STATE OF MICHIGAN
IN THE SUPREME COURT
(Hoekstra, P.J., Sawyer, J., and Saad, J.)

IN RE APPLICATION OF THE DETROIT EDISON COMPANY TO INCREASE RATES

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION and THE DETROIT EDISON COMPANY,

Appellees.

_______________________________________/

Supreme Court No. 145750

Court of Appeals No. 302110

MPSC Case No. U-16384

BRIEF ON APPEAL OF APPELLEE MICHIGAN PUBLIC SERVICE COMMISSION

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The Association of Businesses Advocating Tariff Equity (ABATE) appealed the Court of Appeals' decision in *In re Detroit Edison Co,* 297 Mich App 377; 823 NW2d 433 (2012) (Appendix 18a). This decision affirmed the Michigan Public Service Commission's order in *In the matter of the application of THE DETROIT EDISON COMPANY for authority to increase its rates, amend its rate schedules and rules governing the distribution and supply of electric energy* [Originally filed in U-15768] [Refund], MPSC Case No. U-16384, Order, December 21, 2010 (Appendix 3a). On March 29, 2013, this Court granted leave to appeal. *In re Detroit Edison Co,* 297 Mich App 377; 823 NW2d 433 (2012), lv gtd, 493 Mich 950; 828 NW2d 27 (2013) (Appendix 28a). Pursuant to MCR 7.301(A)(2), this Court has jurisdiction over this appeal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

MCL 460.6a(1) requires a utility to refund to its customers any revenue amounts it may have collected through self-implementation rates that exceed the final rates authorized by the Michigan Public Service Commission and to allocate any refund amounts among primary customers based upon their pro rata share of the revenue collected. Consistent with the statutory provision, the Commission approved a rate refund methodology that allocated the excess revenue collected amongst the Detroit Edison Company's primary customers based upon their pro rata share of the self-implemented rate increase. The Court of Appeals upheld the Commission's Order after determining that MCL 460.6a(1) was ambiguous and subject to differing interpretations. In its March 29, 2013 order, this Court asked the parties to address the following questions:

1. Whether the Court of Appeals erred in concluding that MCL 460.6a(1) is subject to "reasonable but differing interpretations" and therefore ambiguous, see *Mayor of Lansing v Public Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004) (ambiguity arises where a provision of the law "'irreconcilably conflict[s]' with another provision ...or where it is *equally* susceptible to more than a single meaning"), citing *Klapp v United Ins Group Agency*, 468 Mich 459, 467; 663 NW2d 447 (2003)?

Appellee Michigan Public Service Commission's answer:	Yes.
Appellee Detroit Edison Company's answer:	Yes.
Appellant Association of Businesses Advocating Tariff Equity's answer:	Yes.
Court of Appeals' answer:	No.

2. Whether MCL 460.6a(1) requires that a refund to primary customers required after a utility implements increased rates or charges under that subsection be allocated to each primary customer that was over-charged on the basis of the amount paid by each primary customer?

Appellee Michigan Public Service Commission's answer:	No.
Appellee Detroit Edison Company's answer:	No.
Appellant Association of Businesses Advocating Tariff Equity's answer:	Yes.
Court of Appeals' answer:	No.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

MCL 460.6a(1) states in relevant part:

> A gas or electric utility shall not increase its rates and charges or alter, change, or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, without first receiving commission approval as provided in this section.
>
> * * *
>
> If the commission has not issued an order within 180 days of the filing of a complete application, the utility may implement up to the amount of the proposed annual rate request through equal percentage increases or decreases applied to all base rates. For a petition or application pending before the commission prior to the effective date of the amendatory act that added this sentence, the 180-day period commences on the effective date of the amendatory act that added this sentence. If the utility uses projected costs and revenues for a future period in developing its requested rates and charges, the utility may not implement the equal percentage increases or decreases prior to the calendar date corresponding to the start of the projected 12-month period. For good cause, the commission may issue a temporary order preventing or delaying a utility from implementing its proposed rates or charges. If a utility implements increased rates or charges under this subsection before the commission issues a final order, that utility shall refund to customers, with interest, any portion of the total revenues collected through application of the equal percentage increase that exceed the total that would have been produced by the rates or charges subsequently ordered by the commission in its final order. *The commission shall allocate any refund required by this section among primary customers based upon their pro rata share of the total revenue collected through the applicable increase, and among secondary and residential customers in a manner to be determined by the commission.* (Emphasis added).

INTRODUCTION

The Michigan Public Service Commission (MPSC or Commission) and ABATE agree on the first question. The statute at issue here – MCL 460.6a(1) – is plain and unambiguous. But that is where the agreement ends.

Section 6a(1) expressly mandates using a *pro rata* allocation for refunds to *the group or class of* primary customer, leaving all other aspects of the means and methodology used to implement the refund to the Commission's discretion. And, the Commission did just that. It employed a pro rata refund share for its current primary customers. That is what MCL 460.6a(1) requires.

The statute's language is clear. It specifies "pro rata" share, not actual share. It provides that the refund shall be allocated "among the primary customers," not to each individual primary customer. It identifies "primary customers" and does not specify each primary customer during the period in which the rates exceeded the approved rates. ABATE's argument that each customer is entitled to a refund of its actual share is not supported by the statute's plain language. The Court of Appeals erred by determining that the statutory language was ambiguous, but this Court should affirm the decision because it reached the right result.

