario—it is the municipal utility that filed suit rather than the customer—this Court should grant leave and extend its *Great Wolf Lodge* reasoning to this case. Any other result would similarly leave the regulated utility’s right of first entitlement “subject to unilateral abrogation by property owners.” *Id.*

As an initial matter, it is equally undisputed here that Consumers Energy has provided electric service to the subject parcel since 1939. The fact that owners have changed and buildings have been torn down and constructed does not alter the fact that Rule 411(11) gives Consumers Energy the “right” to keep providing electric service to the subject parcel.

Now consider the four bases the Court of Appeals used to distinguish *Great Wolf Lodge*. First, it makes no difference that the parcel’s current owner “did not enter into a contract with Consumers” Energy. Slip op 7. Rule 411’s right of first entitlement is based on which utility *served* the subject parcel. Every owner that purchases a parcel can say that it did not have a contract with the first-serving utility.

Second, it makes no difference that *Great Wolf Lodge* was an appeal from a Public Service Commission decision. This Court did not couch its opinion in *Great Wolf Lodge* as one dependent on deference to the Commission’s decision. Quite the contrary, this Court’s opinion was a definitive, plain-text interpretation of Rule 411(11).

Third, it makes no difference that Rule 411(11)’s purpose may not need to be vindicated here because Holland already had utility lines that served the subject parcel’s street. Rule 411(11) has no “other available utilities” exception; yet the Court of Appeals interpreted the Rule as though it did.

In addition, serving the “street” and serving the “parcel” are two different things. It is undisputed that Holland’s nearest electric facilities were approximately 1,000 feet away from the Riley Street property. (Koster Aff ¶ 6.) So the cost for the City of Holland to *extend* its facilities to the parcel was \$65,050. *Id.* ¶ 17. And that result is precisely what Rule 411(11) was supposed to prevent by giving Consumers Energy the “right” to keep serving the parcel. Under the Court of Appeals’ ruling, Holland’s electric customers have to pay for costs that never should have been incurred. And Consumers Energy—which as the server of last resort had a legal obligation to serve the property—invested resources to provide electricity to the parcel in the first instance. So the Court of Appeals’ ruling deprives Consumers Energy’s millions of Michigan customers of their investment in the electric facilities that served the property.

Finally, it cannot possibly be outcome determinative that the *Great Wolf Lodge* case was filed by the customer and this case was filed by the poaching municipal utility. If that procedural difference is all that is required to circumvent this Court's holding in *Great Wolf Lodge*, then *Great Wolf Lodge* has been rendered a nullity. A first-serving utility's "right" to continue providing electricity is meaningless if it can be circumvented so easily—the very same problem that this Court addressed by issuing the *Great Wolf Lodge* opinion.

In sum, by relying on legally irrelevant factual and procedural differences, the Court of Appeals created a road map for doing exactly that which *Great Wolf Lodge* is supposed to prevent: the poaching of a regulated utility customer by an unregulated municipal utility. The Court should grant leave and reverse a Court of Appeals interpretation that says a regulated utility's first-service "right" is dependent on whether the customer and poaching municipal utility are smart enough to style their pleadings in the right way.

**B. The Court of Appeals' decision undermines Rule 411's purpose.**

As noted above, Rule 411's entire reason for being is to prevent the unnecessary duplication of existing electric distribution facilities. In fact, Rule 411(14) specifically states that "a utility shall not extend service to a new customer in a manner that will duplicate the existing electric distribution facilities of another utility, except where both utilities are within 300 feet of the prospective customer." Mich Admin Code, R 460.3411(14). Yet such duplication is exactly what has happened here and will happen again in the future under the Court of Appeals' published ruling.

Consumers Energy has supplied the Riley Street property's electric power needs since 1939. Unless this Court acts, the City of Holland will now service the property instead. As noted above, it is undisputed that Holland's nearest electric facilities were approximately 1,000 feet away from the Riley Street Property—more than three times the distance threshold that Rule

411(14) establishes. (Koster Aff ¶ 6.) So who bears the \$65,050 cost to extend Holland's facilities? (*Id.* ¶ 17.) First, Holland rate payers must pay, even though they had no say in whether the City should even extend services to this property outside the City's corporate limits. And second, Consumers Energy rate payers have already paid in building the infrastructure so Consumers Energy could serve this parcel in the first place. Losing that investment is particularly onerous, as Consumers Energy was legally obligated to serve the parcel as a regulated utility of last resort.

