

STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
MARKEY, P.J., AND SAAD AND WILDER, JJ.

Attorney General Michael A. Cox,
Appellant,

Supreme Court No. 134667

v

Michigan Public Service Commission, The Detroit
Edison Company, and Constellation NewEnergy, Inc.,
Appellees.

Court of Appeals No. 259845

MPSC No. U-13808

ATTORNEY GENERAL MICHAEL A. COX,

Supreme Court No. 136431

Appellant,

Court of Appeals No. 261747

v

MICHIGAN PUBLIC SERVICE COMMISSION and
CONSUMERS ENERGY COMPANY

Michigan Public Service Commission
Case No. U-13917

Appellees.

Attorney General's Reply Brief in Response to the MPSC

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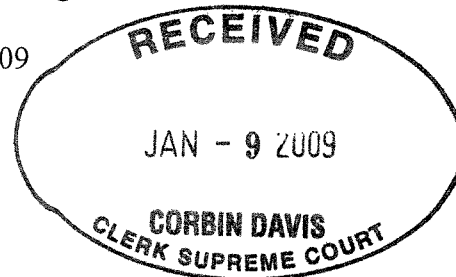


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INTRODUCTION

In Case Nos. SC 134667 and SC 136431, the Court granted leave to appeal regarding the transmission cost issue raised by the Attorney General and consolidated the cases for argument and decision. The Attorney General filed separate briefs addressing each case. The Detroit Edison Company (DECo) filed an Appellee's Brief in SC 134667. Consumers Energy Company (CECo) filed an Appellee's Brief in SC 136431. The Michigan Public Service Commission (MPSC or the Commission) filed a single brief for both cases. This reply brief responds to the MPSC's brief. Some record references in this brief will be for the Attorney General's Appendix in SC 134667 and some for SC 136431.

THE MPSC PRESENTS AN OVERLY-DEFERENTIAL, ONE-SIDED STANDARD OF REVIEW

Legal questions decided by the MPSC or any other administrative agency are subject to de novo judicial review, and questions concerning an agency's interpretation of statutes are legal questions.¹

Pages 1-2 in the MPSC's brief do not directly acknowledge the de novo review standard. Instead, the MPSC's brief discusses only aspects of de novo review tending to support whatever decision the MPSC makes regarding any legal question without balancing the favorable standards with consideration of other relevant standards related to de novo review.

The Commission's brief argues (1) that its decisions in the underlying administrative cases are entitled to respectful consideration, (2) that the words used in MCL 460.6j(1)(a) can be fairly characterized as unclear or obscure so the Commission's interpretation is particularly

¹ *Cardinal Mooney High School v MHSAA*, 437 Mich 75, 80; 467 NW2d 21 (1991), *Oakland County v Bd of Rd Comm'rs v Michigan Dept of Social Svcs*, 456 Mich 144, 149; 566 NW2d 616 (1997), *Consumers Power Co v PSC*, 460 Mich 148, 157; 596 NW2d 126 (1999), *In re MCI Telecommunications Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999), and *Lansing Mayor v PSC*, 470 Mich 154, 157; 680 NW2d 840 (2004).

helpful, (3) that the Commission's interpretation should not be overruled without cogent reasons, and (4) that the Attorney General has presented no cogent reasons for overruling the Commission's orders. Standing alone the Commission's arguments ignore the ultimate and exclusive role of Michigan courts in interpreting statutes, ignore other applicable standards of review, and present a biased view favoring the MPSC.

Literally, the concept of de novo review means a matter in dispute is to be considered "anew," "afresh," and "over again."² It is emphatically the province and duty of the courts to say what the law is.³ Courts must give effect to the Legislature's intent when statutory language is unambiguous, and an unambiguous statute must be enforced as written.⁴ Courts must not abandon or delegate their responsibility to interpret legislative intent.⁵ Administrative interpretations of a statute must be rejected if not in accord with the intent of the Legislature.⁶ By definition de novo review should preclude granting deference to a lower tribunal's interpretation of a statute.⁷ Courts must not give an administrative agency's interpretation of a statute "great weight,"⁸ must not afford an agency's interpretation "deference,"⁹ and must not adopt an agency's interpretation simply because it is "plausible or reasonable."¹⁰

² *Department of Civil Rights ex rel Johnson v Silver Dollar Cafe*, 441 Mich 110, 116; 490 NW2d 337 (1992).