That the Legislature would leave the "nuts and bolts" of fashioning a refund to the Commission is not surprising or inconsistent with the MPSC's charge to regulate Michigan's public utilities. Establishing a rate refund is not a simple or easy process. Over the years, a number of different methodologies have been adopted to implement refunds by utilities. Generally speaking, one of the determinations that must be made is whether the refund should be historical or

prospective. If a historical-based refund is issued, the utility is required to identify its customers during a previous time period and either credit the customer's bill or mail the customer a check. This method is administratively burdensome, increases costs to customers, and delays the issuance of refunds. While a prospective refund is cost-effective and efficient, refunds are only issued to the utility's current customers. Simply put, no refund method is exact.

As the expert administrative agency charged by the Legislature to regulate public utilities, the Commission has regularly been faced with the task of fashioning a refund for utility customers. In order to formulate a reasonable refund methodology, the Commission must exercise its broad regulatory discretion and utilize its technical expertise.

And, as was the case here, the Commission must adhere to any requirements set forth by the Legislature. When issuing a refund created by self-implementation rates, MCL 460.6a(1) requires a utility to refund to its customers any revenues collected from self-implementation rates that exceed the revenues collected from rates authorized in the MPSC's final order. Section 6a(1) also requires the Commission to allocate any refund among primary customers based upon their pro rata share of the revenues collected. In this case, the Commission adopted a refund methodology that is consistent with the plain, unambiguous statutory provision and the Commission's decision should be affirmed.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS BELOW

Historically, the Commission has possessed broad authority to regulate rates for all public utilities. MCL 460.6. Although the Commission continues to have broad regulatory authority, Public Act 286 of 2008 (Act 286) gave utilities the ability to implement higher rates while awaiting a final rate order. Specifically, if the Commission has not issued a final rate order 180 days after a utility applies for a rate increase, the utility may implement an equal-percentage rate increase, on its own initiative, up to the amount requested in its application. MCL 460.6a(1). This process is referred to as self-implementation.[1] Although self-implementation rates do not require Commission approval, these rates are temporary, at the discretion of the utility, and only remain in effect until the Commission issues a final order. If the rates approved in the Commission's final order are lower than the utility's self-implemented rates, the utility must refund the difference with interest to its customers. MCL 460.6a(1).

This case stems from Detroit Edison Company's (Detroit Edison or the Company) January 26, 2009 Application to increase its electric rates by $378,000,000. MPSC Case No. U-16384, Order, December 21, 2010, p 1 (Appendix 3a). Relying on Section 6a(1) of Act 286, Detroit Edison elected to self-implement a rate increase in the amount of $280,000,000. *Id.* (Appendix 3a). A final rate order was issued, and the order authorized a rate increase of approximately $217,000,000. *Id.* at 2 (Appendix 4a).

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[1] The Commission retains the authority to prevent or delay self-implementation for good cause. MCL 460.6a(1).

A. MPSC Case No. U-16384 – The Commission's Order

Because Detroit Edison's self-implemented rates exceeded the rates ultimately approved by the Commission, the Company was required to file an application requesting the authority to refund the excess monies collected. *Id.* at 3 (Appendix 5a).

While four parties participated in the contested case proceeding, the Commission issued an order that adopted the MPSC's technical Staff's (Staff) refund and allocation methodologies. MPSC Case No. U-16384, Order, December 21, 2010, p 9 (Appendix 11a). Staff witness Alan Droz, a Certified Public Accountant, presented testimony addressing the calculation of the self-implementation refund; the amount of the refund; and the Staff's proposal for allocating the refund among primary, secondary and residential customers. (10/5/10 Hr'g Tr, pp 70-80.) (Appendix 3b-13b.) The Staff also sponsored five exhibits. Exhibit S-1 showed the revenue differences for each rate schedule for each month that the self-implemented rates were in effect. (10/5/10 Hr'g Tr, pp 74-75); Exhibit S-1. (Appendix 7b-8b, 14b-17b.) Exhibit S-3 identified the rate schedules that were due a refund and showed the allocation of the refund, along with the associated interest, by rate schedule class. (10/5/10 Hr'g Tr, pp 75-79); Exhibit S-3. (Appendix 8b-12b,18b-19b.) For the purpose of consistency, the Staff recommended the use of the same allocation method for the secondary and residential customer classes as was used for the primary customer class. (10/5/10 Hr'g Tr, pp 77-78.) (Appendix 10b-11b.)

Adopting the Staff's refund and allocation methodology, the Commission ordered Detroit Edison to refund to customers excess self-implementation revenues in the amount of $26,872,231. MPSC Case No. U-16384, Order, December 21, 2010, p 10 (Appendix 12a). Additionally, the Commission indicated that it was not persuaded that the statute required an exact refund to every utility customer and determined that the statute only required that the refund to primary customers be based on their pro rata share of the total revenues collected:

> The Commission is not persuaded that the refund must be precisely tailored to each and every Detroit Edison customer who paid a self-implemented rate. Other than requiring that the refund to primary customers be based on their pro rata share of the total revenues collected through the applicable increase, the statute leaves the method of the refund up to the Commission's discretion. MCL 460.6a(1). *Id.* at 9. [Appendix 11a.]

