

STATE OF MICHIGAN  
IN THE SUPREME COURT

Appeal From The Michigan Court Of Appeals  
Honorable Markey, P.J., and Saad and Wilder, JJ. Presiding

ATTORNEY GENERAL,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, DETROIT  
EDISON COMPANY, and CONSTELLATION NEWENERGY,  
INC.,

Appellees.

SC: 134 667  
COA: 259845  
MPSC: U-13808

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DETROIT EDISON COMPANY,

Appellee,

v

MICHIGAN PUBLIC SERVICE COMMISSION,  
ASSOCIATION OF BUSINESSES ADVOCATING TARIFF  
EQUITY, MICHIGAN ENVIRONMENTAL COUNCIL,  
PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN, and  
CONSTELLATION NEWENERGY, INC.,

Appellees,

and

ATTORNEY GENERAL,

Appellant.

SC: 134 668  
COA: 264099  
MPSC: U-13808

[Caption Continued On Next Page]

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REPLY OF MICHIGAN PUBLIC SERVICE COMMISSION TO DETROIT EDISON  
COMPANY'S APPELLEE'S BRIEF IN CASE NO. 134671

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Albert Ernst (P24 059)  
Gary P. Gordon (P26290)  
Daniel J. Martin (P67848)  
Attorneys for Michigan Public  
Service Commission  
Dykema Gossett PLLC  
Capitol View  
201 Townsend Street, Suite 900  
Lansing, MI 48933  
(517) 374-910

ATTORNEY GENERAL,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, DETROIT EDISON COMPANY, ENERGY MICHIGAN, INC., CONSTELLATION NEWENERGY, INC., and ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,

Appellees.

SC: 134669  
COA: 264191  
MPSC: U-13808

DETROIT EDISON COMPANY,

Appellee,

v

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY, MICHIGAN ENVIRONMENTAL COUNCIL, PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN, CONSTELLATION NEWENERGY, INC., and ATTORNEY GENERAL,

Appellees,

SC: 134671  
COA: 264099  
MPSC: U-13808

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellant.

DETROIT EDISON COMPANY,

Appellee,

SC: 134673  
COA: 264099  
MPSC: U-13808

v

MICHIGAN PUBLIC SERVICE COMMISSION, ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY, CONSTELLATION NEWENERGY, INC., and ATTORNEY GENERAL,

Appellees,

and

MICHIGAN ENVIRONMENTAL COUNCIL, and PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN,

Appellants.

MICHIGAN ENVIRONMENTAL COUNCIL and PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN,

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION, DETROIT EDISON COMPANY, and CONSTELLATION NEWENERGY, INC.,

Appellees.

SC: 134674  
COA: 264131  
MPSC: U-13808

DETROIT EDISON COMPANY,

Appellee,

v

MICHIGAN PUBLIC SERVICE COMMISSION, MICHIGAN ENVIRONMENTAL COUNCIL, PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN, CONSTELLATION NEWENERGY, INC., and ATTORNEY GENERAL,

Appellees,

and

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,

Appellant.

SC: 134676  
COA: 264099  
MPSC: U-13808

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, DETROIT EDISON COMPANY, ENERGY MICHIGAN, INC., CONSTELLATION NEWENERGY, INC., and ATTORNEY GENERAL,

Appellees.

SC: 134677  
COA: 264156  
MPSC: U-13808

ATTORNEY GENERAL,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION and CONSUMERS ENERGY COMPANY,

Appellees.

SC: 136431  
COA: 261747  
MPSC: U-13917

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**I. The Appellants’ Briefs Demonstrate That, Contrary To The Court Of Appeals’ Opinion, There Was Competent, Material, And Substantial Evidence On The Whole Record To Support Appellant Michigan Public Service Commission’s (“MPSC”) Decision Regarding The Control Premium. Appellee Detroit Edison Company’s (“Edison”) Appellee’s Brief Failed To Undermine This Demonstration. The Court Of Appeals Should Therefore Be Reversed.**

This Court’s order granting leave directed the parties to address “whether the Court of Appeals erred in concluding that the Michigan Public Service Commission’s decision to prohibit recovery of the control premium that DTE Energy paid to acquire MCN Energy by including the premium in Detroit Edison’s rates was not supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, §28; *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90 (July 23, 2008).” (9/19/08 Supreme Court Order, MPSC Appx. 607a). The Commission, and Appellants The Attorney General, ABATE, and MEC/PIRGIM, each submitted briefs that catalogued the voluminous record evidence supporting the Commission’s decision. The record evidence demonstrates that the Court of Appeals erred in concluding that the Commission’s decision was not supported by competent, material, and substantial evidence on the whole record.

