IN THE SUPREME COURT

(On Appeal from the Michigan Court of Appeals)

(Joel P. Hoekstra, P.J.; David H. Sawyer and Henry W. Saad, J.J.)

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,

Appellant,

vs.

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee,

and

THE DETROIT EDISON COMPANY,

Petitioner-Appellee.

Supreme Court No. 145750

Court of Appeals No. 302110

MPSC Docket No. 00-016384

BRIEF ON APPEAL – APPELLANT

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

The Association of Businesses Advocating Tariff Equity ("ABATE") applied for leave to appeal from *In Re Application of Detroit Edison Company to Increase Rates,* Association of Businesses Advocating Tariff Equity, Appellant, v Michigan Public Service Commission, Appellee ("PSC") and Detroit Edison Company, Petitioner-Appellee ("Detroit Edison"), 297 Mich App 377, 823 NW2d 433 (2012), *lv gtd*, 828 NW2d 27 (2013) (Appendix 18a). On March 29, 2013, this Court granted leave to appeal (Appendix 28a). This Court has jurisdiction to review the case by appeal, MCR 7.301(A)(2); MCR 7.302(H).

STATEMENT OF QUESTIONS PRESENTED

1. This Court's Order granting leave to appeal stated:

> The parties shall address: (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 (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 (2003); and (2) whether MCL 460.6a(1) requires that a refund to primary customers required after a utility implements increased rats 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.

Appellant ABATE answers: Yes

Appellees presumably will answer: No

The Court of Appeals answered: No

The Court's question is inter-related to the following issue from ABATE's Application for Leave to Appeal, which is also presented in accordance with MCR 7.302(H)(4)(a):

2. Whether the PSC acted arbitrarily and capriciously by adopting a method which deprived some customers of a refund even though they had overpaid and gave other customers a windfall?

Appellant ABATE answers: Yes

Appellees presumably will answer: No

The Court of Appeals answered: No

INTRODUCTION

This case arises out of two ratemaking proceedings before the PSC. In the first proceeding, Detroit Edison filed an application seeking to increase rates, and 180 days after the application was filed, it self-implemented a rate increase as permitted by law.[1] This self-implemented rate increase ultimately turned out to be in an amount higher than the amount approved in the final PSC order, thus necessitating a refund to utility customers of the amount over-charged to those customers during the self-implemented rate increase period.

The PSC established a new docket to determine the amount of the refund, plus interest, and the methodology to make the refund. ABATE sponsored testimony that actual refunds had to be made to the primary rate class.[2]

Instead of ordering actual refunds to the customers that had been over-charged, the PSC approved a methodology whereby Full Service customers would receive credits based upon their electric usage in a future month. Any customer that had switched to Retail Access Service from Full Service would not receive any credits, even though those customers had been over-charged during the self-implemented rate period.

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[1] Detroit Edison Company changed its name effective in 2013 and is now known as DTE Electric Company.

[2] "Primary" refers to electric utility service involving alternating current, three-phase and at a nominal voltage level of 4,800 volts or higher (i.e., the largest customers). *See,* Rate Schedule No. D6 (Appendix 22a).

STATEMENT OF FACTS

On January 26, 2009, Detroit Edison filed an application with the PSC seeking an annual increase in electrical rates in the amount of $378,000,000, which was docketed as Case No. U-15768. Under Section 6a(1) of 2008 PA 286, MCL 460.6a(1), Detroit Edison was allowed to self-implement an interim rate increase, which it did in the amount of $280 million.

On January 11, 2010, the PSC issued a final order approving a rate increase in the amount of $217,392,000, which was less than the amount of the self-implemented increase, thus invoking the refund provisions of Section 6a(1).

