STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

Judges Joel P. Hoekstra, P.J., and David H. Sawyer and Henry W. Saad, JJ.

In re Application of Detroit Edison Company to Increase Rates

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ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, Docket No. 145750

Appellee,

and

THE DETROIT EDISON COMPANY,

Petitioner-Appellee.

BRIEF ON APPEAL – PETITIONER-APPELLEE THE DETROIT EDISON COMPANY

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Appellant Association of Businesses Advocating Tariff Equity's ("ABATE") Jurisdictional Statement is complete and correct.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

The Court's Order granting leave to appeal directed the parties to address two issues:

1. "[W]hether 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)."

   - ABATE answers: Yes
   - The Detroit Edison Company ("Edison") answers: Yes, the Court of Appeals majority's standard for statutory ambiguity was inconsistent with *Mayor of Lansing* and *Klapp, supra,* but MCL 460.6a(1) is ***not ambiguous***.
   - Michigan Public Service Commission ("MPSC" or "Commission") did not decide the standard for statutory ambiguity, but instead interpreted MCL 460.6a(1) according to its plain language.
   - Court of Appeals' majority presumably would answer: No
   - Court of Appeals' dissent presumably would answer: Yes

2. "[W]hether 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."

   - ABATE answers: Yes
   - Edison answers: No
   - MPSC answered: No
   - Court of Appeals' majority answered: No
   - Court of Appeals' dissent answered: Yes

ABATE states that additional issues raised in its application for leave to appeal may be presented pursuant to MCR 7.302(H)(4). But the additional issue that ABATE now presents was not included in ABATE's Statement of Questions Presented in its application for leave to appeal. If the Court wishes to consider an issue beyond the two that it identified in its order granting leave to appeal, the issue is best stated as:

3. Was the MPSC's allocation of the total rate refund among Edison's customers authorized by law and supported by competent, material and substantial evidence on the whole record?

   - ABATE presumably would answer: No
   - Edison answers: Yes
   - MPSC answered: Yes
   - Court of Appeals' majority answered: Yes
   - Court of Appeals' dissent answered: No

INTRODUCTION

MCL 460.6a(1) allows a utility such as The Detroit Edison Company ("Edison")[1] to self-implement a rate increase if the Michigan Public Service Commission ("MPSC" or "Commission") does not issue a rate order within 180 days after the utility applies for a rate increase. MCL 460.6a(1) also requires the utility to refund the self-implemented rate increase, with interest, to the extent "total revenues" from the self-implemented rates (which must be increased on an equal-percentage basis for all customer classes) exceed the total revenues that would have been collected under the Commission's final rates (which are based on the record from a contested case, and driven by the principle that various customer classes should pay for the costs that they cause). Thus, the utility obtains a *full* revenue recovery in accordance with the MPSC's final rates, and must refund the *net* amount of revenue that it over-collected pursuant to the self-implemented rates.

On December 21, 2010, the Commission issued an Order in Case U-16384 (Appendix 3a-17a), which provided a refund to Edison's customers of a portion of the rates that Edison had self-implemented. The Association of Businesses Advocating Tariff Equity ("ABATE") appealed only how the Commission *allocated* the refund among Edison's customers. The Court of Appeals affirmed, and this Court granted leave to appeal. *In re Application of Detroit Edison Company to Increase Rates*, 297 Mich App 377; 823 NW2d 433 (2012), *lv gtd* 828 NW2d 27 (2013) (Appendix 18a-23a, 28a).

On May 24, 2013, ABATE filed its brief on appeal, which provides little discussion on the issues that this Court directed the parties to address. Instead, ABATE essentially contends

[1] Effective January 1, 2013, The Detroit Edison Company changed its legal name to DTE Electric Company. We will continue to refer to "Edison" in this brief for consistency with the case caption and prior proceedings.

that the refund to each of Edison's primary (high voltage) customers should equal the exact historical amount that each individual customer actually overpaid under the self-implemented rates. ABATE also asserts that hypothetical (unnamed and unidentified) Edison customers who paid the self-implemented rates, but later chose to purchase electricity from a different energy provider under Retail Open Access ("ROA") rates, should share in a portion of the refund.

In its review of the case, the Court of Appeals majority stated that a statute is ambiguous when it "is subject to reasonable but differing interpretations." 297 Mich App at 385. This standard for statutory ambiguity is inconsistent with this Court's majority decisions in *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"), and *Klapp v United Ins Group Agency*, 468 Mich 459, 467; 663 NW2d 447 (2003). The parties did not address this issue before the Court of Appeals (because no party argued before the Court of Appeals that MCL 460.6a(1) was ambiguous).

The Court of Appeals majority's discussion of the ambiguity standard was unnecessary in light of MCL 460.6a(1)'s plain language and the record, as well as case law and Commission practice regarding refunds, and the Commission's explanation of how ABATE's proposal is contrary to MCL 460.6a(1)'s plain language. Thus, the standard for statutory ambiguity should be corrected or clarified as this Court deems appropriate. However, the Commission's allocation of the refund among Edison's customers should be affirmed, because it is supported by the plain language of MCL 460.6a(1), which is not ambiguous.

