Approved, Michigan Court of Appeals

LOWER COURT	Electronically Filed	CASE NO.
Public Service Commission	BRIEF COVER PAGE	Lower Court U-17053 Court of Appeals 316728

(Short title of case)

Case Name: **IN RE APPLICATION OF DETROIT EDISON TO IMPLEMENT OPT-OUT PROGRAM**

1. Brief Type (select one): ☐ APPELLANT(S) ☐ APPELLEE(S) ☑ REPLY ☐ CROSS-APPELLANT(S) ☐ CROSS-APPELLEE(S) ☐ AMICUS ☐ OTHER [identify]:

2. This brief is filed by or on behalf of [insert party name(s)]: **Cynthia Edwards, Linda Kurtz, Leslie Panzica-Glapa**

3. ☑ This brief is in response to a brief filed on **12/02/2013** by **1) the PSC and 2) Detroit Edison** .

4. ORAL ARGUMENT: ☑ REQUESTED ☐ NOT REQUESTED

5. ☐ THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.
[See MCR 7.212(C)(1) to determine if this applies.]

6. As required by MCR 7.212(C), this brief contains, in the following order: [check applicable boxes to verify]

- ☑ Table of Contents [MCR 7.212(C)(2)]
- ☑ Index of Authorities [MCR 7.212(C)(3)]
- ☐ Jurisdictional Statement [MCR 7.212(C)(4)]
- ☐ Statement of Questions [MCR 7.212(C)(5)]
- ☐ Statement of Facts (with citation to the record) [MCR 7.212(C)(6)]
- ☑ Arguments (with applicable standard of review) [MCR 7.212(C)(7)]
- ☑ Relief Requested [MCR 7.212(C)(9)]
- ☑ Signature [MCR 7.212(C)(9)]

(Reply Brief)

7. This brief is signed by [type name]: /s/ **Kurt T. Koehler**

Signing Attorney's Bar No. [if any]: **P70122**

STATE OF MICHIGAN

IN THE COURT OF APPEALS

IN RE APPLICATION OF DETROIT EDISON
TO IMPLEMENT OPT-OUT PROGRAM,

CYNTHIA EDWARDS and LINDA KURTZ,

Intervenors, Appellants,

and

LESLIE PANZICA-GLAPA,

Appellant,

Court of Appeals No. 316728

v

MICHIGAN PUBLIC SERVICE COMMISSION
and THE DETROIT EDISON COMPANY

Appellees.

/

CONSOLIDATED CASES

DOMINIC CUSUMANO AND LILLIAN CUSUMANO

Intervenors, Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION
and THE DETROIT EDISON COMPANY

Court of Appeals No. 316781

Appellees.

/

In the matter of the application of
THE DETROIT EDISON COMPANY
seeking approval and authority to
implement its proposed advanced metering
infrastructure Opt-Out Program

MPSC Case No. U-17053

/

APPELLANTS' REPLY BRIEF IN DOCKET NO. 316728
ORAL ARGUMENT REQUESTED

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Dated: January 6, 2014

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ARGUMENT

I. THE RECORD ON APPEAL AND STANDING

The PSC claims the Appellants cited material outside of the record. The Appellants' brief referenced Edwards and Kurtz's excluded testimony to establish standing to appeal. Excluded testimony is still part of the record on appeal; therefore it may be cited in the brief. MCR 7.210(A)(3). However, it cannot support reversal on the merits arguments unless its exclusion is reversed on appeal. *Toho-Towa Co. Ltd v Morgan Creek Productions*, 217 Cal App 4th 1096, 1104-1105; 159 Cal Rptr 3d 469 (Cal Ct App 2013). Excluded evidence was not cited in support of the Appellants' first two arguments, but it was cited in the ADA/ PWDCRA arguments. The Appellants will file a motion to amend their brief to remove it. The PSC also complains about comments cited. The brief cited comments based on their appearance in PSC Staff reports, which were later accepted and adopted by the PSC, and PSC orders. In this context the comments were effectively incorporated into the record by the PSC. (U-17000 Record; 2 Tr. 179:1-5.)