The PSC ordered that the refund proceedings be given a new docket number, and ultimately, Case No. U-16384 was established to determine the methodology of the refund and its amount. In an order issued December 21, 2010, the PSC determined that the refund amount, together with interest, was $26,872,231.[3] This sum does not belong to Detroit Edison, nor does it belong to the PSC. It belongs to the customers who were over-charged

Detroit Edison requested the PSC to approve a credit methodology that calculated the credit for a billing month in the future, and then calculated a credit factor in cents per kilowatt hour based on an ***estimate*** of sales by rate class for that future month (i.e., "prospective credit"). ABATE proposed a refund of the ***actual*** over-charges during the historical period the self-implemented rates were in effect for primary customers (i.e., "historical refund"). The PSC adopted a prospective credit methodology and ABATE filed a timely Claim of Appeal on January 18, 2011.

The Court of Appeals issued a "For Publication," 2-1 decision on July 26, 2012, upholding the use of the PSC's prospective month credit methodology. ABATE filed an Application for Leave to Appeal, which this Court granted on March 29, 2013.

[3] PSC Order, U-16384 (Appendix 3a).

STANDARD OF REVIEW

Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, *prima facie*, to be lawful and reasonable.[4] A party, such as ABATE, aggrieved by an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable.[5] To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment.[6]

A PSC order is considered unlawful if it is based on an erroneous interpretation or application of the law, and is considered unreasonable if the evidence does not support it.[7] In reviewing PSC decisions, a court may not substitute its judgment for that of the agency, but may not abandon or delegate its duty to interpret statutory language and legislative intent.[8]

Questions of statutory interpretation are questions of law, which are reviewed *de novo*.[9] If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent.[10]

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[4] *Michigan Con Gas Co v Pub Serv Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). However, self-implemented rates, like at issue here, are not prescribed by the PSC and thus not entitled to any such presumption of reasonableness. Furthermore, when the PSC determines final rates that are lower than the self-implemented rates by the utility, those overcharges are identified as not having been lawfully collected and must therefore be refunded.

[5] MCL 462.26(8).

[6] *In Re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999).

[7] *Associated Truck Lines, Inc v Pub Serv Comm*, 377 Mich 259; 140 NW2d 515 (1966); *Attorney General v Pub Serv Comm*, 231 Mich App 76, 77-78; 585 NW2d 310 (1998); *Attorney General v Pub Serv Comm*, 249 Mich App 424, 429; 642 NW2d 691 (2002).

[8] *Attorney General v Pub Serv Comm*, 244 Mich App 401, 406; 625 NW2d 786 (2002).

[9] *In Re Complaint of Rovas against SBC Michigan*, 482 Mich 90, 108; 754 NW2d 259 (2008); *In Re MCI Telecommunications Complaint, supra*

[10] *Tryc v Michigan Veterans' Facility*, 451 Mich 129; 545 NW2d 642 (1996).

An agency's interpretation of its enabling statutes is entitled to respectful consideration and, if persuasive, will not be overruled without cogent reasons. However, an agency's interpretation cannot conflict with the plain meaning of the statute. Although a court must consider an agency's interpretation, the court's ultimate concern is the proper construction of the plain language of the statute and it is not bound by an agency's interpretation of a statute.[11]

Finally, a final order of the PSC must be supported by competent, material and substantial evidence on the whole record.[12] Substantial evidence is evidence that a reasonable mind would accept as adequate to support a decision.[13]

ARGUMENT

1. THE COURT OF APPEALS HAS EFFECTIVELY AND IMPERMISSIBLY REWRITTEN PORTIONS OF 2008 PA 286.

A. The Court of Appeals did not apply MCL 460.6a(1) as written.

This argument concerns the refund provision of 2008 PA 286.[14] It is clear that the Legislature intended to create two separate and distinct standards for making refunds in the event that a final order approved a rate increase in an amount less than what was self-implemented by

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[11] *In Re Complaint of Rovas against SBC Michigan, supra.*

[12] *Detroit Edison Co v Pub Serv Comm*, 264 Mich App 462, 465; 691 NW2d 61 (2004) (quoting Const 1963, art 6, § 28).

[13] *In Re Complaint of Pelland*, 254 Mich App 675, 685-686; 658 NW2d 849 (2003), lv den, 469 Mich 914 (2003) (reversing PSC's decision as unlawful and as being based upon "unsupported speculation").