COUNTER-STATEMENT OF FACTS

On January 26, 2009, Edison filed an application requesting a rate increase. On July 16, 2009, the Commission approved a rate design for a self-implemented rate increase beginning July 26, 2009 (July 16, 2009 Order in Case U-15768, p 8). On January 11, 2010, the Commission issued its final Order for a rate increase effective January 26, 2010 (January 11, 2010 Order, p 85). Since higher self-implemented rates (approximately $280 million vs. $217.4 million annually) were in effect from July 26, 2009 to January 26, 2010, Edison was required to refund the net revenue that it recovered during that period above the revenue that it would have recovered under the Commission's final rates.

On April 1, 2010, Edison filed its application to refund the amount it over-recovered due to the self-implemented rates. The Attorney General, ABATE and Energy Michigan intervened. The Commission's professional Staff proposed to allocate the refund among Edison's various rate schedules that paid net revenues during the self-implementation period that exceeded the revenues that would have been produced under the Commission's final Order. The Staff further proposed no refund (because there is nothing to refund) to those rate schedules that did not pay higher total revenues during the self-implementation period than they would have paid under the Commission's final rates. Staff utilized the same allocation method for all customer classes (MPSC Appendix 8b-9b, testimony of Alan Droz at 2 T 75-77).

Edison supported the Staff's refund proposal. ABATE disagreed, instead asserting that Edison's primary (high voltage) customers should each be refunded the exact, historical amount that each overpaid individually. ABATE also argued that (unnamed and unidentified) Edison primary customers who paid the self-implemented rates, but later chose to purchase electricity

from a different energy provider, should share in the refund (but ABATE did not name or identify any such customers in its pleadings or proofs).

The Commission approved the Staff's proposed methodology to allocate the undisputed refund amount ($26,862,231, including interest) among Edison's customers, and rejected ABATE's arguments (Appendix 11a-13a, December 21, 2010 Order in Case U-16384, pp 9-11). The Court of Appeals affirmed, and this Court granted leave to appeal. *In re Application of Detroit Edison Company to Increase Rates*, 297 Mich App 377; 823 NW2d 433 (2012), *lv gtd* 828 NW2d 27 (2013). (Appendix 18a-23a, 28a). Additional detail will be discussed below, where it is best understood in context.

STANDARDS OF REVIEW

This appeal presents the judicial review of a ratemaking decision by the MPSC, a state administrative agency. Const 1963, art 6, § 28 provides that judicial review of administrative agency decisions shall include the determination of whether those decisions are "authorized by law; and in cases where a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record." A Commission decision is supported by substantial evidence if it is based on expert opinion testimony by a qualified expert who has a rational basis for that opinion, regardless of whether other experts disagree. *Consumers Power Co v Public Service Comm*, 189 Mich App 151, 153; 472 NW2d 77 (1991), *lv den* 439 Mich 922 (1992). Under MCL 462.26(8), an appellant such as ABATE has the burden to prove by clear and satisfactory evidence that the MPSC's Order is "unlawful or unreasonable."

This appeal involves the interpretation of the language of a statute, MCL 460.6a(1). This Court recently summarized the applicable rules of statutory construction in *Dep't of Environmental Quality v Worth Twp*, 491 Mich 227, 237-38; 814 NW2d 646 (2012):

> "When interpreting statutes, this Court must 'ascertain and give effect to the intent of the Legislature.' The words used in the statute are the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the context within which they are used in the statute. In interpreting a statute, this Court avoids a construction that would render any part of the statute surplusage or nugatory. 'As far as possible, effect should be given to every phrase, clause, and word in the statute.' Moreover, the statutory language must be read and understood in its grammatical context. When considering the correct interpretation, the statute must be read as a whole, unless something different was clearly intended. Individual words and phrases, while important, should be read in the context of the entire legislative scheme." (Footnotes to citations omitted).

One issue raised by the Court of Appeals below is whether MCL 460.6a(1) is ambiguous. A statute is ambiguous when a provision of the statute "'irreconcilably conflict[s]' with another provision . . . or where it is equally susceptible to more than a single meaning." *Mayor of Lansing, supra,* 470 Mich at 166; *Klapp, supra,* 468 Mich at 467.

This Court reviews legal questions, including issues of statutory interpretation, *de novo. In re Complaint of Rovas Against SBC Michigan,* 482 Mich 90, 97; 754 NW2d 259 (2008). In *Rovas,* this Court also reaffirmed the standard of review that accorded "respectful consideration" to the statutory interpretations by administrative agencies charged with the administration of the statute, as earlier stated by this Court in *Boyer-Campbell v Fry,* 271 Mich 282, 296-97; 260 NW 165 (1935), which held:

> ". . . the construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. However, these are not binding on the courts, and [w]hile not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform them is taken note of by the courts as an aiding element to be given weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature" (482 Mich at 103, internal citations and quotation marks omitted).