Absent any further statutory direction, the Commission noted that it was exercising its discretionary authority to fashion a refund:

> The Commission has long rejected the notion that historical perfection must be achieved with refunds or surcharges. The Commission has authority to exercise discretion in fashioning a refund procedure, and the most precise procedure may have disadvantages, such as attendant costs or administrative burdens, that outweigh the apparent advantages. *See, Attorney General v Public Service Comm,* 235 Mich App 308; 597 NW2d 264 (1999); *Attorney General v Public Service Comm,* 215 Mich App 356; 546 NW2d 266 (1996); May 17, 2005 order in Case No. U-13990, pp. 21-22. *Id.* [Appendix 11a.]

After determining that the statute requires refunds to primary customers to be based on their pro rata share of the revenue, and not on the amounts actually paid, the Commission indicated that:

> And, as the Staff correctly notes, the refund must be allocated based on the pro rata share of the revenue from the self-implemented increase, not on the precise dollar amount paid in excess revenue; thus,

> ABATE's argument in favor of a refund that reflects what each primary customer "actually paid" is inconsistent with the language of the statute. Finally, were the Commission persuaded to order a refund based on the amount each primary customer paid during self-implementation, the administrative costs associated with making those individual determinations would be addressed in a future rate case, and, under basic principles of cost causation, would likely be borne by the primary class. *Id.* at 9-10. [Appendix 11a-12a.]

Further, the Commission did not agree with ABATE that hypothetical primary customers, who made the business decision to switch from standard electric service, or bundled service, to an alternative electric supplier during the self-implementation period, were treated unfairly under the refund procedure adopted. Customers who take service from an alternative electric supplier are billed under Detroit Edison's retail open access (ROA) tariffs. Assuming some primary customers switched to an alternative energy supplier while self-implementation rates were in effect, because there was no record evidence to support this claim (*Id.* at 10 (Appendix 12a)), the Commission indicated that there was nothing hidden from these customers and that any customer who may have switched suppliers early in the self-implementation period likely underpaid during the self-implementation period because only one ROA rate schedule was due a refund:

> There was nothing hidden from such customers. The possibility that the rate increase adopted in the final order would differ from the unapproved rate increase self- implemented by the company was always present, as was the possibility that the final rate design would differ, however slightly, from the self-implemented rate design. Such customers would have (or should have) been aware of that fact at the point in time when they decided to switch. Indeed, any customer who made that switch early in the self-implementation period likely underpaid during the self-implementation period, since only one ROA rate schedule overpaid during self-implementation. *See,* Exhibit S-3. *Id.* [Appendix 12a.]

ABATE appealed the Commission order.

B. The Court of Appeals' July 26, 2012 Opinion

On July 26, 2012, the Court of Appeals issued its decision affirming the Commission's refund allocation method. The Court of Appeals determined that the Commission properly construed MCL 460.6a(1) when deciding that nothing in the statutory provision compels the Commission to issue refunds based on each individual primary customer's actual overpayment. *In re Detroit Edison Co*, 297 Mich App at 387 (Appendix 22a).

In its decision, the Court of Appeals indicated that the method of fashioning a reasonable refund relies on statutory interpretation. *Id.* at 384-385 (Appendix 20a-21a). After reviewing § 6a(1), the Court determined that the statutory provision is ambiguous and subject to differing reasonable interpretations. *Id.* at 385 (Appendix 21a). After reviewing its past decisions, the Court of Appeals stated that "within the context of PSC statutes, the term 'refund' enjoys a broader meaning. There is nothing in the statute that compels the conclusion that use of the term 'refund' means the monies returned to a primary customer must be based on the individual primary customer's actual overpayment." *Id.* at 386 (Appendix 21a).

While noting that § 6a(1) of Act 286 requires that the refund to primary customers be based on their pro rata share of revenues collected, the Court of Appeals found that there were "cogent reasons" supporting the Commission's interpretation and concluded that the MPSC's decision was both lawful and reasonable. *Id.* at 387 (Appendix 22a).

ARGUMENT

I. MCL 460.6a(1) requires a utility to allocate any refund among primary customers based upon their pro rata share of the total revenue collected.

A. Standard of Review

The standard of review for MPSC orders is narrow in scope and limited to determining whether the Commission's order is lawful and reasonable. State courts give respectful consideration to State agency interpretations of statutes that the agency administers and enforces. The burden of proof rests on appellants, such as ABATE, to establish by clear and satisfactory evidence that the order is unlawful or unreasonable.

The Michigan Legislature has established the standard of review for Commission orders. In Section 25 of the Railroad Act, the Legislature identified the manner in which MPSC orders are to be reviewed by providing that all rates, classifications, regulations, practices, and services fixed by the Commission are deemed *prima facie* lawful and reasonable. MCL 462.25. Further, Section 26(8) of the Railroad Act places a heavy burden of proof on an appellant to show by clear and satisfactory evidence that the Commission's order is unlawful or unreasonable. MCL 462.26(8).