DTE claims that Leslie Panzica-Glapa does not have standing to appeal because she did not formally intervene before the PSC. Parties in interest are allowed by MCL 462.26(1) to bring an appeal of right. The words "in interest" in MCL 462.26 cannot be interpreted in a manner rendering them "surplusage or nugatory." *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012). MCL 462.26 could have stated "parties before the PSC," but it does not. DTE's attempt to distinguish *Ass'n of Businesses Advocating Tariff Equity (ABATE) v Public Service Comm*, unpublished opinion per curiam of the Court of Appeals, issued June 24, 2004 (Docket No.246912, 247078) fails. In *ABATE* the Attorney General is not a customer or a utility. He lacked "party in interest" status but for the statute giving him that status. Utility customers do not require a special statute to be "parties in interest." Ms. Panzica-Glapa is a customer of DTE who

desires to participate in the AMI opt-out program. This gives her a basis for "party in interest" status that the attorney general lacked. (1 Tr. 90-91.)

The other case relied upon by DTE, *SBC Michigan v Public Service Comm*, unpublished opinion per curiam of the Court of Appeals, issued Nov. 3, 2005 (Docket No. 256177), is distinguishable as it 1) was not an appeal from a contested PSC case, 2) relied upon *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 614; 684 NW2d 800 (2004), which has been overturned by the Michigan Supreme Court, and 3) involved generally applicable arbitration guidelines that were not specifically applicable to SBC. SBC was never a "party in interest" in that case to begin with. A true "party in interest" does not lose that status by failing to intervene. *In re Freeman Estate*, 218 Mich App 151, 154-55; 553 NW2d 664 (1996); *Tucker v Clare Bros Ltd*, 196 Mich App 513, 517-20; 493 NW2d 918 (1992). Appellants in the same exact situation as Ms. Panzica-Glapa were allowed to appeal in *In re Application of Consumers Energy to Increase Electric Rates*, unpublished order of the Court of Appeals, entered December 6, 2013 (Docket Nos. 317456, 317460).

II. THE PSC EXERCISED FACT-FINDING AND RATEMAKING POWERS

The PSC and DTE claim that this was solely a ratemaking case to approve rates for DTE's AMI opt-out program. Cases may have a ratemaking component, but involve other powers as well. *Mich Elec & Gas Ass'n v Public Service Comm*, 252 Mich App 254, 265-66; 652 NW2d 1 (2002). While there was indeed a ratemaking component here, the PSC also implicitly engaged in fact-finding by 1) approving the rules for the opt-out program in the tariff, including the type of meter or meters to be used in the opt-out, and 2) finding that DTE's opt-out program complied with the PSC's September 11, 2012 order in U-17000. DTE's expert witness admitted that it submitted in Exhibit A-2 proposed tariff language "establishing the rules for Edison's residential only Opt-Out program." (3 Tr. 236:1-2; 4 Tr. 517:24-25 – 518:1-9.) The PSC made a

fact-finding that DTE's AMI opt-out program complied with the September 11, 2012 order in U-17000. (4 Tr. 577:18-23, 585-586; Order p. 17-18, U-17053, May 15, 2013.)

III. THE PSC EXCEEDED ITS STATUTORY AUTHORITY BY ENABLING DTE TO MANDATE AMI METERS WHEN IT APPROVED AN AMI OPT-OUT WHERE THE ONLY OPT-OUT METER IS A MODIFIED AMI METER

The powers of the PSC are strictly construed. *Consumers Power Co v Public Service Comm*, 460 Mich 148, 155; 596 NW2d 126 (1999). These powers are limited to those explicitly granted by statute. *Union Carbide Corp v Public Service Comm*, 431 Mich 135, 146; 428 NW2d 322 (1988). Agency interpretations of statutes are entitled to respectful consideration, but not deference. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 101-02; 754 NW2d 259 (2008). DTE argues the PSC may use its ratemaking powers to approve the opt-out rate and the terms of the opt-out contained in its tariff, but that the PSC lacks the authority to set the type of opt-out meter used. (DTE Brief 11-16.) AMI mandates exist only for federal buildings and customers with voluntary special rates. 16 USC § 8253(e)(1); MCL 460.1177. DTE's expert witness testified that there is not an AMI meter mandate in Michigan. (3 Tr. 242-243, 416 8-12.) The ALJ ruled that although there is no AMI meter mandate in Michigan, that fact did not preclude the adoption of an opt-out program (PFD p 23, U-17053, Mar. 22, 2013.) This is true, but the lack of a mandate requires that the AMI opt-out should include a non-AMI meter option.