The MPSC's decision in this case allocated rate refunds among Edison's customers. Michigan courts generally defer to the MPSC's decisions on the allocation of utility rates among

the utility's customers (sometimes referred to as "rate design" or "rate structure" decisions), which decisions are regarded as particularly legislative and discretionary in character. Courts will not reverse such a MPSC decision except upon a showing that it is "arbitrary, capricious or an abuse of discretion." *In re Application of Michigan Consolidated Gas,* 281 Mich App 545, 548; 761 NW2d 482 (2008); *Great Lakes Steel Div of Nat Steel Corp v Public Service Comm,* 130 Mich App 470, 480; 344 NW2d 321 (1983). *See also Attorney General v Public Service Comm #2,* 133 Mich App 790, 798-99; 350 NW2d 320 (1984) (declining to address Attorney General's arguments concerning rate design); *Consumers Power Co v Public Service Comm*, 415 Mich 134, 172; 327 NW2d 875 (1982) (Williams, J. dissenting from affirmance of injunction: "The courts have neither the authority nor the expertise to determine what rate structure most equitably spreads a rate increase among commercial, industrial, household and other users").

Like other rate allocation decisions, the Michigan courts have recognized that the MPSC has "broad discretion" in allocating rate refunds among utility customers, that the MPSC is not bound to any specific refund formula, and that each customer is not entitled to receive a "precise" refund of exactly the amount of rates the customer was overcharged. *Attorney General v Public Service Comm,* 235 Mich App 308, 314-316; 597 NW2d 264, 267 (1999); *Attorney General v Public Service Comm,* 215 Mich App 356, 369-70; 546 NW2d 266 (1996).

ARGUMENT

I. THE COURT OF APPEALS MAJORITY'S STATEMENT REGARDING STATUTORY AMBIGUITY IS INCONSISTENT WITH THIS COURT'S PRECEDENT, BUT MCL 460.6a(1) IS NOT AMBIGUOUS, SO ANY CLARIFICATION OF THE LAW SHOULD NOT AFFECT THIS CASE'S OUTCOME.

Although ***none of the parties argued before the Court of Appeals that MCL 460.6a(1) was ambiguous***, the Court of Appeals majority stated: "We conclude that [MCL 460.6a(1)] is

ambiguous and that it is subject to reasonable but differing interpretations." *In re Application of Detroit Edison Company to Increase Rates, supra*, 297 Mich App at 385 (Appendix 21a). This Court's Order granting leave to appeal from the Court of Appeals decision directed the parties to address:

> "[W]hether 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)." (Appendix 28a).

The Court of Appeals majority stated a standard for finding statutory ambiguity that is inconsistent with the standard adopted by this Court's majority in *Mayor of Lansing, supra*, and *Klapp, supra*. The Court of Appeals majority's "reasonable but differing interpretations" standard is similar to the standard articulated by Justice Cavanaugh in his dissenting opinion in *Mayor of Lansing, supra,* 470 Mich at 174 ("A statute is ambiguous when reasonable minds can differ regarding its meaning"), and 470 Mich at 177 ("A statute is ambiguous if there can be reasonable disagreement over the statute's meaning"). Similar differences among the views of the Justices regarding the proper standard for finding ambiguity are reflected in this Court's opinions in *Peterson v Magna Corp*, 484 Mich 300; 773 NW2d 564 (2009).

Edison assumes, for purposes of further discussion, that the *Mayor of Lansing* majority's standard for statutory ambiguity is controlling. Even under the Court of Appeals' "reasonable but differing interpretations" standard, however, MCL 460.6a(1) is not ambiguous (and none of the parties to this case has previously argued that the statute was ambiguous).

As further discussed below, the Commission's decision and the Court of Appeals' (ultimate) affirmance are consistent with MCL 460.6a(1)'s plain meaning. ABATE's alternative

interpretation is contrary to the meaning and context of MCL 460.6a(1)'s language, as the Commission recognized. Therefore, any modification or clarification of the correct standard for statutory ambiguity should not affect the ultimate disposition of this case.

II. THE COMMISSION LAWFULLY ALLOCATED REFUNDS AMONG EDISON'S CUSTOMERS IN ACCORDANCE WITH MCL 460.6A(1)'S PLAIN LANGUAGE.

This Court's Order granting leave to appeal directed the parties to address:

> "[W]hether 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." (Appendix 28a).

Before the Commission, ABATE claimed that the rate refund to each primary customer must equal the exact historical amount that each individual customer actually overpaid under the self-implemented rates. The Commission rejected ABATE's claim regarding refunds because it was (1) contrary to the meaning and context of MCL 460.6a(1)'s plain language, (2) contrary to well-established law regarding rate refunds, (3) contrary to the record in this case, and (4) unreasonably burdensome and costly. The Commission explained:

> "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).** 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. ***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 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" (Appendix 11a-12a, December 21, 2010 Order in Case U-16384, pp 9-10) (Emphasis added to portions most relevant to statutory interpretation).

The Commission's decision faithfully followed the language of MCL 460.6a(1). When the statutory language is read accurately and in context, only the Commission's interpretation is viable. MCL 460.6a(1) addresses the collection and refund of self-implemented rates in only three relevant sentences that we list separately here:

> "[1] 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 . . .
>
> "[2] 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 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.
>
> "[3] The commission shall allocate any refund required by this section among primary customers based upon their pro rata share of the total revenues collected through the applicable increase, and among secondary and residential customers in a manner to be determined by the commission" (MCL 460.6a(1)).