This Court has explained how difficult it is for an appellant to prove that an MPSC order is unlawful or unreasonable. In *In re MCI Telecommunications Complaint,* the Court said that to find a Commission order unlawful, "there must be a showing that the commission failed to follow some mandatory provision of the

statute or was guilty of an abuse of discretion." *In re MCI Telecommunications Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999) (quoting *Giaras v Public Service Comm*, 301 Mich 262, 269; 3 NW2d 268 (1942)). Likewise, in the same decision, the Court stated that "[t]he hurdle of unreasonableness is equally high. Within the confines of its jurisdiction, there is a broad range or 'zone' of reasonableness within which the PSC may operate." *Id.*

While an appellant always has the burden of proving that a Commission order is unlawful or unreasonable, courts may apply different standards of review when evaluating the appellant's arguments depending on the nature of the agency decision involved. For the Commission's judicial or quasi-judicial decisions, the decision must be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Dowerk v Twp of Oxford*, 233 Mich App 62, 72; 592 NW2d 724 (1998). Even in these "substantial evidence" cases, however, Michigan courts have held that Section 26 of the Railroad Act does not grant courts all of the powers traditionally vested in a court of equity, nor the power to make *de novo* findings of fact. See *In re Rovas Complaint*, 482 Mich 90, 101; 754 NW2d 259 (2008). Rather, a court should not substitute its judgment in place of the Commission's factual findings or regulatory judgment. *Consumers Power Co v Public Service Comm*, 196 Mich App 687, 691; 493 NW2d 424 (1992). If an administrative agency's finding of fact is supported by evidence—even if there is conflicting evidence — it is the general rule that the agency's findings are

conclusive upon the reviewing court. *Bejin Co v Public Service Comm*, 352 Mich 139, 153; 89 NW2d 607 (1958).

The Commission's legislative or quasi-legislative judgments, such as the MPSC's ratemaking orders, may not be overturned unless the Commission exceeded its statutory authority or abused its discretion. *In re Rovas Complaint*, 482 Mich at 100-101; *Coffman v State Board of Examiners in Optometry*, 331 Mich 582, 589-590; 50 NW2d 322 (1951). An abuse of discretion does not occur unless "an unprejudiced person considering the facts upon which the decision was made would say that there was no justification or excuse for the decision." *Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254; 701 NW2d 144 (2005). Moreover, this Court has stated that the abuse of discretion standard must be given a more deferential review than *de novo*:

> [A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. [*Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006) (citing *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003)).]

The Commission's statutory interpretations are subject to a different standard of review. The Michigan Supreme Court has held that an agency's statutory interpretation is entitled to the "most respectful consideration" and should not be overturned without "cogent reasons." *In re Rovas Complaint*, 482 Mich at 93. At the same time, courts may not abdicate their judicial responsibility to interpret statutes by giving "unfettered deference" to an agency's statutory interpretation. *Id.* In *In re Rovas Complaint*, the Michigan Supreme Court reaffirmed the *Boyer-Campbell Co v Fry* standard of review for agencies' statutory interpretations. *In re*

Rovas Complaint, 482 Mich at 103. The *Boyer-Campbell* standard of review states that while agency interpretations are not controlling, they are an aid, and courts should give them weight when construing doubtful or obscure laws that the agency administers. *Boyer-Campbell Co v Fry,* 271 Mich 282, 296-297; 260 NW 165 (1935). The *Boyer-Campbell* Court even held that agency interpretations are "sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature." *Id.*

B. Analysis

As the expert administrative agency charged with regulating public utilities, the Commission is regularly faced with the task of fashioning refunds for utility customers. In this case, the Commission followed the plain language of MCL 460.6a(1) and properly determined how to effectuate a refund of excess self-implementation rates to Detroit Edison's customers – it allocated the refunds among primary customers based on their pro rata share of the total revenues collected.

1. Section 6a(1)'s language is unambiguous and the Court of Appeals erred in concluding otherwise.

In reaching its determination that the Commission properly allocated refunds, the Court of Appeals reasoned that § 6a(1) is ambiguous and subject to reasonable but differing interpretations. *In re Detroit Edison Co*, 297 Mich App at 386-387 (Appendix 21a-22a). The Court of Appeals' determination that the statute is ambiguous followed the reasoning applied by this Court in *In re MCI*

Telecommunications Complaint. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). However, the Court has since determined that a statutory provision should only be found to be ambiguous after "all other conventional means of [ ] interpretation" have been applied. *Mayor of Lansing v Public Service Comm*, 470 Mich 154, 165 (2004) (citing *Klapp v United Insurance,* 468 Mich 459, 474; 663 NW2d 447 (2003)). And, under this framework, the Court espoused a two-prong test indicating that a statutory provision is only ambiguous if it irreconcilably conflicts with another provision or when it is equally susceptible to more than a single meaning. *Mayor of Lansing*, 470 Mich at 166.

Under the Court's test, MCL 460.6a(1) is unambiguous. None of the parties to this proceeding alleged a statutory conflict. Moreover, a reading of MCL 460.6a(1) shows that the language in the statute is plain with each word used for a specific purpose. As such, the Commission agrees with ABATE that there is no ambiguity in the language of MCL 460.6a(1). (ABATE's Brief, p 8.) Nevertheless, ABATE's statutory interpretation imputes a selective legislative intent when it concludes that MCL 460.6a(1) requires a refund calculation methodology that is "totally dependent upon identification of the actual historical billing determinants related to actual usage." (ABATE's Brief, p 9.) Nothing in the statutory language dictates a historical, actual customer-specific refund calculation.