³ *Marbury v Madison*, 5 US 137,177-178; 2 L Ed 60 (1803). *Accord, In re Del Rio*, 400 Mich 665, 726; 256 NW2d 727 (1977).

⁴ *Lansing Mayor v PSC*, 470 Mich at 157.

⁵ *General Motors Corp v Erves*, 395 Mich 604, 620-621; 236 NW2d 431 (1975). *Accord, Miller Brothers v PSC*, 180 Mich App 227, 232; 446 NW2d 640 (1989).

⁶ *Howard Pore, Inc v State Comm'r of Revenue*, 322 Mich 49, 66; 33 NW2d 657 (1948).

⁷ *S Abraham & Sons, Inc v Dept of Treasury*, 260 Mich App 1, 20, n 8; 677 NW2d 31 (2003). *Accord, In re Complaint of Rovas, supra*, at 106-107.

⁸ *In re Complaint of Rovas*, 482 Mich 90, 105; 754 NW2d 259 (2008).

⁹ *Id.* at 106-108.

¹⁰ *Id.* at 102 & 107.

Plain language of a statute controls over an administrative agency's interpretation of the statute,¹¹ but in giving effect to the de novo standard of judicial review discussed above the Supreme Court should balance various standard for judicial review and should resist the temptation offered by the MPSC's brief to give talismanic or magical power to incantations such as "respectful consideration," "particular helpfulness," or "cogent reasons" in determining how a statute is interpreted. Yielding to this temptation will simply substitute a new phrase or phrases for deferential review standards adopted by the Court of Appeals in this case (See, SC 134667 Attorney General's Appendix, pp 49a-50a & SC 136431 Attorney General's Appendix, p 10a). The judicial role is to say what the law is.¹² Standing alone, judicial review concepts that the Court discussed in 1935¹³ (whether labeled deference, respectful consideration, or something else), can quickly become the basis for effectively abandoning de novo review, delegating judicial responsibility for determining the meaning of statutes, and yielding to statutory interpretations adopted by the MPSC because the MPSC adopted them. Even though the meaning of "respectful consideration" may give less weight to an administrative agency's statutory interpretation than the term "deference,"¹⁴ this can evolve into little more than doublespeak, which juxtaposes de novo review alongside of "respectful consideration" instead of alongside of "deference." This is how the MPSC's brief argues.

The MPSC's brief urges the Court to conclude that the Attorney General has presented no cogent reasons for overruling the Commission's interpretation. The language in MCL 460.6j(1)(a), applicable rules of law regarding the limited nature of the MPSC's powers, and applicable rules of law regarding statutory interpretation create cogent reasons for overruling the

¹¹ *Id.* at 121. See, *Consumers Power Co v PSC*, 460 Mich at 157, n 8.

¹² *Marbury v Madison*, *supra*.

¹³ *Boyer-Campbell v Fry*, 271 Mich 282, 296-297; 260 NW 165 (1935).

¹⁴ *In re Complaint of Rovas*, *supra*, at 104, n 38

MPSC. If the Court concludes that those factors do not present cogent reasons for overruling the MPSC, then the Court should forthrightly overrule prior opinions that have consistently limited the scope of the MPSC's powers and have adopted applicable rules for construing statutes.

THE MPSC HAS LIMITED POWERS.