Sentence [1] above provides the manner in which the utility must spread its self-implemented rates among its customers, and specifies "equal percentage increases or decreases applied to all base rates." This is significant, because when the Commission eventually issues a rate order, the Commission's final rates will not contain equal percentage increases for each rate class, but will instead set rates for each class based on the principle that those customer classes that cause costs should pay those costs. *See, for example,* MCL 460.11. Since the equal percentage rate increases mandated for self-implemented rates are set differently than the cost-

allocated method of setting the final rates, some rate classes will overpay, and some rate classes will underpay, under the self-implemented rates as compared to the final rates.

Sentence [2] above governs the total (net) refund amount of the self-implemented rates to be paid to all customers, which must be based on the "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." In other words, the total (net) refund to all customers equals the total net revenue over-collection (the net of the amounts that all customers over paid or underpaid during the pendency of the self-implemented rates).

In this case, it is undisputed that the total (net) refund amount is $26,872,231, and that the primary class' share of the refund was $5,372,089 (Appendix 14a). As the Commission recognized, "the statute requires a refund based on total revenue, and the Legislature did not envision a refund that would serve to reduce the amount of the authorized annual rate increase" (Appendix 10a). Edison also has constitutional protections against "takings" and confiscatory rates,[2] and is entitled to total rates that provide a corresponding recovery for providing service to

[2] Edison has constitutional protections against "takings" and confiscatory rates under the Fifth Amendment to the US Constitution, which is applicable to the states through the Fourteenth Amendment. Similarly, Const 1963, art 10, § 2 provides in part, "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." These constitutional protections have been recognized and applied to public utility rates in well-established federal and Michigan case law. *See generally, Missouri ex rel Southwestern Bell Telephone Co v Public Service Comm of Missouri*, 262 US 276; 43 S Ct 544; 67 L Ed 981 (1923); *Federal Power Comm v Natural Gas Pipeline*, 315 US 575; 62 S Ct 736; 86 L Ed 1037 (1942); *Duquesne Light Co v Barasch*, 488 US 299; 109 S Ct 609; 102 L Ed 2d 646 (1989). *See also*, *Northern Michigan Water Co v Public Service Comm*, 381 Mich 340; 161 NW2d 584 (1968); *Consumers Power Co v Public Service Comm*, 415 Mich 134; 327 NW2d 875 (1982); *ABATE v Public Service Comm*, 430 Mich 33; 420 NW2d 81 (1988).

its customers.[3] Thus, the total (net) refund amount may not exceed the net amount by which the total self-implemented rates exceeded the total rates that would have been produced under the Commission's final rate order.

The purpose of Sentence [3] above is to allocate the total (net) refund amount among all the utility's customers. This sentence does ***not*** say that "exact, actual refunds must be made to all primary customers," as ABATE incorrectly asserts. Instead, it provides that the Commission "shall allocate any refund required by this section among primary customers based upon their pro rata share of the total revenues collected through the applicable increase."

The language of Sentence [3] is very specific, and provides that the "refund required by this section" is the total (net) refund amount discussed above. Thus, for example, if one class of customers overpays by $30 million, and the remaining customers underpay by $5 million, then the total (net) refund amount is $25 million. ***Only $25 million can be refunded to the customers who overpaid $30 million, regardless of how much they actually overpaid.*** The Commission accurately recognized in its Opinion 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 customer 'actually paid' is inconsistent with the language of the statute" (Appendix 12a).

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[3] As a matter of fundamental ratemaking law, under both federal and Michigan case law, Edison is entitled to a commensurate return of and on its investment in providing utility service. *See, Bluefield Waterworks Improvement Co v Public Service Commission of West Virginia*, 262 US 679, 690-694; 43 S Ct 675; 67 L Ed 1176 (1923); *Federal Power Comm v Hope Natural Gas Co*, 320 US 591, 603; 64 S Ct 281; 88 L Ed 333 (1944). *See also, Permian Basin Area Rate Cases*, 390 US 747, 769-70; 88 S Ct 1344; 20 L Ed 2d 312 (1968); *FPC v Memphis Light, Gas and Water Division*, 411 US 458; 43 S Ct 1723; 36 L Ed 2d 426 (1973); *General Telephone Co v Public Service Comm*, 341 Mich 620; 67 NW2d 882 (1954); *Michigan Consolidated Gas Co v Public Service Comm*, 389 Mich 624; 209 NW2d 210 (1973).

The express language of Sentence [3] also says that a portion of the total (net) refund must be allocated "among primary customers based upon their pro rata share of the total revenue collected through the applicable increase." The statutory language only refers to the "customers" ***in the plural*** and collectively as "primary customers," and never makes any mention of an allocation to any particular or single customer. The language also uses only the ***plural pronoun*** "their" to refer to the primary customers as a class, and never uses the singular pronoun "its" or the singular adjective "each" to refer to any one customer. This means that the refund allocation required by Sentence [3] is to be made to the "***primary customers***" (plural) as a class based upon "***their***" (plural) pro rata share of the total self-implemented rates, and ***not*** to "***each primary customer***" (singular) based upon "***its***" (singular) pro rata share of the self-implemented rates.