2. The Commission properly applied the plain language of § 6a(1).

Section 6a(1) of Act 286 states that the Commission shall allocate any refund required among primary customers based upon their pro rata share of the total revenue collected through the applicable increase:

> If the commission has not issued an order within 180 days of the filing of a complete application, the utility may implement up to the amount of the proposed annual rate request through equal percentage increases or decreases applied to all base rates. ....If a utility implements increased rates or charges under this subsection before the commission issues a final order, that utility shall refund to customers, with interest, any portion of the total revenues collected through application of the equal percentage increase that exceed the total that would have been produced by the rates or charges subsequently ordered by the commission in its final order. *The commission shall allocate any refund required by this section among primary customers based upon their pro rata share of the total revenue collected through the applicable increase, and among secondary and residential customers in a manner to be determined by the commission.* [MCL 460.6a(1) (emphasis added).]

This Court has provided guidance when interpreting statutes. In *Petersen v Magna Corp*, the Court stated:

> The primary goal of such interpretation is to give effect to the intent of the Legislature. The first step in ascertaining such intent is to focus on the language of the statute itself. If statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute. The words of a statute provide the most reliable evidence of the Legislature's intent, and as far as possible, effect should be given to every phrase, clause, and word in a statute. If the statutory language is certain and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. [*Petersen v Magna Corp*, 484 Mich 300, 307; 773 NW2d 564 (2009) (internal citations omitted).]

Accordingly, the plain meaning of a statute is to be preferred and enforced. *People v Stone,* 463 Mich 558, 562; 621 NW2d 702 (2001). When interpreting a statute,

courts are required to consider "the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" *Sun Valley Foods Co v Ward,* 460 Mich 230, 237; 596 NW2d 119 (1999) (quoting *Bailey v United States,* 516 US 137, 145; 116 S Ct 501 (1995)). Each word of a statute is presumed to be used for a purpose. *Robinson v City of Detroit,* 462 Mich 439, 459; 613 NW2d 307 (2000). And, courts should avoid a statutory interpretation that would render any part of the statute surplusage or nugatory. *State Farm Fire and Cas Co v Old Republic Ins Co,* 466 Mich 142, 146; 644 NW2d 715 (2002).

As this Court has indicated, it is appropriate to consult a dictionary to determine the ordinary meaning of a word. *People v Tennyson,* 487 Mich 730, 738; 790 NW2d 354 (2010). "Among" is a non-technical word, and it is commonly defined as "in a group or class." The American Heritage Dictionary, p 44 (3d ed 1976). Therefore, the plain meaning of the statute requires that any refund shall be allocated to the "group or class" of primary customers. The statute does not require a specific refund to each primary customer; it simply requires that any refund be allocated "among" primary customers.[2]

Additionally, the statute requires that the amounts refunded be based upon the "pro rata" share of the total revenue collected through the applicable self-implemented rate increase. Pro rata is defined as meaning "in proportion." *Id.* at 1050. Therefore, the statute requires that the refund be allocated to the "group or

[2] When designing rates, costs (or refunds) are allocated among customer classes, and then further divided to specific rate schedules. The major rates classes are residential, commercial & industrial primary, commercial & industrial secondary, and other.

class" primary customers "in proportion" to the total revenue collected through the self-implemented rate increase – not the actual money paid.

Recognizing the statutory requirement of § 6a(1), the Commission properly determined that it would allocate the refunds on a pro rata basis for all customer classes. MPSC Case No. U-16384, Order, December 21, 2010, pp 9-10 (Appendix 11a-12a). Specific to the primary customers, the Commission stated that "the refund must be allocated based on the pro rata share of the revenue from the self-implemented increase, not on the precise dollar amount paid in excess revenue; thus, ABATE's argument in favor of a refund that reflects what each primary customer 'actually paid' is inconsistent with the language of the statute." *Id.* (Appendix 11a-12a). And, as this Court previously held in *In re Rovas Complaint,* the Commission's interpretation of a statute is entitled to "respectful consideration" and should not be overturned without "cogent reasons." *In re Rovas Complaint*, 482 Mich 90, 103; 754 NW2d 259 (2008) (quoting *Boyer-Campbell Co v Fry,* 271 Mich 282, 296-297; 260 NW 165 (1935)).

ABATE devotes a considerable portion of its brief arguing that the statute is clear and unambiguous, while crafting an interpretation that requires the statute to be re-written. ABATE's interpretation overlooks the statutory phrase "among primary customers" in order to advance its preferred refund methodology. But under the plain language of § 6a(1), the Commission must allocate any refund required "among primary customers" based upon their "pro rata" share of the total revenue collected through the self-implemented rates.

Unlike the Commission's interpretation, ABATE also fails to give full force and effect to the language in § 6a(1). Instead, ABATE improperly adds language to the statute that artificially limits its scope. *Empire Iron Mining Partnership v Orhanen,* 455 Mich 410, 421; 565 NW2d 844 (1997) ("We will not judicially legislate by adding language to the statute."). ABATE's interpretation adds a statutory requirement that simply does not exist; the use of "actual historical billing determinants related to actual [electric] usage." (ABATE's Brief, p 9.) This "requirement" is not found anywhere in the plain language of the text, which reads that "[t]he commission shall allocate any refund required by this section among primary customers based upon their pro rata share of the total revenue collected through the applicable increase, and among secondary and residential customers in a manner to be determined by the commission." MCL 460.6a(1). The fact that ABATE can articulate a competing interpretation of the statute should not lead this Court to the conclusion that the Commission's interpretation is contrary to the plain statutory language. The Commission's implementation of Section 6a(1) of Act 286 is consistent with the plain language of the statute, and viewed in its best light, ABATE's interpretation of the statutory language simply supports the Court of Appeals' determination that ambiguity exists – which must be resolved in the Commission's favor.