DTE argues that the PSC may approve an AMI opt-out program using its general ratemaking power where the sole opt-out option is still the same AMI with its transmitter disabled. The ratemaking power is broad, but not unlimited. *Attorney General v Public Service Comm*, 269 Mich App 473, 482; 713 NW2d 290 (2005), *lv den* 475 Mich 883 (2006). This Court has held that the PSC may not "enable a utility to compel customers to pay to support a voluntary renewable resources energy program even if they have not chosen to receive power from the program." *Id.* This Court explained that where a program, such as the AMI opt-out program or

the renewable energy surcharge program as it existed before 2008, is not statutorily mandated, the PSC cannot enable the utility to make it mandatory. *Attorney General v Public Service Comm*, 279 Mich App 180, 193; 756 NW2d 253 (2008) (finding that LIEFF was statutorily mandated); *Attorney General v Public Service Comm*, 276 Mich App 216, 232-33; 740 NW2d 685 (2007). This rationale restricts the ratemaking power. Customers declining to receive the AMI meter that is not mandated by statute cannot be forced to receive it. The legislature has not delegated to the PSC the authority to enable a utility to create a mandate absent statutory authorization to do so. The economic viability of alternative meters cannot be considered, as that is an argument for the legislature. *Attorney General*, 269 Mich App at 482.

According to these precedents, the lack of a mandate means that there must be at least one opt-out option that is not an AMI meter. The PSC and DTE argue that the opt-out provides an alternative for customers who do not want a "transmitting AMI meter." This misstates the issue. The U-17000 September 11, 2012 order noted that some customers have "significant concerns about AMI." (Order p 5, U-17000, Sept. 11, 2012.) DTE's witness characterized U-17000 as investigating, "the potential for providing an opportunity for customers to opt out of having a smart meter." (3 Tr. 229:12-13.) The U-17000 order plainly referred to concerns about AMI meters and not just concerns about transmitting AMI meters. DTE's witness confused the issue at several points in his testimony. At times he referred to some customers wanting "a non-transmitting AMI meter." (3 Tr. 230:15-19, 231:9-23, 232:9, 232:24, 234:20-22, 243:7; 432.) Yet, he also admitted that the customer concerns DTE received were about AMI meters generally. (3 Tr. 225:2, 230:7-9, 232:19-22, 234:16, 240:16, 241:4, 256:1.) The Appellants have significant concerns about AMI meters and not just about "transmitting AMI meters." The PSC mandated that DTE provide an AMI opt-out program. Disabling the transmitter does not fully

address those concerns. The AMI opt-out meter is exactly the same AMI meter that DTE is deploying as its standard meter. (3 Tr. 233, 252, 260, 273; 4 Tr. 506-507.) For opt-out customers, the radio transmitter on the AMI meter will be manually disabled. (3 Tr. 233, 252, 349.) Customers who do not accept the uniform AMI meter in either its standard or its modified opt-out form may have their electricity shut off. (3 Tr. 386:2-8.) There is no competitor to provide distribution services, nor would the customer be free switch if there were. Mich Admin Code, R 460.3411. The word *mandate* is not mere hyperbole in this situation, because the record shows the AMI opt-out meter is still an AMI meter.

DTE correctly states that it has a statutory obligation to measure usage of electricity and that it owns the meter. MCL 460.10q(5). Edwards, Kurtz, and Panzica-Glapa have not argued otherwise. However, this statute and its corresponding regulations do not permit an AMI meter mandate. In fact testimony showed that the electromechanical meters perform the same usage measurement functions as the AMI meter. (4 Tr. 508-509.)