ABATE erroneously asserts that "exact, actual refunds must be made to all primary customers that overpaid their utility bills during the period that the rates were self-implemented" (ABATE brief, p 8), and that "the required calculation methodology is totally dependent upon identification of the actual historical billing determinates related to actual usage" (ABATE brief, p 9; emphasis in original). ABATE broadly misstates the statutory requirements.

If the Legislature had instead intended, as ABATE wishes, to mandate a specific refund allocation for "each primary customer" (singular) based on "its" or "each customer's" or "that customer's" (singular) pro rata share of the total revenue collected by the self-implemented rates, then the Legislature "surely could have said so."[4] The statute must be applied as written.[5] The

[4] *Lash v Traverse City*, 479 Mich 180, 189; 735 NW2d 628 (2007); *People v McIntire*, 461 Mich 147, 160; 599 NW2d 102 (1999).

[5] *Elozovic v Ford Motor Co*, 472 Mich 408, 421-22, 425; 697 NW2d 851 (2005) ("The text must prevail. . . . The Legislature is held to what it said. It is not for us to rework the statute. Our duty is to interpret the statute as written"); *Di Benedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000) ("we presume that the Legislature intended the meaning it clearly expressed -

Legislature is presumed to have intended the plain meaning of the statutory language.[6] It would be improper to judicially re-write the Legislature's language.[7]

ABATE incorrectly suggests that its interpretation of MCL 460.6a(1) is supported by a dictionary definition of "pro rata," which indicates a "proportionality" (ABATE brief, pp 7-8). ABATE ignores that the express language and context of MCL 460.6a(1) only speaks of "pro rata" in connection with the "primary customers" (plural) as a class, and makes no "pro rata" reference to any particular or single customer.

ABATE similarly argues, again incorrectly, that its interpretation is supported by various dictionary definitions of "refund," indicating a full refund or repayment of money to a particular person (ABATE brief, pp 7-8). ABATE ignores the express language and context of the "refund" required by MCL 460.6a(1), which is a "refund" to the "primary customers" (plural) as a class, and not a refund to any particular customer. The same word "refund" is also used in Sentence [3] of MCL 460.6a(1) to describe the amounts to be repaid to secondary and residential customers, but those customers' "refunds" are not required to be based on any particular formula. ABATE's argument improperly views the single word "refund" in a vacuum, without regard to its context.[8]

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no further judicial construction is required or permitted, and the statute must be enforced as written"); *Hanson v Mecosta Co Road Comm'rs*, 465 Mich 492, 504; 638 NW2d 326 (2002); *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992); *Ambs v Kalamazoo County Road Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003) ("where the language of a statute is clear, it is not the role of the judiciary to second-guess a legislative policy choice; a court's constitutional obligation is to interpret, not rewrite, the law").

[6] *Danse Corp v City of Madison Heights*, 466 Mich 175, 182; 644 NW2d 721 (2002).

[7] *Hanson, supra*, 465 Mich at 504; *Ambs, supra*, 255 Mich App at 650.

[8] *In re Complaint of Rovas Against SBC Michigan, supra*, 482 Mich at 114; *Dep't of Environmental Quality v Worth Twp, supra*, 491 Mich at 237-38.

As further discussed above, MCL 460.6a(1)'s refund is a net amount, so actual refunds cannot be given. ABATE's proposal that "exact, actual refunds must be made to all primary customers that overpaid their utility bills during the period that the rates were self-implemented" (ABATE brief, p 8) would mean that the net refund to other rate classes could be further reduced so that each primary customer could obtain an actual refund. Nothing in the statute indicates that the Legislature intended such a result.

Under ABATE's flawed interpretation, it would also be possible for a utility to under-collect in total during the self-implementation period (because self-implemented rates are overall lower that final rates), yet owe refunds to customers in the primary class (which could have overpaid due to "equal percentage" self-implemented rates, while other customers underpaid, for a net negative amount available to be refunded). There is nothing in the statute to indicate that the Legislature intended such an unworkable, as well as illegal, result. Instead, the second sentence quoted above requires the refund amount to be calculated by comparing total revenues from self-implemented rates to total revenues that would have been produced under final rates. ABATE's historical refund proposal threatens to undermine the Legislature's refund directives by requiring actual refunds without regard to how the amount of money available to be refunded is calculated, or even whether there is any net amount at all to be refunded.

The Court of Appeals' majority found ABATE's suggested focus on dictionary definitions of "refund" unpersuasive, and instead followed prior Commission refund cases and recognized 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." *In re Application of Detroit Edison Company to Increase Rates, supra*, 297 Mich App at 386 (Appendix 21a).