II. The Commission has statutorily-authorized broad authority to design refund methodologies and properly utilized this authority to order a pro rata refund among Detroit Edison's primary customers.

A. Standard of Review

The standard of review applicable to decisions of the Michigan Public Service Commission is set forth in Argument I. A., *infra,* at page 8.

B. Analysis

As was aptly stated by the Court of Appeals, "[t]here is nothing in the statute [§ 6a(1) of Act 286] that compels the conclusion that use of the term 'refund' means the monies returned to a primary customer must be based on the *individual* primary customer's *actual* overpayment." *In re Detroit Edison Co*, 297 Mich App at 385 (Appendix 21a) (emphasis added). In refunding the excess revenues collected from the self-implementation rates, the Commission followed the statutory requirements and properly exercised its authority to fashion a refund allocation methodology.

1. The Commission has broad statutory authority to set just and reasonable rates, which includes the discretion to design refund methodologies.

This case is one of the many instances where the Commission has ordered a refund of excess revenues collected by a utility. In designing the refund methodology to be used for self-implementation, the Commission properly exercised its ratemaking authority to refund the excess self-implementation revenues

collected by Detroit Edison in a manner that is consistent with the plain meaning of Act 286.

As the expert administrative agency charged with regulating public utilities, the tasks required of the Commission necessitate a considerable amount of technical expertise. Recognizing this, the Legislature delegated broad authority to the Commission to set just and reasonable rates in order to fulfill its statutory duties. This includes the authority to determine refund methods. *Attorney General v PSC*, 215 Mich App 356, 361-362; 546 NW2d 266 (1996).

MCL 460.6 provides the Commission with broad authority to regulate public utilities:

> The public service commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities. The public service commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of public utilities . . . . [MCL 460.6(1).]

Other statutes also grant the Commission broad authority to regulate electric rates. Under the Transmission of Electricity through Highways Act, for example, the Commission has authority to set rates, rules, and conditions of service for the business of transmitting and distributing electricity. MCL 460.551. This Court has long recognized the Commission's statutorily-authorized broad discretion to set just and reasonable rates. *Detroit v Michigan Railroad Comm,* 209 Mich 395, 433-434; 177 NW 306 (1920); *Michigan Bell Telephone Co v Public Service Comm*, 332 Mich 7, 26-27; 50 NW2d 826 (1952). In *Detroit Edison Co v Public Service Comm,* the Court of Appeals, citing decisions of this Court, observed that the Legislature had

delegated to the Commission full discretionary ratemaking authority. *Detroit Edison Co v Public Service Comm,* 127 Mich App 499, 524; 342 NW2d 273 (1983).

Included in the Commission's authority is the ability to design rates without being constrained by any particular formula or specific methodology. And, Michigan Courts have continually rejected claims made by ABATE and others that the Commission's ratemaking authority is limited to a specific formula or methodology. Citing this Court's decisions in *Building Owners & Managers Ass'n v Public Service Comm* and *Michigan Bell Telephone,* the Court of Appeals has held that "the PSC is not bound by any particular method or formula in exercising its legislative function to determine just and reasonable rates." *ABATE v Public Service Comm*, 208 Mich App 248, 258; 527 NW2d 533 (1994) (citing *Building Owners & Managers Ass'n v Public Service Comm,* 42 Mich 494, 510; 383 NW2d 72 (1986); *Michigan Bell Telephone,* 332 Mich at 36-37)); *Residential Ratepayers Consortium v Public Service Comm*, 239 Mich App 1, 6; 607 NW2d 391 (1999). Michigan law also recognizes that the Commission is not limited to a particular method or formula in establishing a rate design that refunds excess rates.

Recently, this Court confirmed in *Great Wolf Lodge* that MCL 460.6(1) delegates broad ratemaking authority to the Commission. *Great Wolf Lodge v Public Service Comm,* 489 Mich 27; 799 NW2d 155 (2011). When reviewing the issue of imposing interest on a refund, this Court unanimously held that absent a statutory requirement, the Commission is not required to impose interest on a refund that it orders a utility to pay but recognized the Commission's discretionary

authority to impose interest if it chooses. This Court reasoned that the Commission's authority to impose interest is not explicitly authorized by statute but originates from *Detroit Edison Co v Public Service Comm*, 155 Mich App 461; 400 NW2d 644 (1986) and MCL 460.6(1):

> The PSC's authority to award interest in addition to a refund under these circumstances is not explicitly authorized by statute. Rather, it has its genesis in the Court of Appeals' decision in *Detroit Edison Co v Pub Serv Comm*. In that case, the Court of Appeals held that the PSC's authority to award interest derives from MCL 460.6(1). MCL 460.6(1) vests the PSC with the power and jurisdiction, among other things, to "regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities." Because "[t]he selected rate of interest has a direct impact on the fees and charges that a utility's customers ultimately pay for service," the Court of Appeals concluded that the PSC had authority to determine the amount of interest to award. [*Great Wolf Lodge,* 489 Mich at 42-43.]