[14] MCL 460.6a(1) provides:

> "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.)

the utility. For primary customers, where the customers are large and the refunds are large, they were to receive their pro rata share of the total revenue collected through the applicable increase, but for lower voltage secondary and residential customers, the Legislature gave the PSC free rein to determine the manner of the refund. It is appropriate to consult a dictionary to learn the common and approved usage of words if the Legislature does not define those terms in the statute.[15] The word "refund" was defined by this Court as follows:

> The word "refund" is defined in 3 Bouvier Law Dictionary (Rawle's 3d rev.), p. 2856:
>
> "To pay back by the party who has received it, *to the party who has paid it,* money which ought not to have been paid."[16]

Black's Law Dictionary (8th ed) defines the word "refund" as follows:

> *n.* 1. The return of money to a person who overpaid, such as a taxpayer who over estimated tax liability or whose employer withheld too much tax from earnings. 2. The money returned to a person who overpaid. (citations omitted) (p. 1307)

Likewise, the United States Supreme Court, quoting *Webster's New International Dictionary*, defined "refund" as follows:

> *Webster's New International Dictionary* (2d ed., Unabridged), defines "refund" as "that which is refunded" and defines the transitive verb as: "to return (money) in restitution, repayment . . ."[17]

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[15] *Alvan Motor Freight, Inc v Dept of Treasury*, 281 Mich App 35; 761 NW2d 269 (2008).

[16] *Grand Rapids v Iosco Land Co*, 273 Mich 613, 617; 263 NW 753 (1935).

[17] *United States v Wurts*, 303 US 414, 417; 58 S Ct; 82 L Ed 932 (1938).

Black's Law Dictionary (8th ed) defines the phrase "pro rata" as follows:

> *adv.* Proportionately; according to an exact rate, measure, or interest. <the liability will be assessed pro rata between the defendants> (p. 1257)

Using the normal and accepted meaning of the words "refund" and "pro rata," as defined above, the Court of Appeals erred in concluding that MCL 460.6a(1) is subject to "reasonable but differing interpretations" and therefore ambiguous. The standard is whether the law "irreconcilably conflict[s]' with another provision . . . or where it is *equally* susceptible to more than a single meaning."[18]

There is no irreconcilable conflict between the portion of law dictating refunds to the primary customers and any other provision of MCL 460.6a(1). Further, based upon the dictionary definitions of the words "refund" and "pro rata," it cannot be said that this provision is equally susceptible to more than a single meaning. Thus, under the terms of the decision in the *Mayor of Lansing* case, the refunding provisions of MCL 460.6a(1) are not ambiguous, and exact, actual refunds must be made to all primary customers that overpaid their utility bills during the period that the rates were self-implemented.

B. Primary Customers that were over-charged should receive an individual refund equal to the amount that they were over-charged.

If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent.[19] This Court stated the following rules of statutory construction:

> Because the Legislature is presumed to understand the meaning of the language it enacts into law, statutory analysis must begin with the wording of the statute itself. Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence. The court may not

[18] *Mayor of Lansing v Public Service Comm, supra.*

[19] *Tryc v Michigan Veteran's Facility, supra.*

> assume that the Legislature inadvertently made use of one word or phrase instead of another. Where the language of the statute is clear and unambiguous, the court must follow it.[20]

Further guidance on statutory construction is found in a recent Court of Appeals decision:

> When interpreting the meaning of a statute, our main objective is to assert and give effect to the Legislature's intent. The first step is to determine whether the language of the statute is plain and unambiguous. If the language is unambiguous, we must assume that the Legislature intended its plain meaning and, accordingly, we must apply the statute's language as written. In such instances, we must assume that every word has some meaning and we must give effect to every provision, if possible. In doing so, we are to give words their plain and ordinary meaning, unless otherwise defined by the Legislature.[21]

The use of the statutory term "shall" is mandatory – it is a directive, not an option.[22]

There are two key aspects of the refund language of Act 286. First, it requires a historical look-back that compares what customers paid with the amount that would have been produced had the lawful, final (i.e., correct) rates been in place instead of the self-implemented rates.[23] Accordingly, the required calculation methodology is totally dependent upon identification of the ***actual historical*** billing determinants related to actual usage.

