STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Court of Appeals No. 237873

MICHIGAN ELECTRIC COOPERATIVE ASSOCIATION, et al.,

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.

Supreme Court No. 125954
Court of Appeals No. 237873

In the matter of the approval of a code of conduct for CONSUMERS ENERGY COMPANY and THE DETROIT EDISON COMPANY

MPSC Case No. U-12134

THE DETROIT EDISON COMPANY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, et al,

Appellee.

Supreme Court No. 125950
Court of Appeals No. 237872

CONSUMERS ENERGY COMPANY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, et al,

Appellee.

Supreme Court No. 125955
Court of Appeals No. 237874

REPLY BRIEF OF APPELLANTS
MICHIGAN ELECTRIC COOPERATIVE ASSOCIATION, ET AL.

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DYKEMA GOSSETT-A PROFESSIONAL LIMITED LIABILITY COMPANY-124 W. ALLEGAN STREET, SUITE 800-LANSING, MICHIGAN 48933

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Pursuant to MCR 7.306(C), the Michigan Electric Cooperative Association, et al ("MECA") file this reply to the Michigan Alliance for Fair Competition's ("MAFC") and Michigan Public Service Commission's ("MPSC") briefs on appeal.[1] [2]

ARGUMENT

I. THE LEGISLATURE INTENDED THE CODE OF CONDUCT TO CONSTITUTE RULES GENERALLY APPLICABLE TO ALL ELECTRIC UTILITIES AND ALTERNATIVE ELECTRIC SUPPLIERS, AND THUS THE APA'S RULEMAKING PROCEDURES WERE THE ONLY LAWFUL MANNER IN WHICH TO ESTABLISH THE CODE OF CONDUCT.

A. Section 10a(4) Of Act 141 Intended For The Code Of Conduct To Constitute Rules Promulgated Through The APA's Rulemaking Process.

The MPSC and MAFC contend that the Legislature left to the MPSC's discretion the manner in which to establish the code of conduct mandated by 2000 PA 141 ("Act 141"). This position belies Act 141's express language, which demonstrates the Legislature's intent to have the code of conduct be rules promulgated through the APA's rulemaking process. Section 10a(4) of Act 141 states in relevant part:

> Within 180 days after the effective date of the amendatory act that added this section, ***the commission shall establish a code of conduct that shall apply to all electric utilities. . . . The code of conduct established under this subsection shall also be applicable to electric utilities and alternative electric suppliers consistent with section 10, this section, and sections 10b through 10bb***. MCL 460.10a(4); (emphasis added).

In expressly requiring that the code of conduct "***apply to all***" electric utilities and alternative electric suppliers ("AES"), the Legislature intended the code of conduct, to be administered and enforced by the MPSC, to have ***general applicability*** as prescribed by the APA's definition of

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[1] The MPSC failed to serve MECA with its brief on appeal until February 15, 2005.

[2] MECA agrees with and incorporates Detroit Edison Company's and Consumers Energy Company's arguments as presented in their respective briefs on appeal and reply briefs. For reasons of judicial economy and efficiency and to avoid redundancy, MECA is not re-asserting such arguments in its reply.

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"rule."[3] [4] In enacting Act 141, the Legislature is presumed to know the APA's definition of the term "rule" and this Court's interpretation of the same. *Chabre v Page*, 298 Mich 278, 285; 299 NW 82 (1941). Indeed, in order for the code of conduct to have the force and effect of law and apply to **all** electric utilities and AESs, it must fall under the definition of a properly promulgated rule. *See e.g., Danse Corp v City of Madison Heights,* 466 Mich 175, 181; 644 NW2d 721 (2002) (holding that guidelines issued by the Tax Tribunal concerning the definition of "special tools" under the General Property Tax Act were not rules promulgated under the APA's rulemaking provisions and thus did not have the force and effect of law).

The Legislature's purposeful use of the term "code" also evinces its intention to make the code of conduct a set of rules having the force and effect of law. Courts must "construe words and phrases in statutes according to the common usage of the language, but give technical words and phrases their 'peculiar and appropriate' meaning." *Consumers Power Co v PSC*, 460 Mich 148, 163; 596 NW2d 126 (1999), *citing* MCL 8.3. The term "code" is defined in *Black's Law Dictionary*, 8th Ed (Thompson West, 2004), in pertinent part, as[5]:

> a complete system of positive law, carefully arranged and officially promulgated; a systematic collection or revision of laws, rules, or regulations. Strictly, a code is a compilation not just of existing statutes, but also of much of the unwritten law on the subject, which is newly enacted as a complete system of law.