The MPSC's brief (p 3) describes the general power supply cost recovery (PSCR) process. The PSCR process is optional. MCL 460.6j(2). If a utility applies for approval of a PSCR clause and if the Commission approves a clause, then the utility will recover costs via base rates and costs identified in MCL 460.6j(1)(a) via the PSCR process. The MPSC argues for broader cost authority under MCL 460.6j(1)(a) by ignoring many Supreme Court opinions that have repeatedly ruled the MPSC is an administrative agency having limited powers that must be found in affirmative, clear, and unmistakable statutory language. The MPSC's brief does not cite or distinguish any of the Supreme Court's major decisions from 1914 through 1999 regarding its limited powers.¹⁵

The Court of Appeals opinions in both of the underlying cases conflict with the Supreme Court's unswerving rulings that the MPSC is an administrative agency that has limited powers. Those opinions conclude that neither the statute nor any accounting rule prohibits a change to a PSCR clause (SC 134667 Attorney General's Appendix, pp 51a-52a & SC 136431 Attorney General's Appendix, p 11a). In contrast to the Court of Appeals' conclusions, the Supreme Court has issued decisions rejecting attempts to expand or extend powers created by various statutes beyond those clearly stated in the statute.

In 1936, even though the Michigan Public Utilities Commission (PUC) found rates charged were too high and even though the PUC had statutory power to reduce rates

¹⁵ Most of those cases were previously cited in footnote 42 of the Attorney General's brief for SC 134667 and in footnote 15 in the Attorney General's brief for SC 136431.

prospectively, the Supreme Court held that the PUC lacked the power to grant damages resulting from excessive rate charges.¹⁶ That opinion followed rulings in earlier opinions.

In an appeal decided in 1958, Huron Portland Cement Company filed a complaint and requested the MPSC to force Consumers Power Company to provide service to Huron Portland Cement even though it was located in the service territory of another utility. The MPSC ruled it lacked the power to grant the complaint because Consumers Power did not apply for a certificate of public convenience and necessity. The Supreme Court affirmed and ruled that the statute that allows utilities to request permission to serve customers in another utility's service territory could not be extended to empower the MPSC to grant the complaint filed by Huron Portland Cement Company.¹⁷

In 1988, the Supreme Court again confirmed that the MPSC possesses no common law power and possesses only that authority bestowed upon it by statute.¹⁸ Thus, a determination of the Commission's powers requires an examination of the various statutory enactments pertaining to its authority. In addition, the Court ruled that the power and authority to be exercised by boards or commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist.¹⁹ In *Union Carbide*, the Supreme Court reversed a Court of Appeals' ruling that the Commission had implicit ratemaking power to order Consumers Power to terminate an unreasonably high-priced fuel oil contract even though the Court affirmed that the Commission had ratemaking power to disallow recovery of costs resulting from the contract.

¹⁶ *Sparta Foundry Co v Michigan Public Utilities Comm'n*, 275 Mich 562, 564; 267 NW 736 (1936).

¹⁷ *Huron Portland Cement Co v PSC*, 351 Mich 255, 262; 88 NW2d 492 (1958).

¹⁸ *Union Carbide Corp v MPSC*, 431 Mich 135, 146; 428 NW2d 322 (1988).

¹⁹ *Id.* at 151

In 1999, the Supreme Court ruled that the Public Service Commission Act, the Electric Transmission Act, the Railroad Commission Act, and 1929 PA 69 did not empower the MPSC to force electric utilities to provide a “retail wheeling” program. The MPSC had ruled that it had the power to require electric utilities to transport over their electric lines electricity generated by a third party, but the Court ruled that the MPSC lacked clear and unmistakable statutory authority to order a utility to transmit electricity through its system when the electricity is generated by a third party provider.²⁰

Turning back to Court of Appeals precedent, in reaching its conclusion that the MPSC had implied ratemaking power to order Consumers Power to terminate its fuel contract with Union Carbide Corporation, the Court of Appeals²¹ cited and relied upon two earlier Court of Appeals opinions.²² The Supreme Court reversed the Court of Appeals and concluded that the power to set rates does not necessarily imply other powers.²³ In other words, the Court of Appeals' opinion in *Union Carbide*, pre-1988 opinions issued by the Court of Appeals, and subsequent Court of Appeals opinions conflict with the Supreme Court's opinions. The MPSC's power to include costs in the PSCR process must be determined by reference to MCL 460.6j(1)(a).