Consumers Energy agrees with the Court of Appeals that the Public Service Commission does not have jurisdiction over the City of Holland because the City is a municipal utility that has not opted in to regulation. But that fact is irrelevant to whether *Consumers Energy* has the right to exclude other electric providers by virtue of the fact that it is a first-servicer. By focusing only on the City of Holland and its utility service, the Court of Appeals deprived Consumers Energy of its acknowledged right. And in doing so, the Court of Appeals created the very environment Rule 411 is supposed to prevent: the flourishing of duplicative electric facilities, funded at the expense of all Michigan rate payers. This result counsels strongly in favor of this Court's grant of the application.

**II. This Court should also grant Consumers Energy's application because the Court of Appeals' published opinion also nullifies MCL 124.3.**

The Court of Appeals' published decision also renders nugatory MCL 124.3, a statute that the Legislature enacted to prevent the kind of utility poaching that took place here. In its entirety, MCL 124.3(2) states:

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. [Emphasis added.]

The Court of Appeals focused on the phrase “already receiving,” noted that grammatically the phrase “is in the present tense,” and concluded that to have the right of first refusal, Consumers Energy was required to be presently delivering service to a customer, which the Court of Appeals held was a facility or structure, not the property owner. Because Consumers Energy—at the property owner’s instruction—shut off service from one building on the subject property, MCL 124.3(2) was no obstacle to Holland providing its own electric service to the same property (different building) 17 days later.

This interpretation does not represent “the manifest intent of the Legislature.” *Omne Fin, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999). Otherwise, one must assume that the Legislature intended a utility’s right of first refusal to be rendered inoperable (1) whenever there is the slightest interruption in service (even a break of five minutes would do), or (2) electricity was originally supplied to one building, and the property owner then tore down that building and replaced it with a new one. The Legislature’s desire to eliminate unnecessary cost in the form of duplicative electric utilities—the exact reasoning underlying this Court’s decision in *Great Wolf Lodge*—applies equally here.

The Court of Appeals’ opinion also ignores other pertinent language in the statutory definition of “customer.” MCL 460.10y(2) defines “customer” to include not only a “building” served by an electric provider, but also “facilities” so served. To give the term “facilities” purpose, it must mean something more than simply a “building.” And the dictionary supports that notion. Facility is defined as “something such as a *place*, building, or equipment used for a particular purpose or activity.” *Cambridge Academic Content Dictionary* (2d ed), p 330. It is also defined as an “establishment,” *The Concise Oxford Dictionary of Current English* (1st ed), p 419, or “something . . . established to serve a particular purpose,” *Merriam Webster’s*

*Collegiate Dictionary* (10th ed), p 415. See also *The Compact Oxford English Dictionary* (2d ed), p 560 (“the physical means . . . for doing something . . . ; . . . [an] establishment that provides” “a service or feature of a specified kind”). The Court of Appeals cited the *The American Heritage Dictionary* (4th ed)’s definition as “something created to serve a particular function.” Slip op at 5.

Thus, for the purposes of MCL 124.3(2), the whole of the Riley Street property was a “facility,” as this was the *place* established by Benjamin’s Hope to provide its services. To put it another way, the property was Benjamin Hope’s establishment, operated with the goal of providing the organization’s services. The “CL Construction trailer” was decidedly *not* the facility. Contra Slip op at 5. And it is undisputed that Consumers Energy was serving the parcel beginning in 1939 and through April 2012.

In sum, what occurred here was fundamentally contrary to MCL 124.3’s language and purpose: Holland pursued a current customer of Consumers Energy, contrary to the statute, and then began rendering electric service to that customer. MCL 124.3(2) prohibits a public utility from engaging in that very action. If MCL 124.3(2) does not bar that kind of poaching here, then it may as well not exist at all. This Court should separately grant the application to correct the Court of Appeals’ erroneous (and now binding) reading of MCL 124.3.

## CONCLUSION AND REQUESTED RELIEF

The issue of when a municipal utility may poach a regulated utility's customers has substantial jurisprudential significance and wide-ranging ramifications. This Court's immediate intervention is necessary to (1) clarify that *Great Wolf Lodge* applies regardless of whether a customer or a municipal utility files suit to oust a first-serving regulated utility, and (2) affirm that MCL 124.3 means exactly what it says: a municipal utility cannot poach a regulated utility's customer, outside the municipal limits, unless the regulated utility consents in writing.

Consumers Energy respectfully requests that this Court grant leave to appeal and reverse, or, alternatively, reverse summarily.

Respectfully submitted,

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WARNER NORCROSS & JUDD LLP

By /s/ John J. Bursch

John J. Bursch (P57679)  
Conor B. Dugan (P66901)  
900 Fifth Third Center  
111 Lyon Street, N.W.  
Grand Rapids, Michigan 49503-2487  
616.752.2000

Attorneys for Defendant-Appellant

12126065