DTE argues, citing *Union Carbide*, *supra*, at 148, that the PSC may not infringe on the management decisions of the utility by requiring it to offer an opt-out meter it does not want to offer. The PSC agreed and did not impose any such requirement on DTE. (Order p. 18, U-17053, May 15, 2013.) DTE's argument is premature in that it presupposes an outcome that might, but is not certain, to occur on remand. In any event, this restriction is limited to the Commission's ratemaking power, which it may use to encourage, but not compel, utility management decisions. *Union Carbide, supra*, at 148. Where a specific statute, other than the ratemaking statute, , applies the PSC can bar a utility management decision. *Consumers Power Co*, *supra*, at 460 Mich at 177-78 (Brickley, J. dissenting.); *Consumers Energy Co v Public Service Comm*, 261 Mich App 455, 457; 683 NW2d 188 (2004). MCL 460.556 is a specific statute that grants the

PSC the discretionary power to see that the utility's property is properly maintained and operated in compliance with the law. This statute applies to distribution instrumentalities. MCL 460.551. Prior to the September 11, 2012 order, DTE made the business decision to offer an opt-out program. (3 Tr. 230:12-15.) A change to the AMI opt-out order to add a non-AMI meter to make the order compliant with the law, as discussed above, is permissible.

Furthermore, none of the cases applying the *Union Carbide* management decision limitation on the PSC's ratemaking power dealt with utility property placed on or within customer residences. Instead they dealt with things like power plants (in *Union Carbide*) and the utility's power lines (in *Consumers Power Co*.) Just as the state and the PSC do not own the utility, the utility does not own the residences of their customers. Utilities do not have absolute dominion over utility property placed on customer homes. *See Schultz v Consumers Power Co*; 443 Mich 445; 506 NW2d 175 (1993) (the utility has a duty to inspect and repair utility property in the customer's home); *Wink v Wink Gas Co*, 115 SW2d 973, 978 (Tex Civ App 1938) (City could prohibit a utility from installing multiple meters in a single premises). A utility cannot sell or withhold service at will and has an obligation to meet customer needs. *Mich Consol Gas Co v Austin*, 373 Mich 123, 138-39; 128 NW2d 491 (1964); *Finnin v New Orleans Public Service, Inc*., 167 La 122; 118 So 860 (1928) (duty to promptly replace a removed meter).

IV. THE COMMISSION'S ORDER WAS NOT SUPPORTED BY COMPETENT, MATERIAL, AND SUBSTANTIAL EVIDENCE

The burden of proof for cases under MCL 462.26 is for the appellant to show by clear and satisfactory evidence that the order is not supported by competent, material, and substantial evidence. MCL 462.26(8); *Mich Cent R R Co v Mich R R Comm*, 160 Mich 355, 368; 125 NW 549 (1910) (the burden is to show "that the facts are such as to render the order invalid.") DTE attempts to reframe the question presented. (DTE Br. 18.) However, the issue is not whether

record evidence exists to support the costs and benefits of the entire AMI program as general matter. Ms. Edwards, Ms. Kurtz, and Ms. Panzica-Glapa are not challenging the entire AMI program, nor was this case about the AMI program generally. (3 Tr 254:22-25.) Rather, the issue is whether this particular opt-out program proposed by DTE, with its non-transmitting meter, is supported by competent, material, and substantial evidence. DTE argues that the order is properly supported, and the PSC would apply the legislative abuse of discretion or arbitrary and capricious standard instead. (DTE Br. 18; PSC Br. 19-24.) The substantial evidence standard applies because 1) *In re Application of Detroit Edison Co*, 296 Mich App 101,114-115; 817 NW2d 630 (2012), which applied the substantial evidence test, controls AMI related cases; and 2) as noted above, the PSC engaged in some fact-finding in addition to ratemaking.

