

**STATE OF MICHIGAN  
IN THE SUPREME COURT**  
(On Appeal From The Michigan Court Of Appeals)

ASSOCIATION OF BUSINESSES  
ADVOCATING TARIFF EQUITY,  
Appellant,

v

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

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Supreme Court No. 134677

Court of Appeals No. 264156

MPSC U-13808

Consolidated with Supreme Court Case Nos.  
134667-69, 134671, 134673-74, and 134676

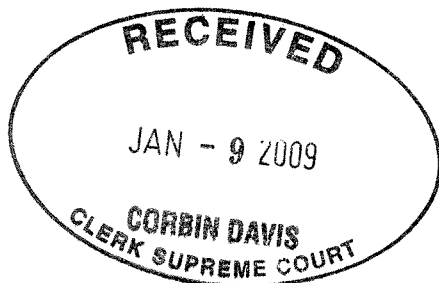
**APPELLANT ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY'S  
REPLY BRIEF**

**PROOF OF SERVICE**

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**STATE OF MICHIGAN  
IN THE SUPREME COURT**  
(On Appeal From The Michigan Court Of Appeals)

ATTORNEY GENERAL,  
Appellant,

Supreme Court No. 134667

v

Court of Appeals No. 259845

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

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MPSC U-13808

DETROIT EDISON COMPANY,  
Appellee,

Supreme Court No. 134668

v

Court of Appeals No. 264099

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

MPSC U-13808

and

ATTORNEY GENERAL,  
Appellant.

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ATTORNEY GENERAL,  
Appellant,

Supreme Court No. 134669

v

Court of Appeals No. 264191

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

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MPSC U-13808

DETROIT EDISON COMPANY,  
Appellee,

v

Supreme Court No. 134671

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

Appellees,

Court of Appeals No. 264099

MPSC U-13808

and

MICHIGAN PUBLIC SERVICE  
COMMISSION,

Appellant.

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DETROIT EDISON COMPANY,  
Appellee,

v

Supreme Court No. 134673

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

Appellees,

Court of Appeals No. 264099

MPSC U-13808

and

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

Appellants.

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MICHIGAN ENVIRONMENTAL COUNCIL  
and PUBLIC INTEREST RESEARCH GROUP  
IN MICHIGAN,

Appellants,

v

Supreme Court No. 134674

Court of Appeals No. 264131

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

Appellees.

MPSC U-13808

DETROIT EDISON COMPANY,

Appellee,

v

Supreme Court No. 134676

Court of Appeals No. 264099

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

Appellees,

and

MPSC U-13808

ASSOCIATION OF BUSINESSES  
ADVOCATING TARIFF EQUITY,

Appellant.

ASSOCIATION OF BUSINESSES  
ADVOCATING TARIFF EQUITY,

Appellant,

v

Supreme Court No. 134677

Court of Appeals No. 264156

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

Appellees.

MPSC U-13808

**APPELLANT ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY'S  
REPLY BRIEF**

**\* \* \* ORAL ARGUMENT REQUESTED \* \* \***

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## I. INTRODUCTION

This Reply Brief of the Association of Businesses Advocating Tariff Equity (“ABATE”) addresses the Appellee’s Brief filed by The Detroit Edison Company (“Edison”). In essence, Edison argues that:

1. Edison introduced evidence that it claims supports a showing of “synergy savings” (i.e., costs avoided, not incurred) resulting from the \$893 million “control premium” that Edison’s parent company, DTE Energy, paid to acquire MCN Energy (including its principal subsidiary, Michigan Consolidated Gas Company (“MichCon”)).

2. The Administrative Law Judge (“ALJ”) recommended to the Michigan Public Service Commission (“MPSC” or “Commission”) that Edison recover a portion of the control premium from ratepayers.

3. The ALJ’s recommendation should be given more weight than the decision of the Commission because the ALJ presided over the evidentiary proceedings.

4. The Commission was not permitted to question the evidence presented by Edison.

5. Any evidence submitted by other parties questioning or opposing Edison’s request should be disregarded.

6. The Court of Appeals correctly reversed the Commission.

Edison’s argument completely ignores that:

1. The burden of proof was on Edison regarding its request to recover its self-allocated \$589 million portion of the control premium for ratepayers through rates Edison charges to its electric customers.

2. The burden was on Edison to show by “clear and satisfactory evidence” that the Commission’s Order was unreasonable because it was not supported by competent, material and substantial evidence on the whole record.

3. Although the ALJ “presided over the evidentiary hearings” (Edison Brief, p 11), the vast majority of evidence was submitted via pre-filed direct and rebuttal testimony and Exhibits. Only cross-examination was done live before the ALJ, and that was limited and did not cover all witnesses.