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[20] *Robinson v City of Detroit,* 462 Mich 439, 459; 613 NW2d 307 (2000).

[21] *Oneida Charter Twp v Grand Ledge*, 282 Mich App 435, 442; 766 NW2d 291 (2009).

[22] *In Re Kostin*, 278 Mich App 47, 57; 748 NW2d 583 (2008); *Scarsella v. Pollock*, 461 Mich 547, 549; 607 NW2d 711(2000).

[23] " 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 exceeds the total that would have been produced by the rates or charges subsequently ordered by the commission in its final order." MCL 460.6a(1)

It is clear that the Legislature knows how to provide for reconciliations when it intends to allow "imprecise" collections. The silence or absence of a prohibition in a statute does not create an implication the agency has a power.[24]

Pro rata refunding of overcharges can be simple, direct and fair. Once the final rate is known, simply recalculate the customer's bill using the correct rate and refund the difference from the amount paid. Since the amount of money involved did not belong to Detroit Edison or the PSC, in fashioning a refund methodology, they did not place a priority on accuracy or fairness like they might have had it been their money. Accordingly, the choice of the estimated prospective month refund methodology guarantees that primary customers will not receive accurate refunds because the methodology is founded on estimates of (1) which Full Service customers will be buying electricity from Detroit Edison in a future month, and (2) in what amount. These two estimates will invariably prove incorrect, and primary customers could receive no refund or a refund that is more or less than the amount they actually overpaid during the period the self-implemented rates were in effect.

The reason primary customers could receive ***no*** refund is because, in the meantime,[25] they might have exercised their statutory right to purchase their electric generation requirements from an alternative electric supplier ("AES" or "AESs") and, therefore, would be excluded from a refund based on the fact that they did not buy their electric generation from Detroit Edison at

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[24] *Wolverine Power Supply Coop, Inc v. Dept of Environmental Quality*, 285 Mich App 548, 564; 777 NW2d 1 (2009).

[25] The self-implemented charges took place over roughly the last 6 months of 2009, but the single month for the prospective credit was in January 2011.

the time the prospective credit would be made.[26] The reason that primary customers could receive a refund that is ***different*** from the actual amount they overpaid during the period self-implemented rates were in effect is due to the simple fact that the PSC's prospective credit method uses a combination of historical calculations to determine the amount of the refund and then estimates of future customers and sales to return the over-charges to some customers.

The historical piece is the difference between what customers actually paid under the self-implemented rates and what they would have paid under the final rates based on actual sales to customers during the self-implementation period.

Instead of calculating ***actual*** historical refunds, the future piece is an ***estimate*** of what the number of customers by class and utility sales to them would be in a future month (e.g. January 2011 here), which then allows the calculation of an ***estimated*** credit factor for that month.

If utility sales vary by class or customer from the known historical sales, and they always will, then the credit will be inaccurate. For example, if a company was operating at full capacity during the self-implementation period but was engaged in a production changeover during the credit month, then that customer could receive tens of thousands of dollars less than what it overpaid. This money difference would be given to other undeserving customers, violating the concept of a "refund." The result of this prospective credit methodology is really not a refund at

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[26] In dissent, Judge Saad aptly discussed this circumstance:

> "In this case, a few of the primary customers of Detroit Edison sought refunds of the actual amount that they overpaid Detroit Edison for electric power before they switched to buying electricity from another electric company. Their statutory right to a refund for those over-payments is set forth clearly in 2008 PA 286 (Act 286). The overpayments occurred because, for the first time in Michigan, Act 286 allows an electric utility to self-implement a rate increase, subject to later reduction by the PSC. The risk to the electric utility is that it will have to refund to its customers the [**439] amounts overpaid during this self-implementation period. Indeed, Act 286 expressly says that the utility "shall refund" customers if the PSC does not grant the full rate increase represented in the self-implemented rate. MCL 460.6a(1)." (footnote omitted.)

all but simply a calculation of a "proxy" for a refund of the amounts that were actually overpaid by customers and which amounts are known. Only the actual historical approach will result in a true pro rata refund, as required by Section 6a(1).