DTE attempts to distinguish *In re Application of Detroit Edison Co,* stating that it was a general rate case and applies only to general rates cases. This analysis fails because the opt-out program could have been considered in a general rate case much like Consumers Energy's AMI opt-out program was in U-17087. The testimony indicates that DTE's opt-out program will be considered in general rate cases in the future. (3 Tr. 234:15-17; 4 Tr. 579:17-20.) The requirement of a cost-benefit relationship is still applicable in a single-issue case. Costs will not be reasonable and prudent if the customers participating in the opt-out derive no corresponding net benefit from them. *In re Application of Detroit Edison Co*, *supra*, 296 Mich App at 115. A cost/benefit relationship is needed in AMI cases for the order to be properly supported. *Id.* at 115-116. Aspirational, optimistic, conclusory, and speculative testimony is insufficient to properly support an order. *Id.* at 115. DTE claims that the record shows that there are benefits arising from AMI. (DTE Br. 18.) However, the question here is not whether there are benefits from AMI *generally* especially since this is an AMI *opt-out* program, but whether the customers

choosing to opt-out of AMI will receive a corresponding benefit in exchange for the costs. Furthermore, DTE's expert witness gave nearly identical testimony in this case about the benefits of AMI as he did in U-16472. (3 Tr. 227-229; 7 Tr. 669-672, U-16472.) His benefits testimony in U-16472 has already been rejected as aspirational by this Court. *In re Application of Detroit Edison Company to Increase Rates*, unpublished per curiam opinion of the Court of Appeals slip op 7-10, issued July 30, 2013 (Docket Nos. 308130, 308154, 308156).

The PSC argues that the legislative standard of review should apply because this proceeding had a ratemaking component. The PSC fails to distinguish *In re Application of Detroit Edison*, which applied the substantial evidence test in a ratemaking proceeding involving AMI meters. The PSC's position fails to recognize that it also exercised fact-finding powers in this case when it found DTE's opt-out compliant with the September 11, 2012 order in U-17000 and when it approved the tariff language. The substantial evidence test applies to agency fact-finding. Although an agency's interpretations of its own orders are accorded substantial deference, they must be supported by substantial evidence. *Ameritech Mich v Public Service Comm*, 240 Mich App 292, 303; 612 NW2d 826 (2000). Arbitrary and capricious decisions lack a determining principle, are not based on the relevant factors, whimsical, decisive yet unreasoned, subject to sudden change, or are clear errors. *Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 63-64; 678 NW2d 444 (2003). It is arbitrary to assume that a non-transmitting AMI meter will address concerns about AMI meters or to assume that opt-out customers want a non-transmitting meter without any evidence showing that they do. (3 Tr. 230:12-15, 235:22-23; 243:6-11). "It is 'arbitrary and capricious' to fill gaps in an administrative record with possibly-erroneous assumptions." *In re Armstead*, 97 BR 798, 805 (Bankr ED Pa 1989).

Substantial evidence is defined as "the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion" on the whole record. *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994); *Mich Employment Relations Comm'n v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 124; 223 NW2d 283 (1974). The evidence presented in the record failed to address how this specific AMI opt-out program with a non-transmitting AMI meter proposed by DTE benefits opt-out customers and addresses their "significant concerns about AMI." (Order p. 5, U-17000, Sept. 11, 2012.) The testimony simply assumed that it accommodated customers wishing to opt-out. (3 Tr. 230:12-15, 235:22-23; 243:6-11.) This is the kind of aspirational testimony that this Court has rejected in the past. *In re Application of Detroit Edison Co*, 296 Mich App at 115.

The record shows that customers may voluntarily opt to receive a non-transmitting AMI meter without giving a reason. (3 Tr. 230:23-24, 232.) The record also shows that DTE may shut-off electricity to customers refusing to receive the standard AMI meter or the opt-out, transmitter-off, AMI meter. (3 Tr. 386:2-8.) This AMI opt-out leaves customers no choice but to receive an AMI meter with or without the transmitter enabled. (3 Tr. 260, 273; 4 Tr. 592:-15-18.) Consequently, DTE would be able to use one uniform meter (3 Tr. 294; 4 Tr. 513-514.), but this will not happen for some time as DTE still maintains both the old electromechanical and new AMI meters. (3 Tr. 385:16-20, 376, 446.) Uniformity does not benefit customers who wish to opt-out of having an AMI meter.[1] Other evidence in the record consists of estimates as to the number of customers that will opt-out. DTE's expert witness testified that through mid-July 2012