THE TEXT OF MCL 460.6J DOES NOT SUPPORT THE MPSC'S INTERPRETATION OF THAT STATUTE AND CONFLICTS WITH ITS OWN PROMULGATED RULES

Pages 10-24 in the MPSC's brief review provisions in MCL 460.6j. The Commission argues (Brief, pp 11-14) that it relied on its own expertise to interpret the technical and obscure language in MCL 460.6j. What this argument really claims is that the MPSC knows best what

²⁰ *Consumers Power Co v PSC*, 460 Mich at 157, n 8.

²¹ *Union Carbide Corp v PSC*, 153 Mich App 217, 230-231; 395 NW 2d 292 (1986).

²² Those cases are *Attorney General v PSC*, 122 Mich App 777, 787; 333 NW2d 131 (1983), and *Attorney General v PSC #1*, 133 Mich App 719, 725-726; 349 NW2d 539 (1984).

²³ *Union Carbide Corp v PSC*, 431 Mich at 148-149.

the statute means. But plain meaning in a statute prevails over the MPSC's interpretation.²⁴ An administrative agency's decision is not authorized by law when it is based on an erroneous interpretation or application of the law,²⁵ and an agency's interpretation should be viewed as an erroneous interpretation or application of the law when the agency's interpretation fails to follow applicable rules of statutory construction.²⁶

The MPSC's orders and brief (pp 12-14) rely upon the Commission's earlier interpretations of the statute, but the Commission's power must be found in statutory language, not in its own acts and assumption of authority.²⁷ The cardinal rule of statutory interpretation and a court's foremost duty are to discern and give effect to the Legislature's intent.²⁸ All other rules of construction are subservient to this principle.²⁹ Statutory analysis must begin with the wording of a statute.³⁰ When statutory language is unambiguous, courts presume that the Legislature intended the meaning clearly expressed, and no further judicial construction is required or permitted. Only where the statutory language is ambiguous may courts or the MPSC look outside the statute to ascertain the Legislature's intent.³¹ Ambiguity does not arise simply because reasonable minds could or do differ regarding the meaning of a statute.³² Unless defined in a statute, plain and ordinary meaning must be ascribed to every word or phrase of a statute.³³

²⁴ *Consumer Power Co v PSC*, 460 Mich at 157, n 8.

²⁵ *In re Complaint of Pelland*, 254 Mich App 675, 681; 658 NW2d 849 (2003).

²⁶ *Consumers Energy Co v PSC*, 255 Mich App 496, 503-504; 660 NW2d 785 (2002).

²⁷ *Sittler v MCMT Bd of Control*, 338 Mich 681, 686-687; 53 NW2d 681 (1952), and *Roxborough v Mich Unemployment Comp Comm'n*, 309 Mich 505, 510; 15 NW2d 724 (1944).

²⁸ *Murphy v Michigan Bell Telephone Co*, 447 Mich 93, 98; 523 NW2d 310 (1994), and *Burba v Burba (after remand)*, 461 Mich 637, 647; 610 NW2d 873 (2000).

²⁹ *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 584; 624 NW2d 180 (2001).

³⁰ *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000).

³¹ *DiBenedetto v West Shore Hospital*, 461 Mich 394, 402; 605 NW2d 300 (2000), and *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999).

³² *Lansing Mayor v PSC*, 470 Mich 154.

³³ *Robertson v Daimler Chrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002).