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[3] The APA expressly defines a "rule", in pertinent part, as:

> an agency regulation, statement, standard, policy, ruling, or instruction of ***general applicability that implements or applies law enforced or administered by the agency***, or that prescribes the organization, procedure or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency. MCL 24.207 (emphasis added).

[4] The MPSC and MAFC do not dispute that the code of conduct is intended to have general applicability.

[5] In undertaking to give meaning to words, courts frequently consult dictionaries. *Chandler v County of Muskegon*, 467 Mich 315, 320; 652 NW2d 224 (2002).

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The term "code" is similarly defined by *The American Heritage Dictionary,* 2d. Ed. (Houghton Mifflin Company, 1991), in relevant part, as:

> "1. a systematically arranged and comprehensive collection of laws.
> 2. A systematic collection of regulation or rules of procedure or conduct."

As such, the Legislature's explicit mandate in section 10a(4) of Act 141 was to have the MPSC issue the "code of conduct" as a set of "rules" applicable to all electric utilities and AESs having the force and effect of law. Consequently, the APA's rulemaking provisions must be applied.

The Legislature's intent to have the code of conduct promulgated by rulemaking as opposed to a contested case proceeding is also evident when section 10a(4) is viewed in juxtaposition to other provisions within the same section of Act 141. In at least three instances dealing with ratemaking, licensing, and anti-slamming, the Legislature mandated that the Commission proceed by issuing "orders."[6] If the Legislature had intended to authorize the MPSC to make generally applicable policy through the issuance of orders in a contested case proceeding rather than the APA's prescribed method of rulemaking, these examples demonstrate that the Legislature certainly knew how to do so. The Legislature's failure to use the phrase "shall issue orders" in reference to the code of conduct demonstrates that it did not intend the MPSC to develop the code of conduct through a contested case. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993) ("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there."); *In Re MCI Telecommunications*

[6] *See, e.g.* MCL 460.10a ("No later than January 1, 2002, the Commission **shall issue orders** establishing the rates, terms and conditions of service that allow all retail customers of an electric utility or provider to choose an alternative electric supplier.") (emphasis added); MCL 460.10a(2) ("The commission **shall issue orders** establishing a licensing procedure for all alternative electric suppliers.") (emphasis added); MCL 460.10a(3) ("The commission **shall issue orders** to ensure that customers in this state are not switched to another supplier or billed for any services without the customer's consent ["slamming"].") (emphasis added).

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Complaint, 460 Mich 396, 415; 596 NW2d 164 (1999)("The express mention of one thing in a statute implies the exclusion of other things.")

B. The MPSC's Use Of A Contested Case To Adopt The Code Of Conduct Does Not Allow It To Evade The APA's Explicit Requirements.

The MPSC and MAFC contend that the MPSC's October 29, 2001 and October 3, 2002 orders are "a determination, decision, or order in a contested case," and thus they are an explicit exception to the APA's definition of a "rule" and rulemaking requirements. This is effectively a circular argument, an *ex post* rationalization, the acceptance of which would allow any agency to evade the APA's rulemaking requirements merely by conducting a contested case proceeding and issuing an order or decision pursuant to it. In essence, the exception would swallow the rule, effectively rendering the APA's rulemaking requirements meaningless. Statutes are to be construed to avoid absurd or unreasonable results. *Dep't of Civil Rights v Beznos Corp*, 421 Mich 110, 120; 365 NW2d 82 (1984). Every word of a statute should be read in such a way as to be given meaning, and a court should avoid a construction that would render any part of the statute surplusage or nugatory. *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992).

Instead of developing rules of general applicability and labeling them as a "contested case" to avoid rulemaking requirements, the MPSC was first required to look to the desired effect of the legislative mandate and then determine what process was mandated under the APA. In this case, Act 141 expressly requires that the code of conduct apply prospectively to all electric utilities and AESs. MCL 460.10a(4). The APA's procedural mechanism for such rules of general applicability is the rulemaking procedures at MCL 24.231 *et seq*, and thus this mechanism must be employed. The MPSC may not self-select an alternative process which it deems more amenable to its needs when rulemaking is the mandatory statutory process.