The *Great Wolf Lodge* decision reiterated the long-established principle: MCL 460.6(1), in combination with other statutes and court rulings, delegates broad authority to the Commission.

Similarly, the Commission has exercised its authority to utilize a variety of methods when ordering rate refunds. In some instances, the Commission has adopted a historical refund methodology that identifies particular customers and either provides a credit on the customer's bill or mails them a refund check when they are no longer a customer of the utility. In other cases, the Commission has provided refunds to a class of customers on a prospective basis using the class's proportionate share of the overall load to provide a credit or a refund check to current members of the customer class. No particular refunding methodology can ensure exact accuracy. *Attorney General v PSC,* 215 Mich App at 369-370. And the

Commission has broad discretion in fashioning refunds. *Attorney General v Public Service Comm,* 235 Mich App 308; 597 NW2d 264 (1999); *Attorney General v PSC,* 215 Mich App at 361-362 (affirming the lawfulness of using a historical refunding system); *Detroit Edison Co v PSC,* 155 Mich App 461, 469; 400 NW2d 644 (1986) (finding that the rate of interest to be paid on customer refunds falls within the broad grant of authority vested in the MPSC); *Attorney General v PSC,* 65 Mich App 230, 236; 418 NW2d 660 (1987).

Recognizing the statutory requirement of § 6a(1) of Act 286, the Commission properly determined that it would allocate the refunds among the primary customers based on their pro rata share, and in fact, applied the same methodology to all customer classes. As § 6a(1) only requires that the allocation of any refund to the group or class of primary customers be based upon their pro rata share of the total revenue collected, all other decisions involving refund methodology are left to the Commission. Nothing in the statute indicates that the Legislature intended to limit the Commission's authority to fashion a reasonable refund methodology.

As support for its position on the method of calculating the refund under § 6a(1), ABATE points to *Grand Rapids v Iosco Land Co* as an example of where actual historical refunds were required. *Grand Rapids v Iosco Land Co,* 273 Mich 613; 77 NW2d 1 (1935). The Court's decision in *Grand Rapids* involved a statute that provided for the payment or refunding "to the taxpayers" of all or a portion of a special assessment associated with a road widening. Here, the Court found that a previous landowner who had paid the assessment was entitled to a refund rather

than a subsequent owner because the previous landowner was the taxpayer who had paid the assessment. *Grand Rapids* is not instructive in this case because of a simple, but critical distinction. This case involves a rate refund to customers, and to the primary customers as a group ("among"), not a tax refund to a taxpayer; and utility customers do not have a vested right to rate refunds.

While it is true that MCL 460.6a(1) provides for a refund to the group or class of primary customers based on their pro rata share, contrary to ABATE's assertions, a specific ratepayer cannot claim an interest in a possible utility refund. (ABATE's Brief, pp 4, 10.) In order to establish a property interest, there must be a legitimate claim of entitlement. *Board of Regents v Roth*, 408 US 564, 569-578; 92 S Ct 2701; 33 L Ed 2d 548 (1972), *Bundo v Walled Lake*, 395 Mich 679, 692; 238 NW2d 154 (1976). In this situation, such an analysis would require a determination that the interest to be protected is property. The property interest at stake, however, cannot be the money paid in rates since ratepayers receive utility service in exchange for the rates they pay. Michigan courts have determined that ratepayers/customers have no vested rights in utility rates. *In re Certified Question (Fun'N Sun RV, Inc v Michigan*, 447 Mich 765, 792-795; 527 NW2d 468 (1994); *Attorney General v Public Service Comm*, 249 Mich App 424, 437; 642 NW2d 691 (2002) lv den 467 Mich 929 (2000); *Association of Businesses Advocating Tariff Equity v Public Service Comm*, 174 Mich App 63, 72-75; 435 NW2d 766 (1989); *In re Blue Cross & Blue Shield Revised Reimbursement System*, 93 Mich App 357, 363-365; 287 NW2d 236 (1979). And, following the same analysis, utility customers do not have a vested right in

any potential refund. *Attorney General v PSC*, 249 Mich App at 437. Consequently, ABATE's reliance on *Grand Rapids* is misplaced.

Moreover, in support of its argument in favor of actual historical refunds, ABATE claims that "refunding of overcharges can be simple, direct, and fair." (ABATE's Brief, p 10.) This assertion is an oversimplified statement, and it ignores the practical consequences of adopting a historical refund methodology. The historical approach to refunds is simply not cost-effective, and these additional costs would be borne by the primary customers. As the Commission stated, "were the Commission persuaded to order a refund based on the amount each primary customer paid during self-implementation, the administrative costs associated with making those individual determinations would be addressed in a future rate case, and, under basic principles of cost causation, would likely be borne by the primary class." MPSC Case No. U-16384, Order, December 21, 2010, p 10 (Appendix 12a).