Edison’s Appellee’s Brief argues that the Court of Appeals’ reversal of the Commission should be affirmed because:

- (i) although the Commission recited the record evidence supporting its decision it did not sufficiently describe how the evidence supported its decision and, in any event, any attempt by counsel to try and characterize evidence as supporting the Commission’s decision is a mere “post hoc rationalization.” (Edison Brief, pp 14-16, 27-36);
- (ii) Edison’s witness’ testimony “conclusively refuted” all the record evidence to the contrary. (*Id.*, at 15, 22, 28);
- (iii) the Commission “ignored” Edison’s evidence. (*Id.*, at 11-14);

(iv) the Administrative Law Judge (“ALJ”) heard the testimony and reached findings that contradict the Commission’s decision. (*Id.*, at 11-14); and

(v) while the amount of savings was disputed, the Commission erred by not allowing recovery of any amount of the control premium in Edison’s rates. (*Id.*, at 13, 26-27).

Edison’s arguments are unsound.

- A. Edison’s claim that the Commission’s Appellant’s Brief failed to explain how the record evidence recited therein supported the Commission’s decision and further claim that explanations of the evidence by counsel are improper “post hoc rationalizations” represent an unpersuasive effort to obscure the simple fact that voluminous record evidence on its face supports the Commission’s decision.**

The well-settled system of appellate review of Commission decisions limits appellate review to inquiring whether the Commission’s decision is supported by substantial, competent, and material evidence on the whole record. *Associated Truck Lines, Inc v Mich Pub Serv Comm’n*, 377 Mich 259, 279; 140 NW2d 515 (1966). The Appellants’ Briefs demonstrated that the Court of Appeals erred in reversing the Commission’s decision on the control premium by, among other things, noting substantial record evidence in support of the Commission decision. (See, e.g., MPSC Brief, pp 4-9, 15-23).<sup>1</sup> Edison claims that although the Commission excerpted record evidence it did not explain how that evidence supports the decision to not allow recovery of the control premium. (See Edison Brief, p 6). Review of the Commission’s decision and the evidence establishes that Edison’s claim is unsupported.

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<sup>1</sup> It is important to note that Edison, as the appellant in the Court of Appeals, carried the burden of showing a lack of evidence in support of the Commission decision. Thus, the Court of Appeals was required to examine whether Edison demonstrated that the Commission’s decision was not supported by substantial, competent, and material evidence on the whole record, not whether the Commission demonstrated that its decision was properly supported.

The Commission's decision under review was a decision to preclude Edison's recovery of the control premium through an increase in rates because, **as stated in the Commission's Order**, and as reiterated in the Commission's Appellant's Brief:

DTE's Acquisition of MCN was not subject to any form of oversight by the Commission;

The massive premium of \$893 million was paid despite the fact that MCN was "financially distressed" at the time of the Acquisition;

If MCN is later sold for a profit, the Commission would be powerless to recoup any portion of the sale price for the ratepayers who, pursuant to Edison's request, would be the ones who paid the cost of acquiring MCN;

The alleged synergy savings were speculative, and Edison admitted that some portion of the savings that resulted from the Acquisition could have been achieved without the Acquisition;

Many of the alleged savings resulted from cost reductions that were merely temporary (e.g., Edison noted the elimination of approximately 1,100 employees as a result of the Acquisition but nearly 400 of these positions had been filled with replacements during the time between the Acquisition and the Commission's decision); and

Edison's stated savings did not account for certain added costs caused by the Acquisition, including the unspecified cost of fixing problems resulting from the combination such as the combined Edison-MichCon billing system that, as of the date of the Commission's decision, had incorrectly billed approximately 480,000 ratepayer/customers.

(11/23/04 MPSC Order, Appx. 496a-504a). These Commission findings are supported by a vast amount of record evidence, including expert witness testimony that **on its face**, without need of argument or explanation, support the Commission's decision. (See MPSC Brief, pp 15-23). Such testimony included, but was not limited to, the following:

The control premium does not provide any significant value to [Edison] ratepayers. The benefit that [Edison] contends that results from the merger does not contribute to a decline in costs from

previous levels . . . . The Commission should exclude the control premium from the development of [Edison's] revenue requirement. [Edison's] own Exhibits indicate that as a result of the merger, customers will be seeing increases in [Edison's] expenses at a level equal to or greater than the rate of inflation.