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Likewise, the MPSC's and MAFC's protestations that the parties were provided adequate "due process" is both false and a red herring. In enacting the APA, the Legislature articulated a scheme by which agencies must act. Therefore, whether a party has been provided due process by an agency is a function of what process was required under the APA. The language directing that the code of conduct "**apply to all electric utilities and alternative electric suppliers**" reflects the Legislature's intention that the code be a set of "rules" under the APA. The MPSC is thus necessarily directed to establish the code pursuant to the APA's rulemaking provisions. Rulemaking was the due process the Legislature intended. The MPSC is not empowered to decide what due process is "good enough." The Legislature has prescribed an elaborate procedure for rule promulgation to ensure that the essential functions of the legislative process conferred to the agency are not lost or exceeded by the agency's actions. See *Danse*, *supra*, at 183.[7]

The MPSC and MAFC also claim that it was impossible to complete rulemaking within the 180-day timeframe prescribed in section 10a(4) of Act 141, and thus the Legislature implicitly gave the MPSC discretion to develop the code of conduct via order or rulemaking. This assertion is specious and speculative. First, nothing in the record demonstrates that a rulemaking proceeding could not have been accomplished within the 180-day timeframe. Second, the MPSC made absolutely no attempt to undertake a rulemaking process, and thus its claims of impossibility are entirely speculative. Third, it is not for the MPSC to second guess the

[7] At footnote 7 of *Danse*, this Court stated:

> "While the rule-making authority of the State Tax Commission may more precisely be characterized as an administrative or executive branch function, it is clear nonetheless that the resemblance of this authority to traditional "law making' has prompted the Legislature's requirement that such authority be exercised only in conformity with the APA." *Danse*, *supra*, at 183, fn. 7.

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Legislature's 180-day limitation and the sufficiency of such limitation. Finally, as this Court previously recognized, the APA's rulemaking process is an important democratic function that cannot be disregarded because it may be burdensome or difficult. *American Federation of State, County and Municipal Employees v Dep't of Mental Health* ("*AFSME*"), 452 Mich 1, 13-15; 550 NW2d 190 (1996).

C. The Narrowly Construed "Permissive Statutory Authority" Exception To The APA's Definition of "Rule" Does Not Apply.

The MPSC and MAFC ask this Court to read the "permissive statutory power" exception so broadly as to obliterate the APA's rulemaking requirements. As this Court has recognized, however, this exception should be narrowly construed, and the "important democratic function" of the APA rulemaking process cannot be disregarded because it may be burdensome, difficult or time-consuming. *AFSME, supra* at 13-15. Likewise, the cases cited by the MAFC in support of its position are distinguishable. For example, in the cited cases the agency action either (1) did not create a rule of general applicability, which is an important element of the definition of a "rule," or (2) qualified as an exercise of permissive statutory authority because the Legislature had not required the agency to act on a particular subject pursuant to the APA. *See Michigan Trucking Ass'n v Michigan Public Service Commission*, 225 Mich App 424; 571 NW2d 734 (1997) (finding that the MPSC was not required to proceed by rule where the statute authorized it to implement "by rule or order" a safety rating system for motor carriers); *Pyke v Department of Social Services*, 182 Mich App 619, 632; 453 NW2d 274 (1990) (finding that the Department's policy of considering one spouse's receipt of federal benefits when assessing the other spouse's eligibility for benefits was not a rule); *Northern Michigan Exploration Co v Michigan Public Service Commission*, 153 Mich App 635, 649; 396 NW2d 487 (1986) (finding that the Commission's application of a natural gas proration formula to resolve a contested case

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proceeding did not require rulemaking); *American Way Life Insurance Co v Commissioner of Insurance*, 131 Mich App 1; 345 NW2d 634 (1984) (holding that the Insurance Commissioner need not act by rule when determining that an insurer's rate filing should be rejected); *Detroit Automobile Inter-Insurance Exchange v Commissioner of Insurance*, 119 Mich App 113, 117-18; 326 NW2d 444 (1982) (holding that the Commissioner need not act by rule in finding that an insurer's underwriting policy constitutes an unfair trade practice); *Hinderer v Department of Social Services*, 95 Mich App 716, 726-27; 291 NW2d 672 (1980) (finding that the Department need not act by rule when creating budgeting methods in accordance with federal rules and regulations); *Colombini v Department of Social Services*, 93 Mich App 157, 164-65; 286 NW2d 77 (1979) (finding that the Department's client reporting system did not have to be implemented by rule).

Moreover, this Court has previously recognized that, while an agency's decision *whether* to take action on an issue does not constitute rulemaking and is exempt from the APA's rulemaking requirements pursuant to MCL 24.207 (j), once an agency has decided to take action, it must act by rule in setting its standards and policies. *AFSCME*, *supra* at 12. In this case, it is undisputed that the Legislature required the MPSC to create a code of conduct. Simply put, the MPSC had no discretion regarding *whether* to create the code of conduct (*i.e.*, had no "permissive" authority) and, when it did create that code of conduct, the APA required it to act by rule.