2. The Commission properly utilized its authority to order a pro rata refund among Detroit Edison's primary customers.

Because the Commission followed the statute and properly exercised its authority when ordering the allocation of refunds to customers, ABATE is left with the problematic task of crafting essentially a public policy argument to support its position. By alleging a potential harm to some primary customers, who may have elected to purchase electric generation from an alternative electric supplier and switched to the Company's Retail Open Access (ROA) rate schedules during the self-implementation period, ABATE claims that primary customers could receive "no

refunds" and the Commission is "punish[ing] switching customers" instead of fostering competition. (ABATE's Brief, p 14.) There is no record support to substantiate these claims.

Primary customers received refunds of excess revenues collected under self-implementation rates. The MPSC ordered refunds to the primary class customers based on their pro rata share of the total revenue collected. There is no evidence that ABATE's hypothetical occurred in this case. MPSC Case No. U-16384, Order, December 21, 2010, Attachments A & B (Attachment A shows the refund of self-implemented revenues to customers based on their pro rata share; Attachment B shows the tariffs for the approved rates.) (Appendix 14a-17a).

As for the assertion that the Commission turned a blind eye to its statutory duty of fostering competition, this claim misunderstands the import of MPSC's action here. There is no doubt that the Commission is charged with the dual responsibility of encouraging competition and maintaining regulation of incumbent electric utilities. MCL 460.6; MCL 460.10. As stated in MCL 460.10(b)(2), the purpose of the Customer Choice and Electric Reliability Act is to "allow and encourage the Michigan public service commission to *foster competition* in this state in the provision of electric supply *and maintain regulation of electric supply for customers* who continue to choose supply from incumbent electric utilities" (emphasis added). Under the plain statutory language, the Commission is directed

to balance the interests of encouraging competition and maintaining regulation.[3] The Commission regularly encourages competition by approving licenses for alternative energy suppliers, as well as through its orders that establish and modify the choice program rules through utility tariffs. But fostering competition does not mean requiring customers to utilize an alternative supplier, nor does this statutory duty require the Commission to increase costs to some customer groups to benefit others who may have chosen to use an alternative supplier. MPSC Case No. U-16384, Order, December 21, 2010, p 10 ("...the administrative costs associated with making those individual determinations would be addressed in a future rate case, and, under basic principles of cost causation, would likely be borne by the primary class.") MPSC Case No. U-16384, Order, December 21, 2010, p 10 (Appendix 12a).

To the contrary, the record demonstrates that the Commission has encouraged competition. Detroit Edison has ROA tariffs in place, and there are customers taking service under these tariffs. MPSC Case No. U-16384, Order, December 21, 2010, Attachments A & B (Appendix 14a-17a). The record further reflects that some of Detroit Edison's ROA customers were allocated a refund of excess revenues collected under self-implementation rates. *Id.*

Most critically, ABATE's argument is unsupported by any record evidence. ABATE failed to provide the Commission with any evidence showing the number of

[3] Competition is not unfettered in Michigan. By statute, the ability of customers to take service from an alternative electric supplier is capped. MCL 460.10a(1)(a) states that "no more than 10% of an electric utility's average weather-adjusted retail sales for the preceding calendar year may take service from an alternative electric supplier at any time."

potentially affected primary customers who switched to Detroit Edison's ROA tariffs, or the dollar impact on such a customer. MPSC Case No. U-16384, Order, December 21, 2010, p 10 (Appendix 12a). And, while at the Court of Appeals, ABATE claimed unfair treatment towards "two unidentified ABATE members who were primary customers" who were allegedly affected by the Commission's order, *Detroit Edison,* 297 Mich App at 381 (Appendix 19a), there is no evidentiary support for this claim. If this situation did occur, the Commission indicated there was nothing hidden from these customers who elected to make a business decision to purchase electricity from an alternative electric supplier. And, the facts indicate that any customer that switched suppliers early on in the self-implementation period likely underpaid rather than overpaid during that period. MPSC Case No. U-16384, Order, December 21, 2010, p 10 (Appendix 12a).[4]

The Commission properly exercised its broad ratemaking authority to design a refund methodology to return excess amounts paid under self-implementation rates to customers as required by Act 286. The Commission's decision to use a prospective refund method rather than a historical refund method was based on valid policy considerations and record evidence. This Court should affirm the Commission's order.

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[4] For any primary customers that might have switched and overpaid, the Commission's position is that it could have considered refunding any alleged overpayment if documentary evidence was provided to support the claim. ABATE has never provided such documentation in support of any primary customers, only presenting a broad policy argument, and therefore the Commission was not examining a specific request for a refund.

CONCLUSION AND RELIEF REQUESTED

The process of refunding utility rates is not simple. The Commission has the authority and technical expertise to fashion a refund of self-implementation rates. Irrespective of competing interpretations, the refund methodology adopted by the Commission is consistent with the plain language of Act 286 and the excess revenue collected during self-implementation was allocated among Detroit Edison's primary customers based upon their pro rata share. Additionally, the Commission exercised its discretion on the refund methodology and adopted one that gave utility customers their proportional share of the overpayment.

Therefore, the Michigan Public Service Commission respectfully request this Honorable Court to hold that the Commission's implementation of MCL 460.6a is consistent with the plain language of the statute and to affirm its order adopting a refund methodology that allocates refunds to customers prospectively on a pro rata basis.

Respectfully submitted,

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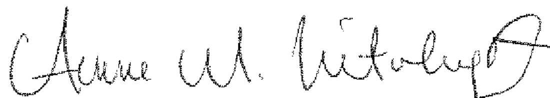

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