(Testimony of James T. Selecky, Appx. 285a-286a).

It is difficult to believe that [Edison's] Corporate Support expense would have increased by 15.6% from 2002 to 2004 absent a merger. It must be remembered that the Corporate Support expense does not include costs associated with healthcare and pensions. The costs included as a part of Corporate Support should largely be controllable.

Therefore, the Commission should seriously question the savings that [Edison] is claiming as a result of the merger with MCN. The control premium as proposed by [Edison] should be excluded from [Edison's] O&M expense.

(*Id.*, at Appx. 288a).

. . . the Commission should disallow Edison's proposed \$85.3 million recover[y] for DTE's merger control premium because the premium costs were incurred by DTE, not Edison; because the premium does not represent costs of production, transmission and distribution; because the proposal would represent a double-recovery of the premium to previous MCN shareholders and, to some extent, to Edison shareholders; and because authorizing recovery would set an undesirable precedent for future mergers and acquisitions not subject to Commission approval.

(Testimony of Charles W. King, Appx. 291a-292a).

As I pointed out in my March 5, 2004 testimony, any charge to recover the merger premium has nothing to do with the provision of electric service to Edison's customers; it represents a double-recovery of the premium by previous MCN shareholders and, to some extent, Edison shareholders as well; and it sets a very undesirable precedent for future utility mergers. Furthermore, the premium cost was paid by DTE, not Edison, and the Commission must base rates on Edison's cost of service, not on Edison's hypothetical avoided costs.

(*Id.*, at Appx. 296a). Given the clearly articulated conclusions and foundation for those conclusions in the excerpted expert testimony (in part above and in greater detail in the

Appellant’s Brief), Edison’s contention of confusion as to how the cited evidence supports the Commission’s decision is indefensible.

After arguing that the Commission should not have relied solely on excerpts to the record evidence but instead should have provided more detailed characterization of the evidence, Edison changes tack and argues that any discussion of evidence not expressly found in the Commission’s decision is merely a “post hoc rationalization” that underscores the weakness of the evidence to speak for itself. (See Edison Brief, pp 14-15). Acceptance of Edison’s novel argument would hinder effective judicial review of Commission decisions. For that reason, the Court has rejected the premise of Edison’s argument and held that evidence supporting the Commission’s decision is no less relevant simply because it was not expressly recited in the final decision; the Commission is not required “to annotate to each finding the evidence supporting it.” *Yankoviak v Mich Pub Serv Comm’n*, 349 Mich 641, 647; 85 NW2d 75 (1957), citing *United States v Pierce Auto Freight Lines*, 327 US 533 (1946). Accordingly, it is appropriate for the Court to take notice of the record evidence supporting the Commission’s decision, even if a particular piece of evidence was not specifically cited in the Commission’s decision.<sup>2</sup>

**B. Edison’s resort to repeated proclamations that its witness’ testimony “conclusively refuted” all evidence to the contrary is unpersuasive and inadvertently reveals the weakness of Edison’s position.**

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<sup>2</sup> “The record in this case consists of more than 3,200 pages of transcript and more than 230 exhibits. To require the PSC to have set out in exhaustive detail the rationale behind every issue, before it would have required the PSC to produce an opinion and order of unmanageable length and complexity.” (7/3/07 Court of Appeals Order, Appx. 599a-600a). Moreover, the Commission’s decision stands at 129 pages and the treatment of the control premium issue spanned 9 pages. (*Id.*, at 496a-504a). Edison’s protest regarding an alleged lack of citations to evidence in the Commission’s decision and the Appellant’s Brief’s discussion of evidence not specifically cited in the Commission’s decision is undercut by the case law noting that not every piece of evidence supporting a finding must be annotated in an opinion and by the facts of this case, in which the Commission went to great lengths to discuss all the parties’ competing positions and to articulate the bases for its conclusions.

The Appellants' Briefs present evidence that supports the decision to not permit Edison to pass on the control premium to its ratepayers. Edison, recognizing that the Court of Appeals cannot be affirmed based on an argument that Edison's evidence was substantial,<sup>3</sup> resorts to a pattern of noting the testimonial evidence relied on by the Commission, citing Edison's witness' conflicting testimony, and making the conclusory declaration that Edison's evidence "conclusively refuted" the evidence to the contrary.