II. THE *AFFILIATE GUIDELINES* CASE IS DIRECTLY ON POINT AND COMPELS A SIMILAR FINDING.

The MPSC and MECA attempt to distinguish the instant case from *Michigan Electric and Gas Ass'n v Michigan Public Service Comm*, 252 Mich App 254; 652 NW2d 1 (2002) (the "*Affiliate Guidelines*" case) where "guidelines" purporting to govern transactions between

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regulated public utilities and their non-regulated holding company parents, subsidiaries and affiliates were held unlawful because the MPSC proceeded via contested case rather than rulemaking. In vacating the MPSC's guidelines, the court found that:

> the PSC eschewed the procedural mandates of the APA in favor of its own course of action. By choosing to implement "guidelines" by order in a contested case against unnamed parties, yet with the force and effect of law, the PSC culled elements of rulemaking, adjudication, and general policy formation, with little regard for the dictates of the APA....the process utilized by the PSC constituted a rather heavy-handed rebuke of established APA procedures, and, accordingly, we are compelled to invalidate that process. *Id.* at 267-268.

The court's rationale in the *Affiliate Guidelines* case is equally applicable to the instant case and compels a similar finding. Like the code of conduct, the affiliate guidelines were intended to have general and prospective application (to all regulated utilities and their respective non-regulated affiliates and subsidiaries), and have the force and effect of law. The only procedure that both could lawfully be established is through the APA's rulemaking process. The MPSC's and MAFC's attempts to distinguish the *Affiliate Guidelines* case are pure sophistry in that they draw distinctions with no substantive significance. For example, it is irrelevant that the MPSC acted *sua sponte* in commencing the contested case in the *Affiliate Guidelines* case, but was commanded by statute (Act 141) to establish the code of conduct in this case. Such an argument goes to the issue of the MPSC's underlying substantive authority to promulgate such standards[8] (which is not in dispute here) rather than the procedure that could lawfully be employed to effectuate these standards. Likewise, it is entirely irrelevant that the 180-day timeframe mandated by Act 141 is shorter than the timeframe occurring in the *Affiliate Guidelines* case. The court in the *Affiliate Guidelines* held the procedure of a contested case for

[8] The court in the *Affiliate Guidelines* case was clear to point out that because the process used by the MPSC was unlawful, it did not need to address the issue of whether the MPSC had any delegated authority to impose the affiliate standards on non-regulated entities.

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developing the desired affiliate standards as unlawful **with no finding that the length of time the MPSC used to develop the guidelines (more than a year) played any part in the appropriateness of the procedure or that the use of a rulemaking process would require more time than was employed**. Because the *Affiliate Guidelines* case is highly analogous to the instant case, a similar result should be reached.

III. THE MPSC'S DETERMINATION TO ISSUE ITS CODE OF CONDUCT THROUGH AN ORDER IN A CONTESTED CASE PROCEEDING IS NOT ENTITLED TO JUDICIAL DEFERENCE.

The MPSC and MAFC assert that the MPSC's decision to proceed via a contested case must be accorded deference. This argument should be rejected because the MPSC is not the sole agency charged with administering and enforcing the APA, and the MPSC is not entitled to deference with regard to Act 141 because it is a new statute.

The APA applies to all agencies and agency proceedings, unless expressly exempted or otherwise provided by law. *See* MCL 24.313. Consequently, the MPSC has not been specially charged with administering the APA. The MPSC, like every other state agency, must undertake and conform its actions and procedures with the Act. Neither the MPSC's administration of the APA, nor its actions and decisions produced under it, should be given any greater weight or deference than any other agency governed by the Act. Indeed, to grant the MPSC deference with respect to its administration and interpretation of this broadly applied statute would effectively result in this Court abdicating its role to interpret the statute and state what the law is.

Likewise, and with regard to Act 141, the MPSC's interpretation and administration of Act 141 is not entitled to deference and great weight. An agency's interpretation of its administering statutes is provided deference only where such interpretation and administration is long-standing, and an agency's interpretation of new legislation is not entitled to the same measure of deference. *Ameritech v MPSC*, 239 Mich App 686, 690; 609 NW2d 854 (2000).

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Here, Act 141 was enacted in June 2000, and the MPSC's orders issued October 2001 and October 2002. The MPSC's administration of Act 141 has only been for a limited period of time and should not be accorded any deference in its interpretation. Further, this appeal relates to the code of conduct mandate at section 10a(4) of the Act 141. This provision relates to the Legislature's mandate concerning an issue that the MPSC had never previously been authorized to address. Consequently, this Court is in an equally optimal position as the MPSC in addressing this section's meaning, and need not accord the MPSC any due deference in its interpretation.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated herein and its brief on appeal, MECA respectfully requests that this Court reverse the Court of Appeals' decision and the MPSC's December 4, 2000 and October 29, 2001 Orders, and vacate the code of conduct.

Respectfully submitted,

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