The Commission's interpretation of MCL 460.6a(1) is also entitled to "respectful consideration," especially because the meaning of this statute can fairly be described as "doubtful or obscure" outside the MPSC.[9] ABATE has offered no "cogent reason" to overrule the Commission's interpretation of MCL 460.6a(1).[10] Moreover, the Commission has general authority and considerable experience in ratemaking and refunds because (1) the Commission possesses express statutory ratemaking authority,[11] (2) ratemaking is a legislative function, and (3) the Commission is not bound to apply any particular formula or use any specific method in setting rates.[12]

ABATE erroneously suggests that *Grand Rapids v Iosco Land Co*, 273 Mich 613; 263 NW 753 (1935) (a tax case requiring that refunds be paid to taxpayers who paid a tax) requires an actual, historical refund to each primary customer (ABATE brief, pp 7, 12). To the contrary, taxpayers are treated individually while ratepayers are treated collectively. As the Court of Appeals majority recognized, in cases that are truly analogous to the present case, the

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[9] *In re Complaint of Rovas Against SBC Michigan, supra*, 482 Mich at 103.

[10] *Id.* The discussion above is based on the reasons that the Commission gave in rejecting ABATE's proposal (Appendix 11a-12a), as well as the Commission's prior discussion (which ABATE does not dispute) of the net amount to be refunded (Appendix 10a, citing the Commission's August 10, 2010 Order in Case No. U-15645, where the Commission further explained MCL 460.6a(1)'s requirements).

[11] MCL 460.6a.

[12] *Residential Ratepayer Consortium v Public Service Comm*, 239 Mich App 1, 6; 607 NW2d 391 (1999); *Detroit Edison Co v Public Service Comm*, 127 Mich App 499, 524; 342 NW2d 273 (1983); *ABATE v Public Service Comm*, 208 Mich App 248, 258; 527 NW2d 533 (1994); *Permian Basin Area Rate Cases*, 390 US 747, 776-77; 88 S Ct 1344; 20 L Ed 2d 312 (1968).

Commission's refund decisions have been repeatedly upheld.[13] In addition, the Commission's well-established regulatory practice has been to base refunds, as well as ratemaking cost of service analyses and utility tariffs, on customer classes rather than on individual customers.[14] Mandating refunds based on individual customers' consumption would be contrary to both established precedents and Commission practice, which would require express language to that effect in the statute. The Legislature never provided such an individual-customer mandate for refunds under MCL 460.6a(1), but instead explicitly listed and addressed only three broad customer classes (primary, secondary, and residential).

The Commission also found that ABATE's proposal for refunds to individual primary customers would add substantial, unreasonable complexity and cost to the refund process (Appendix 12a, December 21, 2010 Order, p10). MPSC Staff witness Mr. Droz explained:

> "To implement ABATE's approach would be administratively burdensome. One would have to determine the amount of self-implementation surcharge revenue collected from each individual primary customer, then calculate each primary customer's pro rata share of that revenue, then apply that percentage to the total refundable amount to arrive at each individual refund, and then apply that refund to each primary customer's bill. Such a complex process could well delay the refund" (MPSC Appendix 12b, 2 T 79).

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[13] *In re Application of Detroit Edison Company to Increase Rates, supra*, 297 Mich App at 385-86 (Appendix 21a), citing *Attorney General v Public Service Comm*, 235 Mich App 308, 316; 597 NW2d 264 (1999) (recognizing "broad discretion to the PSC in establishing how a refund for an over recovery is to be distributed"), and *Attorney General v Public Service Comm*, 215 Mich App 356, 369-370; 546 NW2d 266 (1996) ("the statute does not require adoption of the most precise possible [refund] procedure. Rather, a more precise [refund] procedure may have other consequences, such as increased cost, which must be evaluated by the PSC in assessing the overall reasonableness of the procedure. The PSC may properly conclude that the refund procedure that is most precise is not to be adopted because of attendant costs.").

[14] *See, for example*, the tariff sheets attached to the Commission's July 16, 2009 and January 25, 2010 Orders in Case U-15768 (concerning self-implemented and final rates in this case).

The Court of Appeals majority appropriately recognized that the record supported the Commission's decision, explaining: "Although ABATE disagrees, Alan Droz, an auditor manager with the PSC, testified that implementing individual refunds to all primary customers would result in burdensome administrative costs." *In re Application of Detroit Edison Company to Increase Rates, supra*, 297 Mich App at 386 (Appendix 21a).

Based on the above analysis and arguments, the MPSC properly allocated a portion of the total (net) refund to the primary customers as a class in complete compliance with the requirements of MCL 460.6a(1). Although the Court of Appeals may have used a wrong standard for statutory ambiguity, it was not necessary to that Court's decision. There is nothing ambiguous about that statute, and the MPSC's refund order should be affirmed by this Court.

III. THE COMMISSION LAWFULLY AND REASONABLY PROVIDED REFUNDS TO EDISON'S CURRENT BUNDLED (FULL SERVICE GENERATION AND DISTRIBUTION) CUSTOMERS, AND NOT TO FORMER CUSTOMERS WHO CHOSE TO BUY ELECTRICITY FROM A THIRD-PARTY PROVIDER.