For example, Edison states that the Appellants' position regarding the control premium was "conclusively refuted" and that "Edison conclusively answered" the concerns raised by ABATE witness Mr. Selecky. (Edison Brief, p. 15). Edison also states, "[t]he record demonstrated beyond credible dispute that Edison achieved merger synergies and savings in 2004." (*Id.*, at 22). In support of this statement Edison refers the Court to Appx. 33a-34a, which is merely testimony by Edison's witness that conflicts with the testimony of other witnesses. On page 28, the entirety of Edison's effort to discredit the evidence that savings attributed to the merger would have been achieved without the merger consists of stating that it was "refuted on the record" and a citation to Edison's witness' testimony. Similarly, Edison attempts to discredit an expert witness' testimony that Edison's ratepayers will not realize the proposed savings by noting that Edison's witness disagreed with the other witness' calculations. (Edison Brief, p 28). On page 32 Edison rests an entire argument on a citation to Edison's witness' testimony that another witness' contradictory testimony was "unsound and contrary to established, and appropriate, practice." The Court should not accept deceptive conclusory statements about

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<sup>3</sup> The Commission is constitutionally and statutorily empowered to choose between conflicting evidence in setting Edison's rates. *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 124; 223 NW2d 283 (1974).

disputed facts being “beyond credible dispute” or accepting that Edison’s witness “conclusively refuted” all conflicting testimony on the mere basis that Edison deems it so.

The Court of Appeals should not have examined whether there was substantial, competent, and material evidence on the whole record to support Edison’s position, but whether Edison demonstrated that the Commission’s decision was unsupported by such evidence. Edison did not make such a showing, nor could it have given the record. The Court of Appeals’ decision was therefore erroneous.

**C. The Commission did not “ignore” Edison’s evidence.**

Edison cites case law and MCL 460.557 for the proposition that the Commission “shall” consider and give due weight to all lawful elements necessary to determine a utility’s rates. Applying this standard, Edison claims that the Commission erred by “ignoring” Edison’s evidence. (Edison Brief, pp 11-14). The Commission did not “ignore” Edison’s evidence. (See, e.g., Appx. 497a (addressing the testimony of Edison witness Don Stanczak), Appx. 500a (addressing Edison’s calculations), Appx. 502a (addressing Edison’s witness’ testimony re MCN Energy’s value), and Appx. 503a (detailing admissions by Edison’s expert witness that undermine Edison’s position); see also Attorney General’s Appx. 36a-42a, (examining Edison’s evidence and arguments.). Instead, the Commission chose between two reasonable but diametrically opposed views of the evidence. The standard of review in Const 1963, art 6, §28 requires that the Commission be affirmed if there is competent, material, and substantial evidence on the whole record to support the Commission’s findings. Edison invited the Court of Appeals (and now invites this Court) to apply a different standard, one that requires the Commission to be reversed if there is competent, material, and substantial evidence on the record that supports a different finding. The Court of Appeals accepted the invitation, and in so doing committed reversible error.

**D. Contrary to Edison’s position, the ALJ’s findings do not support the Court of Appeals’ reversal of the Commission.**

Edison discusses *MERC v Detroit Symphony Orchestra*, 393 Mich 116; 223 NW2d 283 (1974) at length (pp 9-12) and asserts that *MERC* suggests that the Commission erred in reaching a different conclusion than the ALJ. Edison’s assertion is misguided for several reasons.

First, the decision under review is the Commission’s final order, not the ALJ’s Proposal for Decision or the findings therein. (See *Dignan v Mich Pub Sch Emp Retirement Bd*, 253 Mich App 571, 576-578; 659 NW2d 629 (2002) (the Commission is “free to accept, reject, or modify” an ALJ’s recommendations, regardless of whether or not the recommendations are supported by substantial evidence.). Second, in *MERC*, unlike in this case, a hearing examiner was required to determine witness credibility (in the sense of veracity, trustworthiness, integrity). As stated by the Court, “[t]he significance of [the examiner’s] report, of course, depends largely on the importance of credibility in the particular case.” *Id.*, at 127. “The crucial decision as to ‘credibility’ of which we speak is that prerogative which permits the decision-maker confronted with conflicting testimony of a subjective nature to assign weight to, or find more inherently reliable, the testimony of a particular witness.” *Id.*, at 126, n 9. In *MERC* the examiner listened to two witnesses testify about a conversation. One witness stated that certain comments were made and the other witness said they were not. The examiner’s findings were significant because the difference between the agency’s conclusion and the examiner’s conclusion rested solely on a determination about which witness was telling the truth. *Id.*, at 126. Here, the Commission’s findings do not rest on determining the veracity of witnesses, and no party has alleged otherwise. Consequently, the fact that the ALJ heard the witnesses testify did not put him in a better position to weigh the evidence than the Commission. Third, in *MERC* the agency’s factual determinations that the Court of Appeals reversed did not involve issues of