4. ABATE’s expert witness, Mr. Selecky, was not even cross-examined regarding his testimony concerning the control premium issue (or **at all** regarding his direct and rebuttal testimony regarding the final rate case).

Despite Edison’s protestations, it is clear that the Commission properly determined that Edison had not met its burden with regard to its request to recover the control premium from ratepayers; the record supported the Commission’s determination; and the Court of Appeals improperly reversed the Commission.

## **II. EDISON MISCHARACTERIZED THE STANDARD OF REVIEW**

Edison mischaracterized the standard of review by overstating both the role of the ALJ in the proceedings below and the weight that should be given to his recommendation to the Commission. Edison states that the ALJ “presided over all the evidentiary proceedings at the MPSC” (Edison Brief, p 6) and “*presided over the evidentiary hearings*” (Edison Brief, p 11, emphasis in original). Edison then contends that “[t]he ALJ’s unique ability to weigh witness credibility in this case *gives added weight to the ALJ’s recommendation that Edison be allowed to recover its control premium costs*, and undermines the MPSC’s contrary decision.” (Edison Brief, p 11, emphasis in original). Edison spends the next page of its Brief arguing why the ALJ’s recommendation should be given more weight than the Commission’s determination. (Edison Brief, p 12). However, Edison failed to advise this Court of the true nature of MPSC proceedings.

The vast majority of evidence is submitted through pre-filed testimony and Exhibits (both direct and rebuttal). These are then bound into the record at the hearing, and the witness is thereafter tendered for cross-examination unless, as is often the case, the parties stipulate to waive cross-examination. That is exactly what occurred regarding the direct and rebuttal testimony and Exhibits of ABATE's expert witness, James T. Selecky, in the final phase of this case. There was no cross-examination of, or any live testimony by, Mr. Selecky regarding the control premium issues. There was live cross-examination of Edison's control premium witnesses, but their direct and rebuttal testimony and Exhibits were pre-filed and simply bound into the record. Thus, although the ALJ had some role in connection with live witness testimony, it was limited and did not even cover all of the witnesses.

Edison's omission of the true nature of the proceedings is an attempt to mislead this Court as to the role of the ALJ and the weight that should be given to his recommendation. With regard to the vast majority of the evidence, the Commission was in the same position as the ALJ, reviewing pre-filed (later bound in) testimony and Exhibits.

Moreover, the credibility of the *evidence* goes to more than just viewing the witnesses live testimony. Unlike the situation in *MERC v Detroit Symphony Orchestra*, 393 Mich 116; 223 NW2d 283 (1794), there was no question here of the witnesses' veracity. The issues related to formulas and projections and Edison's claims of cost savings. As demonstrated in ABATE's Appellant's Brief, the evidence presented by Edison was selective at best, and failed to include all pertinent information. (*See*, ABATE's Appellant's Brief, pp 7 – 11). The Commission possesses the expertise to weigh the conflicting *evidence*, and its determinations should be given deference.

Edison contends that that the courts must conduct a qualitative and quantitative evaluation of the evidence considered by the Commission. (Edison Brief, p 10, citing *MERC, supra*). Yet even in *MERC*, this Court noted that “due deference should be accorded to administrative expertise and [courts] should not invade the province of exclusive fact-finding by displacing an agency’s choice between two reasonably differing views.” *Id.*

ABATE does not disagree with Edison that judicial review of administrative decisions must consider “the whole record – that is, both sides of the record – not just those portions of the record supporting the findings of the administrative agency.” (Edison Brief, p 10, citing *MERC, supra*). However, the Court of Appeals failed to address the evidence presented by ABATE and others.

The Court of Appeals, in its Opinion reversing the Commission, did not cite one page of the record, nor did it address at all the testimony presented by ABATE’s expert witness (or other witnesses opposing Edison) when stating that the Commission’s “conclusion that the acquisition provided no benefit to Edison’s customers is simply unsupported by **any record evidence.**” (ABATE’s Joint App. 389a (emphasis added)). There was clearly no consideration of the whole record – that is, both sides of the record, as contemplated by *MERC, supra*. Instead, the Court of Appeals simply and improperly inserted its own judgment for that of the Commission.

### **III. EDISON IGNORED ITS BURDEN OF PROOF**

The burden of proof regarding recovery of the control premium was upon Edison. *In the matter of the application of Michigan Gas Company*, MPSC October 28, 1993 Order, Case Nos. 10149, 10150; 1993 Mich PSC LEXIS 230; 147 PUR 4<sup>th</sup> 1. Nowhere was this mentioned by Edison, or by the Court of Appeals in its Opinion reversing the Commission. The Commission had every right to require Edison to prove that its claimed savings in fact existed and its claim that it was just and reasonable to pass these enormous costs on to ratepayers. This is especially

true here where Edison's request to recover \$589 million from ratepayers was not based upon money spent by Edison to provide electricity to its customers (as is usually the case), but on Edison's claims of **costs that were saved**. Thus, Edison presented evidence that it claimed showed cost savings, and other parties were left to prove the negative, i.e., that Edison's claimed and projected cost savings were false or unsupported. Nevertheless, such evidence was presented. (*See, e.g.*, Testimony of James T. Selecky, ABATE's Joint App. 145a – 149a).