ABATE asserts that the Commission's refund methodology is arbitrary and capricious because it does not provide refunds for some hypothetical (but unnamed and unidentified) customers who may have paid a portion of Edison's self-implemented rates, but who later switched to Retail Open Access ("ROA" a/k/a "Choice") service and procured their energy from an electric provider other than Edison (ABATE Brief, pp 12-14).[15] The Commission rejected ABATE's argument in its Opinion, explaining:

> "The Commission does not agree with ABATE that primary customers who 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

[15] ROA or Choice customers are those that switch from "bundled" utility service--including both electric generation and distribution--to purchasing their electricity from an alternative electric supplier, instead of Edison. These customers continue to receive distribution service from Edison, and pay ROA rates to Edison for this service.

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[1] 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.

"The Commission does not know whether ABATE is addressing the alleged problems of a hypothetical customer, or a real one. ABATE provided no evidence showing the number of potentially affected customers who switched, or the dollar impact on such a customer" (Appendix 12a, December 21, 2010 Order in Case U-16384, p 10).

ABATE contends that the Commission deprived former primary customers (who converted to Choice customers) of their "rightful refunds" (ABATE Brief, p 12). ABATE cites nothing in MCL 460.6a(1) to support its position. The statute does ***not*** provide for refunds to ***any former customers*** or to ***any Choice customers*** at all. Instead, Sentence [3] of MCL 460.6a(1) only provides refunds to primary, secondary and residential customers. If the Legislature had also intended to provide refunds for former customers or for Choice customers, as ABATE wishes, then the Legislature "surely could have said so."[16] MCL 460.6a(1) must be interpreted and applied as written.[17] The Legislature is presumed to have intended the plain meaning of the statutory language.[18] It would be improper to judicially re-write MCL 460.6a(1)'s language.[19]

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[16] See footnote 4.

[17] See footnote 5.

[18] See footnote 6.

[19] See footnote 7.

ABATE's suggestion that the Commission somehow discriminated against Choice customers is also contrary to case law rejecting such allegations.[20] In addition, ABATE's attempt to create an issue of fact fails because ABATE challenges a ratemaking decision, which is a legislative function.[21] Since legislative action is based upon matters of discretion, rather than upon the weight of facts and evidence, a Court does not review legislative action for "competent, material and substantial evidence on the whole record" (Const 1963, art 6, § 28), but instead must defer to the Commission absent a breach of a constitutional standard or a statutory mandate or limitation,[22] which does not exist here. ABATE does not even raise a viable rate design issue for this Court's consideration.

The Commission's decision is also fully supported by the record.[23] Staff witness Mr. Droz testified against ABATE's proposal, explaining that primary customers made a business

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[20] *Bagley Acquisition Corp v Public Service Comm*, 229 Mich App 172, 175-76; 581 NW2d 286 (1998) (affirming Commission's dismissal of complaint challenging Edison's use of payment plans); *Consumers Power Co v Public Service Comm*, 205 Mich App 571, 578-79; 518 NW2d 514 (1994) (affirming settlement agreement regarding surcharge to be imposed on virtually all ratepayers to recover costs related to Energy Assistance Programs designed to help low income customers); *Attorney General v Public Service Comm*, 141 Mich App 505, 508-509; 367 NW2d 341 (1984) (affirming differential monthly service charges for residential customers' principal residence and alternate residence).

[21] *Detroit Edison Co v Public Service Comm*, 127 Mich App 499, 524; 342 NW2d 273 (1983). As discussed above in the Standard of Review section, the MPSC's rate allocation decisions are subject to an "abuse of discretion" standard of review. *In re Application of Michigan Consolidated Gas, supra,* 281 Mich App at 548; *Great Lakes Steel, supra,* 130 Mich App at 480; *Attorney General, supra*, 235 Mich App at 314-316; and *Attorney General, supra*, 215 Mich App at 369-70.

[22] *Colony Park Apartments v Public Service Comm*, 155 Mich App 134, 138; 399 NW2d 32 (1985); *ABATE v Public Service Comm*, 205 Mich App 383, 390; 522 NW2d 140 (1994).

[23] *Consumers Power Co v Public Service Comm*, 189 Mich App 151, 153; 472 NW2d 77 (1991), *lv den* 439 Mich 922 (1992). *See also, Attorney General v Public Service Comm*, 215 Mich App 356, 366; 546 NW2d 266 (1996) ("Under this Court's limited standard of review, the existence of any evidence supporting the PSC's decision is dispositive").

decision to switch to Choice, which they made with access to public information that they would forfeit any refund by doing so:

> "First, those primary customers who left regulated bundled service for Choice service made a business decision. Presumably (since the self-implementation refund mechanism was public knowledge), they factored into that decision the fact that a refund would be forthcoming to primary bundled customers if final rates were lower than the self-implemented rates and that if they left that customer class before the refund's distribution, they would relinquish their claim to the class's refund. Furthermore, the Appellate Court decision in *Attorney General v. Public Service Commission*, 235 Mich. App. 308 (1999), (which struck down the notion that historical refunds such as what ABATE is suggesting are required), should have further informed their decision to move to Choice and forgo any claim to the bundled customer share of the refund. Yet, they left the primary bundled customer class anyway." (MPSC Appendix 11b-12b, 2 T 78-79).

