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

REPLY BRIEF OF APPELLANT ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY

ORAL ARGUMENT REQUESTED

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ARGUMENT

1. REPLY TO APPELLEE MICHIGAN PUBLIC SERVICE COMMISSION:

A. Primary Customers Have a Statutory Right to a Refund.

The Michigan Public Service Commission ("PSC") essentially argues that customers do not have a statutory right to a refund but, rather, the PSC must exercise its discretion and expertise to develop a refund in what is a complex area.[1] Under the PSC's reasoning, a refund is really a gift conferred upon certain customers by the PSC instead of a right to the return of money that customers have overpaid as a result of utilities' exercise of their extraordinary new right to self-implement rate increases before the PSC has exercised its regulatory powers to determine what would be just and reasonable rates to be charged by a utility to its customers.

The PSC would also have this Court ignore the plain definition of the term "refund," and find that all primary customers that have been overcharged by the utility are not due the overcharges that they paid as a result of the extraordinary relief initially accorded utilities.

Contrary to the PSC's assertion, making a refund is not a complex matter. The PSC simply has to calculate what has been collected under the self-implemented rates and compare that to what would have been collected from customers had the final, lawful rates been in place. The process established by the Legislature allows the utility to implement a temporary collection of funds from customers until such time as the PSC determines the final, lawful rates. The refund language, contrary to the assertion of the PSC, actually limits the PSC's discretion as it relates to refunds to primary customers. If there were no limitation on the PSC's discretion, then the statutory language would have been the same for primary, commercial and residential customers, but it is not.

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[1] PSC Brief, p. 1.

In order to make its argument work, the PSC has to contrive the complexity of making a refund in order to allege that the Legislature left the "nuts and bolts" of fashioning a refund to the PSC.

The PSC states:

> This [historical-based] 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.[2]

First, the PSC never defines the term "refund" nor does it, as it later argues in its Brief that the plain and ordinary meaning of the word should be determined by reference to a dictionary. Under its prospective methodology, the PSC is not providing for a refund, but rather a proxy for a refund based upon assumptions regarding prospective consumption followed by a reconciliation. A true refund would simply look at what customers paid versus what they should have paid once the lawful rates were determined by the PSC in its final order.

B. The PSC Does Not Possess Broad Authority to Regulate Rates Pursuant to MCL 460.6.

At page 3 of its Brief, the PSC claims that it has broad authority to regulate rates and cites MCL 460.6. This Court has held that the broad language of MCL 460.6 furnishes no grant of specific powers but is only an outline of jurisdiction in the PSC and does not purport to be anything more.[3]

At page 7 of its Brief, the PSC quotes the Court of Appeals decision to the effect that the term "refund" enjoys a broader meaning, but yet the PSC argues that the Court of Appeals was incorrect in finding that MCL 460.6a(1) was ambiguous. The PSC cites no statute to support the

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[2] PSB Brief, p. 2.

[3] *Huron Portland Cement Co v Public Service Comm*, 351 Mich 255, 263; 88 NW2d 492 (1958). Accord, *Union Carbide v PSC*, 431 Mich 135, 147-148; 428 NW2d 322 (1988).

allegation that the term refund enjoys a broader meaning. The PSC can point to nothing that requires any usage beyond the plain, ordinary meaning of the term "refund."

The PSC, at page 14 of its Brief, feels that it is appropriate to consult the dictionary definition to determine the ordinary meaning of the word "among." However, the most critical word in MCL 460.6a(1) is the word "refund." If the PSC had consulted the dictionary term for refund, then it would have had to conclude that the PSC was compelled to order the utility to return the amount that was overpaid by primary customers to those primary customers, in accordance with the language of the statute.

The PSC argues at page 18 of its Brief that it has broad discretion to establish rates. It cites to *Attorney General v PSC*, 215 Mich App 356, 361-362; 546 NW2d 266 (1996). This case involved the interpretation of MCL 460.6(h)(13) and (14) related to gas cost recovery ("GCR") mechanisms.[4] This statute allowed gas utility companies to implement a GCR clause and estimate what the future gas costs would be, implement rates to collect the estimated costs, and then allows for a reconciliation to true-up the estimates to actual costs. The facts relate to a totally different statute that pre-dates MCL 460.6a(1), as amended by 2008 PA 286. Consequently, this case is not controlling.

In summary, fashioning a true refund is not a complex task as alleged by the PSC. A true refund would simply take the dollars that were paid under the rates that were self-implemented and compare them to the dollars that would have been paid under the lawful rates as found by the PSC in its final order and refund the difference to primary customers.

[4] *See, Attorney General*, at 369.

C. Customers Had No Prior Notice that if They Switched to Service From an Alternative Electric Supplier That They Would Lose Their Refunds.