In summary, there is this Court's prior case which is directly on point holding that in an instance where a mandatory refund is required to an undefined class of customers, the legislative intent is that the refund should be made to those customers who paid the over-collections.[27] 2008 PA 286 does not authorize reconciliations, unlike the other statutes and, therefore, the PSC has only one means of returning to primary customers the difference between the rates that were self-implemented and the final rates, which is through an actual pro rata refund. An actual pro rata refund will assure that primary customers will receive as a refund equal to what they overpaid for electric service during the self-implementation period and not arbitrarily and capriciously deprive some primary customers of their refund while giving other customers credits in excess of what they were over-charged.

C. The PSC acted arbitrarily and capriciously by adopting a method which deprived some customers of a refund even though they had overpaid and gave other customers a windfall.

By adopting a method to compensate customers for the overpayments they made during the time Detroit Edison self-implemented rates based upon the use of a prospective credit month applicable to only Full Service customers, deprived all customers that had switched to Retail Open Access service of their rightful refunds. The PSC's stated reason for doing so is as follows:

> The Commission does not agree with ABATE that primary customers that chose to switch from bundled to Choice service during the period of self-implementation are treated unfairly under this refund method. There was nothing hidden from such customers. The possibility that the rate increase adopted in the

[27] *Grand Rapids v Iosco, supra.*

> 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 of 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.[28]

This Court has stated on the basis of United States Supreme Court jurisprudence:

> "Arbitrary is ' "[W]ithout adequate determining principle * * * Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, * * * decisive but unreasoned." '
>
> "Capricious is: ' "[A]pt to change suddenly; freakish; whimsical; humorsome." ' [29]

This Court has further acknowledged that bad faith is not a necessary element of arbitrary conduct. Rather, under some circumstances, arbitrariness may be evident in the proof that an act was undertaken (in a perfunctory fashion) or on the basis of ignorance of facts directly bearing on the matter.[30]

The PSC's decision is really not about whether there should be historical perfection in fashioning a refund procedure, but whether it is arbitrary and capricious to simply take money overpaid by certain customers while they were Full Service customers of Detroit Edison (i.e. during the last 6 months of 2009) and simply give that money to different customers who happen to be Full Service customers of Detroit Edison at the time the credits are given (i.e. January 2011). The PSC has no such authority to take refunds rightly due customers who were over-

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[28] PSC Order, U-16384 (Appendix 12a)

[29] *Goolsby v Detroit,* 419 Mich 651, 678; 358 NW2d 856 (1984) (citations omitted).

[30] *Id.*, at 669, quoting *Millstead v International Brotherhood of Teamsters, Local Union No. 957*, 580 F2d 232, 235 (CA 6, 1978).

charged and give the refund amounts to others through future credits on bills. Under the PSC's prospective credit method, primary customers that switched service suffered a loss while other customers received an undeserved windfall.

The argument by the Commission that primary customers who switched service should have known that part of the cost of using an AES as a supplier was the loss of all prior refund potential is preposterous. This result was not in any prior PSC order, rule or guideline which could have been known as the PSC had never before interpreted Section 6a(1) in this manner; rather it was an arbitrary *ad hoc* decision by the PSC that punished switching customers after the fact even though the Legislature directed the PSC to foster competition.[31] This arbitrary decision to deprive customers of refunds if they choose a competitive supplier promoted the monopoly position of the incumbent utilities at the expense of their customers.

RELIEF REQUESTED

Appellant ABATE respectfully requests this Court to reverse the Court of Appeals' Opinion (Appendix 18a), and remand this case to the PSC with the direction to make refunds to all primary customers based on an allocation to each primary customer that was over-charged on the basis of the amount paid by each primary customer.

Respectfully submitted,

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[31] MCL 460.10(2)(a) and (b); again, J. Saad aptly discusses this action by the Commission as being contrary to law.