The Court of Appeals majority recognized that the Commission's decision was supported by the record and applicable case law, explaining:

> "ABATE suggests that there is a cogent reason for overruling the PSC because basing the refund on a prospective refund month applicable to only bundled customers will result in no refund to primary customers who switched to choice or retail open access service during the interim period. However, [Staff witness Mr.] Droz indicated that these primary customers would have factored the potential loss of a refund into their decision to switch to choice. This presumption is supported by the fact that 'refunds' given by way of a prospective adjustment were approved in *Attorney General v Pub Serv Comm*, 215 Mich App 356 and *Attorney General v Pub Serv Comm*, 235 Mich App 308. Moreover, the Legislature is presumed to have been familiar with this treatment of the term 'refund' when it enacted § 6a(1). See *Detroit Edison Co v Pub Serv Comm*, 261 [Mich App 1, 8-9; 680 NW2d 512 (2004)]. Thus, we find no cogent reason for overruling the PSC's interpretation of the statute and conclude that the PSC's action was both lawful and reasonable." *In re Application of Detroit Edison Company to Increase Rates, supra*, 297 Mich App at 386-87 (Appendix 21a-22a).

ABATE wrongly suggests that it would be "preposterous" and "arbitrary" to assume that primary customers understood they would lose their right to a refund if they switched to Choice (ABATE Brief, p 14). MCL 460.6a(1) plainly does not provide any refund to former customers or Choice customers, and there was well-established Commission and Court precedent for prospective refunds. The record also fully supports the Commission's and Court of Appeals

majority's decisions. ABATE has the "burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable." MCL 462.26(8). Although the actual knowledge of ABATE's hypothetical, unnamed primary customers may be indiscernible, it is beyond dispute that these customers (whoever they might be) are by the nature of their heavy electricity usage very large, sophisticated companies, and the record conclusively demonstrates their access to refund-forfeiture information. Under these circumstances, primary customers--like anyone who signs a contract without reading it--cannot be heard to complain.[24]

The Commission also found based on the record that Choice customers were one of the groups of customers that likely ***underpaid*** during the self-implemented rate period: "Indeed, any customer who made that switch [to Choice service] 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."[25] ABATE has cited no evidence of actual harm to any real, concrete Choice customer,[26] and ABATE's alleged harm remains entirely speculative. ABATE has at best presented a hypothetical example of what "could" have happened, but absolutely no evidence of any actual circumstances or effects with respect to any actual customer. ABATE appears to seek a one-sided refund for primary customers to the extent that they overpaid as primary customers, but without regard to what was *underpaid* by ROA

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[24] "One who signs a contract cannot seek to avoid it on the basis that he did not read it or that he supposed that it was different in its terms." *Nieves v Bell Industries, Inc*, 204 Mich App 459,463; 517 NW2d 235 (1994).

[25] Appendix 12a; December 21, 2010 Order in Case U-16384, p 10.

[26] *Id*, n 1 ("The Commission does not know whether ABATE is addressing the alleged problems of a hypothetical customer, or a real one. ABATE provided no evidence showing the number of potentially affected customers who switched, or the dollar impact on such a customer").

customers during six months that self-implemented rates were in effect (from July 26, 2009 to January 26, 2010), which would effectively constitute an unjustified subsidy.

ABATE also incorrectly asserts that the Commission's refund methodology is somehow contrary to an alleged Legislative directive to foster competition (ABATE Brief, p 14), citing MCL 460.10(2), which describes the purposes of 2000 PA 141, MCL 460.10 *et seq* ("Act 141").[27] ABATE's suggested legislative directive is inaccurate, since Act 141 has a number of purposes, including to "to promote financially healthy and competitive utilities in this state" MCL 460.10(2)(e). The Legislature also subsequently limited sales of electricity by alternative electric suppliers.[28]

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals properly affirmed the Michigan Public Service Commission's refund methodology, which is supported by (1) MCL 460.6a(1)'s plain language, (2) well-established case law and Commission practice, and (3) sound, logical public policy and economic facts and rationales set forth on the record. ABATE's proposed interpretation of MCL 460.6a(1) is contrary to controlling law that statutes are to be applied as written by the Legislature. ABATE's further contention that the Commission acted arbitrarily and capriciously is unsupported by the record, which instead fully supports the Commission's decision.

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[27] Act 141 restructured Michigan's electric industry and, among other things, provided for Retail Open Access where retail customers of an electric utility (such as Edison) can purchase electricity from an alternative electric supplier. MCL 460.10g(1)(a) provides: "'Alternative electric supplier' means a person selling electric generation service to retail customers in this state. Alternative electric supplier does not include a person who physically delivers electricity directly to customers in this state. An alternative electric supplier is not a public utility"

[28] MCL 460.10a(1)(a) of 2008 PA 86 ("Act 286") provides: "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."

The Court of Appeals majority stated a "reasonable but differing interpretations" standard for statutory ambiguity that is inconsistent with this Court's precedent, but the majority's discussion of the ambiguity standard was unnecessary in light of MCL 460.6a(1)'s plain language. Thus, the standard for statutory ambiguity should be corrected or clarified as this Court deems appropriate. Otherwise, however, Edison respectfully requests that this Court issue a decision affirming the Court of Appeals, and that the Court fully affirm the Commission's December 21, 2010 Order in Case U-16384.

Respectfully submitted,

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