The PSC reiterates its argument that somehow customers should have been on notice that they would lose their refund if they purchased their generation from an alternative electric supplier even though they were overcharged during the period the utility imposed self-implemented rates, which were ultimately determined to be too high by the PSC. The fact of the matter remains – that these customers were overcharged and the PSC's decision eliminated their refund and allocated the dollars to other utility customers. This decision is anti-competitive and certainly is not in accordance with one of the stated goals of the Customer Choice and Electricity Reliability Act, which was to "foster competition."[5]

The PSC also makes an argument that there was a lack of record evidence with respect to customers changing service from bundled service to generation service provided by an alternative electric supplier. This argument ignores the fact that this was a case of first impression where all of the prior refund decisions had been effectively changed by the Legislature through the new law aimed at assuring that primary customers would receive a *pro rata* refund of any overcharges. Utility customers could logically and reasonably believe that they were due refunds if they were overcharged during the period that self-implemented rates were applied, even though they were subsequently moving their service to an alternative electric supplier as allowed by law. How could those customers be required to present evidence during the hearing phase of the proceedings before the PSC when they had absolutely no notice of how the PSC would arbitrarily and unreasonably decide that those customers were not due a refund even though they overpaid?

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[5] MCL 460.10(2)(b).

It is disingenuous for the PSC to argue that it had no knowledge of customers switching to service provided by an alternative electric supplier. Each year the PSC is required to file a document entitled "Status of Electric Competition in Michigan" pursuant to MCL 460.10u. In the February 1, 2010 cover letter, which is available on the PSC's website along with the complete report, the PSC informed the Legislature as follows:

> Similarly, the electric choice program in The Detroit Edison Company service territory experienced a 75 percent annual MW load increase and an increase of more than 41 percent in the number of choice customers.

In the February 1, 2011 cover letter enclosing the Annual Report for 2010, the PSC reported as follows:

> During 2010, the Consumers Energy Company service territory had over 1,000 customers participating in the electric choice program, and The Detroit Edison Company service territory had over 6,300 choice customers participating. The electric choice companies for both programs were fully subscribed at the 10% cap throughout the year.[6]

A secondary argument raised by the PSC is that customers that changed service to an alternative electric supplier somehow underpaid during the time that the self-implemented rates were in effect. Rates are payable on a monthly basis, and by definition, they overpaid if the annual revenue requirement determined by the PSC in its final order was less than the annual revenue requirement self-implemented by the utility. The facts are clear that The Detroit Edison Company self-implemented rates which were higher than the rates finally approved by the PSC. To claim that these customers somehow underpaid is to defy reality. Finally, there is no record evidence to support this contention.

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[6] http://www.dleg.state.mi.us/mpsc/electric/restruct/status.htm

2. REPLY TO APPELLEE THE DETROIT EDISON COMPANY:

D. There Is No Authority to Claim That Any Refund Should Be Done on a "Net" Basis.

Beginning at page 10 of its Brief, The Detroit Edison Company argues that the language of MCL 460.6a(1) supports the idea that any refund should be done on a "total (net) refund amount." The word "net" is not used anywhere in the statute, and it is impermissible to judicially legislate by adding language to a statute.[7]

E. The PSC Does Not Possess Broad Authority to Regulate Rates Pursuant to MCL 460.6.

Edison's argument essentially is that the Legislature added the refund provisions to protect the utility and not customers. The concept approved by the Legislature is very simple – if the utility implements temporary rates before the PSC determines final and lawful rates, then if the primary customers are overcharged, they should receive a refund.

At page 11 of its Brief, Edison postulates an absurd example in an attempt to confuse the Court with respect to the nature of the refunds. In general terms, 1/3 of Edison's sales are to the residential class, 1/3 is to the commercial class, and another 1/3 is to the industrial class. Therefore, an equal percentage increase cannot produce the results postulated by Edison. If the primary class is overcharged, it should receive a refund in the amount of the overcharge. If, for example, the residential class has underpaid, there is nothing in the statute that would prohibit the PSC from implementing a surcharge on those customers to make the utility whole for any shortfall in revenue.

In summary, the concept of making a refund is very simple: If the primary class is overcharged as a result of a utility self-implementing rates which have not been determined to be lawful, and the PSC later determines that the final rate relief is less than what the utility self-

[7] *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 421; 565 NW2d 844 (1997).

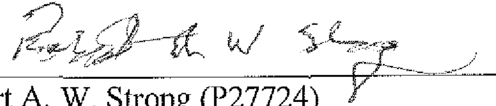
implemented, then the primary class is due a refund in the amount that it was overcharged. This Court should also note that both the PSC and Edison have no money at stake, but yet they support a system which unfairly treats customers. On the other hand, ABATE is trying to protect its members as a result of their being overcharged.

II. RELIEF REQUESTED

WHEREFORE, Appellant ABATE respectfully requests that this Court reverse the PSC's Order and remand this case to the PSC to order refunds to all primary customers in an amount equal to what they overpaid during the period that The Detroit Edison Company self-implemented rates.

Respectfully submitted,

CLARK HILL PLC

By: 

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