Conclusions having no basis in the plain language of a statute cannot be engrafted into a statute by interpretation.³⁴ Words expressed in a statute are the law, and unexpressed motivations or intentions of legislators are not the law.³⁵

The Commission's brief (p 15) claims MCL 460.6j(2) grants the Commission broad authority to administer MCL 460.6j. That subsection grants the Commission discretion to approve or reject a PSCR clause, but cannot nullify the existence of the definition found in MCL 460.6j(1)(a). Courts must avoid an interpretation that would render any part of the statute surplusage or nugatory.³⁶ MCL 460.6j(1)(a) limits the scope of PSCR clauses to recovery of booked costs of fuel burned and booked costs of purchased and net interchanged (PNI) power transactions. In addition, Account 555 in the MPSC's promulgated accounting rules limits recovery of transmission costs to costs of purchased power at the point of receipt.³⁷

In conclusion, MCL 460.6j(1)(a) only authorizes costs related to PNI power transactions at the utility's point of receipt. CECo's and DECo's applications and witnesses admitted that the disputed transmission costs in these cases relate to transmission services not historically recovered via base rate.

³⁴ *Jones v Dept of Corrections*, 468 Mich 646, 655-656; 664 NW2d 717 (2003).

³⁵ *Maier v General Telephone Co*, 466 Mich 879; 645 NW2d 254 (2002) (concurring opinion by Corrigan, C.J.).

³⁶ *State Farm Fire & Casualty, Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002), and *Koontz v Ameritech Services, Inc*, 466 Mich 304; 645 NW2d 34 (2002).

³⁷ The MPSC's promulgated accounting rules are identified in the Uniform System of Accounts for Major and Nonmajor Electric Utilities (USOA), 1986 AACRS, R460.9001. The text of the USOA can be found at the following website: http://www.state.mi.us/orr/emi/admincode.asp?AdminCode=Single&Admin_Num=46009001&Dpt=CI&RngHigh= The text of the rules for Accounts 555 and 565 are also quoted in relevant part on page 28 in the Attorney General's brief on appeal in SC 134667 & page 18 in SC 136431.

THE MPSC'S PRIOR ORDERS REST UPON ITS CONCLUSION THAT TRANSMISSION SERVICES ARE A NECESSARY POWER SUPPLY COMPONENT

Pages 13-16 of the MPSC's first transmission order in MPSC Case No. U-12752 rest the decision to add transmission costs to PSCR expenses on conclusions that transmission is a necessary component of power supply and that adding the internal costs to the external transmission costs would be consistent with the previous policy under MCL 460.6j and Account No. 555 (Attachment A to the AG's Brief in SC 134667 and to the AG's Brief in SC 136431).

The MPSC's brief (p 26) argues that its orders do not rest upon policy concerns. That position is belied by the facts that plain statutory language requires recoverable costs to be related to booked costs of PNI power transactions and that disputed costs are not related to PNI power transactions. Thus, the MPSC now takes a position differing from the policy reasoning asserted in its orders (Compare SC 134667 Attorney General's Appendix pp 25a & 30a-32a & SC 136431 Attorney General's Appendix, pp 4a-5a).

In conclusion, disputed costs for transmission of electricity are not a booked cost related to PNI power transactions. Therefore, the MPSC unlawfully added to and included in PSCR factors costs not within the scope of the statutory definition stated in MCL 460.6j(1)(a). The Commission claims there is no Commission accounting rule prohibiting an adjustment to PSCR clauses (Brief, p 33). This is of no import. The Commission's powers must be found in affirmative, clear, and unmistakable statutory language—absence of prohibitions is irrelevant.

RELIEF REQUESTED

The Attorney General is not arguing CECo or DECo unreasonably or imprudently incurred projected or reported transmission costs that must be disallowed. Instead, the Attorney General requests two rulings: (1) the Court should rule the MPSC's addition of non-PNI related transmission costs to PSCR factors and PSCR expense recovery is not statutorily authorized and should remand with instructions to the MPSC to conduct hearings to determine how properly to reallocate recovery of the improperly shifted costs and (2) the Court should order the MPSC to exclude non-PNI related transmission costs from future PSCR expenses.

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