[1] In U-17087, the PSC approved Consumers Energy's opt-out which allows customers to keep the existing electromechanical meter on their home meaning they remain economically viable. (4 Tr. 549:2-5, U-17087) Some states will still use some electromechanical meters. VT STAT tit 30, § 2811; N.H. REV STAT § 374:62; VA CODE ANN §56-576 (energy efficiency); TEX UTIL CODE § 39.107(b); TEX ADMIN CODE § 25.130(g)(2); Decision p. 20-21, Cal Pub Util Comm, A.11.03-014, Feb 1, 2012; Order, Maine Pub Util Comm, Docket 2010-00345, May 19, 2011)

they had received "approximately 1,100 concerns regarding our AMI meters." (3 Tr. 230:5-11.) He noted that their concerns mainly involved privacy and health effects. (3 Tr. 23:10-11.) DTE then forecast about 4,000 opt-outs. (3 Tr. 253:3-10, 239:2-3; 239:14-16.) By November 30, 2012 the number of concerns received had increased to 3,269. (4 Tr. 474-475.) The PSC staff predicted a higher number of about 15,500 customers would opt-out. (4 Tr. 579:13-16.) The actual number of participants will affect the ultimate opt-out fee (4 Tr. 598-599.) The ALJ agreed that setting the participation rate too low and the fee too high could suppress participation thus increasing the rate further (PFD p. 32, U-17053, Mar. 22, 2013.) The lack of a non-AMI opt-out meter option may similarly adversely affect the number of participants, as there is no substantial evidence in the record that the non-transmitting AMI meter addresses AMI concerns.

V. APPELLANTS ELECT TO PURSUE ADA/ PWDCRA CLAIMS ELSEWHERE

The Appellants prepared rebuttal arguments and authorities for the ADA and PWDCRA issues, but due to the nature of the record they elect to pursue their ADA and PWDCRA claims in a separate case and jurisdiction. They will file a motion to amend their brief to remove them.

RELIEF REQUESTED

In conclusion Ms. Edwards, Ms. Kurtz, and Ms. Panzica-Glapa respectfully request that the Court reverse the May 15, 2013 order of the PSC in U-17053 and remand the case back to the PSC to 1) take additional testimony and issue an AMI opt-out order that offers a non-AMI meter option and 2) create a record on the benefits of DTE's particular AMI opt-out program and tariff to customers who may chose to opt-out as well as the connection of those benefits to costs.

Respectfully submitted,

January 6, 2014

/s/ Kurt T. Koehler

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INDEX OF EXHIBITS

EXHIBIT 1: ***In re Application of Consumers Energy to Increase Electric Rates*, unpublished order of the Court of Appeals, entered December 6, 2013 (Docket Nos. 317456, 317460)**

EXHIBIT 2: ***Ass'n of Businesses Advocating Tariff Equity (ABATE) v Mich Pub Service Comm*, unpublished opinion per curiam of the Court of Appeals, issued June 24, 2004 (Docket Nos. 246912, 247078)**

EXHIBIT 3: ***SBC Michigan v Public Service Comm*, unpublished opinion per curiam of the Court of Appeals, issued Nov. 3, 2005 (Docket No. 256177)**

EXHIBIT 4: ***In re Applications of Consumers Energy to Increase Rates*, unpublished per curiam opinion of the Court of Appeals 10-11, issued October 30, 2012 (Docket Nos. 295287, 296625, 296633, 296640, 298476)**

EXHIBIT 5: ***In re Application of Consumers Energy Company to Increase Rates*, unpublished per curiam opinion of the Court of Appeals 5, issued November 20, 2012 (Docket Nos. 301318, 301381).**

EXHIBIT 6: ***In re Application of Detroit Edison Company to Increase Rates*, unpublished per curiam opinion of the Court of Appeals 5, issued July 30, 2013 (Docket Nos. 308130, 308154, 308156).**

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2014, I served the Appellants' Reply Brief in Docket No. 316728 on the parties listed in the table below via the Michigan Court of Appeals e-filing and electronic service system.

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Respectfully submitted,

January 6, 2014

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