technical expertise. The factual determinations in *MERC* involved only the issue of whether the employer was motivated by animus. *Id.*, at 125. Here, the Court of Appeals reversed factual determinations of the Commission that the parties agree involved technical expertise. Fourth, a correct application of *MERC* actually supports reversal of the Court of Appeals. Though Edison pays lip service to the description of the substantial evidence standard set forth in *MERC*, given the evidence proffered by expert witnesses King and Selecky against inclusion of the control premium in Edison’s rates, the Court of Appeals’ finding that the Commission’s decision was “simply unsupported by any record evidence” (Appx. 596a) clearly represents a failure to consider “both sides of the record,” a failure to “not invade the province of exclusive administrative fact finding,” and a failure to “walk the tight rope of duty” to provide the review afforded in Const 1963, art 6, §28. (See *MERC*, *supra*, at 124).<sup>4</sup>

**E. Edison’s claim that the Commission erred by allowing zero recovery of the control premium, as opposed to a lesser amount than what was sought by Edison, is incorrect.**

Edison argues that the Commission’s decision was not supported by the evidence because it did not allow Edison to recover any of the cost of the control premium. (Edison Brief, pp 13, 26-27). Edison’s argument is irreconcilable with the applicable standard of review.

A rate set by the Commission is presumed valid, and if its total effect is just and reasonable, the reviewing court’s inquiry is at an end. *Mich Bell Telephone Co v Mich Pub Serv Comm’n*, 332 Mich 7, 37; 50 NW2d 826 (1952), citing *Federal Power Comm v Hope Natural Gas Co*, 320 US 591, 602 (1944). The Commission found that the rates established in its Order, which excluded the amortized costs for the control premium, reflected expense levels sufficient

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<sup>4</sup> Notably, in *Lewis v Bridgman Public Schools*, 480 Mich 1000; 742 NW2d 352 (2007), this Court reversed the Court of Appeals because the Court of Appeals attempted to construe *MERC* as requiring an agency to give deference to an ALJ’s findings in a Proposal for Decision.

enough to provide Edison full recovery of its actual operating expenses during the test year and a reasonable return on its utility investments. (See MPSC Brief, pp 8-9, 23). Edison’s attempt to show that the Commission’s decision was in error based on the total exclusion of a particular cost fails because, among other reasons, it is irreconcilable with the applicable standard that looks to whether the overall impact of the rate set by the Commission is reasonable.

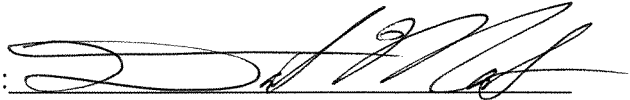
**II. Failure To Reverse The Court Of Appeals’ Flawed Decision Will Set An Unwise Precedent That Will Waste Judicial Resources.**

Edison appealed the Commission’s decision regarding the control premium and, although it is indisputable that there is expert witness testimony and exhibits in the record that support the Commission’s decision, Edison argued that the Commission decision is in error because it conflicts with the testimony of Edison’s expert witnesses. The Court of Appeals second-guessed the Commission and decided that the view that Edison’s witnesses espoused was more convincing than the view that other witnesses espoused. The Court of Appeals thus applied a standard that calls for reversal of the Commission if there is competent, material, and substantial evidence on the record to support a finding that the reviewing court prefers over the finding of the Commission. This is a fundamental departure from the standard in Const 1963, art 6, §28, which requires that the Commission be affirmed if there is competent, material, and substantial evidence on the whole record to support the Commission’s findings. Unless the Court reverses the Court of Appeals’ decision, this precedent will encourage appeals by utilities who are aggrieved by a Commission decision, where the Commission decision rests on competent, material, and substantial evidence on the whole record, so long as the utility has put the self-serving testimony of even one witness in the record. This will result in a waste of judicial resources because it will increase the number of unmeritorious appeals.

Respectfully submitted,

DYKEMA GOSSETT PLLC

Date: January 9, 2009

By: 

Albert Ernst (P24059)  
Gary P. Gordon (P26290)  
Daniel J. Martin (P67848)  
Attorneys for Appellant Michigan Public  
Service Commission  
Capitol View  
201 Townsend Street, Suite 900  
Lansing, MI 48933  
(517) 374-9100

GR01\112259.5  
ID\DJM