It was incumbent upon Edison to prove that its claimed "synergy savings" actually existed, that they were caused as a result of the acquisition, and that it was just and reasonable to pass the control premium costs on to ratepayers. As shown in ABATE's Appellant's Brief, the evidence presented by Edison was selective at best, and failed to include all pertinent information. (*See*, ABATE's Appellant's Brief, pp 7 – 11). In addition, there was evidence presented by other parties that opposed Edison's claims of "synergy savings." The Commission, obviously relying on the testimony of Mr. Selecky, clearly believed that Edison failed to prove its case that the savings existed. (MPSC's November 23, 2004 Opinion and Order, ABATE's Joint App. 341a, 344a.) The Commission also noted that the combination of the billing system caused problems for hundreds of thousands of customers, raising the issue of whether it was just and reasonable to pass the control premium costs on to ratepayers. (MPSC's November 23, 2004 Opinion and Order, ABATE's Joint App. 343a).

Edison briefly addresses some of the contrary evidence raised by the MPSC in its Appellant's Brief and says that this evidence should be ignored. Edison argues that the testimony of witnesses other than its own were not "substantial" because witnesses asserted positions that were not "rational" because they were unfounded or disproved by other witnesses. (Edison Brief, p 11). However, just because Edison witnesses disagreed with the testimony and

conclusions of opposing witnesses, that does not mean that such opposing evidence should be ignored. For example, there was certainly contrary evidence presented on the issue of the claimed “synergy savings” and Edison’s O & M expenses. (*See, e.g.*, Testimony of James T. Selecky, ABATE’s Joint App. 143a – 9a; Rebuttal Testimony of Don M. Stanczak, ABATE’s Joint App. 168a – 42). The experts disagreed over the proper inputs and results concerning Edison’s O & M expenses. Nevertheless, both experts’ analyses show high O & M expense increases. Again, the issue here was claimed savings, not measurable expenses. Moreover, the Commission has the expertise to determine the appropriate O & M ratemaking formula and inputs, and it stated that the O & M evidence presented did not support a showing of savings. (MPSC November 23 Opinion and Order, ABATE’s Joint App. 344a). The Court of Appeals did not address this, but simply substituted its judgment for that of the Commission. Instead of looking at the whole record, the Court of Appeals, where it cited evidence at all, cited only that presented by Edison. This is not an appropriate review.

#### **IV. THE RECORD SUPPORTS THE COMMISSION’S DETERMINATION**

Edison was required to prove its case for recovery. It did not do so. ABATE will not repeat all of the evidence set forth in its Appellant’s Brief (and the other Appellants’ Briefs) that provides support for the Commission’s determination. Despite Edison’s protestations, it cannot explain away that evidence by calling it irrelevant or saying that Edison witnesses provided a different view. Edison’s witnesses claimed that Edison incurred savings because of the acquisition. They also admitted that some items were not measured (e.g., claimed increases in productivity) and that some of the claimed savings could have been achieved without the acquisition. They **claim** that this was the majority, but did they **prove** this? This is a difficult area because it is not like the usual item in a rate request. Rather, it relates to claims of costs that were not incurred, and a request that Edison’s ratepayers pay hundreds of millions of dollars

based on Edison's claims alone. Evidence was presented showing that Edison's case was incomplete, that the acquisition actually harmed hundreds of thousands of customers, and that the numbers "just didn't add up" regarding Edison's O & M expenses. If the costs that Edison claims it avoided had actually been incurred, the Commission could have analyzed those costs for reasonableness and prudence. Given the large increases in O & M expenses, that would have been a tough hurdle for Edison. Instead, the Commission had to examine the claims of Edison, the evidence presented by Edison to support its claims, and the contrary evidence presented by other parties. It did so and was not persuaded that Edison had made its case. The Court of Appeals felt otherwise, but discussed none of the contrary evidence (or the fact that Edison had the burden of proof). Under any standard of review, this was inappropriate.

#### **V. CONCLUSION AND RELIEF**

For the reasons stated in ABATE's Appellant's Brief and this Reply Brief, this Court should reverse the decision of the Court of Appeals and reinstate the Order of the Michigan Public Service Commission that denied Detroit Edison's request to include in its rates, and

recover from ratepayers, the \$589 million control premium that DTE Energy paid to acquire MCN Energy.

Respectfully submitted,

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