STATE OF MICHIGAN

IN THE COURT OF APPEALS

DOMINIC and LILIAN CUSUMANO
Appellants,

Court of Appeals No: 316781

v.

MPSC Case No: U-17053

MICHIGAN PUBLIC SERVICE COMMISSION
and DETROIT EDISON COMPANY
Appellees.

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and LILLIAN CUSUMANO
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APPEAL BRIEF OF
DOMINIC AND LILLIAN CUSUMANO

PROOF OF SERVICE

STATEMENT OF ORDER BEING APPEALED FROM AND RELIEF BEING SOUHT

Presently pending before this Court is an Appeal brought by Dominic and Lillian Cusumano from a May 15th, 2013 Order of the Michigan Public Service Commission under it's Case U-17053. (Appendix A). Appellants were interveners in that case, the purpose of which was to determine whether the Commission should approve a "smart meter" opt-out tariff proposed by Detroit Edison. The Order appealed from granted approval to Detroit Edison for its proposed opt-out tariff while adjusting the rates pursuant to a staff recommendation.

Appellants contend that hearings on the proposed tariff did not allow for any evidence on the type of meter to be allowed opt-out customers and therefore there was not a complete record of competent and material evidence upon which the Commission could base its decision. Appellants seek reversal of the Order approving Edison's opt-out tariff and a remand to the MPSC to reopen hearings on the matter with an instruction to allow testimony as to whether the proposed opt-out meter does or does not address the issues of health and customer privacy that were the reason the case was opened in the first place. Appellants also ask for a remand direction that evidence must be heard to establish whether or not both the standard smart meter and the opt-out meter violate the Fourth Amendment to the U.S. Constitution.

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STATEMENT OF JURISDICTIONAL BASIS

Pursuant to Michigan Constitution, Article 6, Section 28 and MCR 7.203(A)(2), this Court has jurisdiction to hear an appeal as of right of a decision of a state administrative agency.

The Order appealed here was issued on May 15th, 2013. This Court has jurisdiction to hear this appeal since it was filed on June 14th, 2013, within 30 days of the Order appealed from pursuant to MCL 462.26.

STATEMENT OF QUESTIONS PRESENTED

I. WAS THE SCOPE OF THIS PROCEEDING IMPROPERLY LIMITED TO ONLY THE QUESTION OF THE RATES TO BE IMPOSED ON PERSONS OPTING OUT OF HAVING A "SMART METER"?

Appellants answer: "Yes"

II. DID THE ADMINISTRATIVE JUDGE IN THIS PROCEEDING INCORRECTLY APPLY A DOCTRINE OF "MANAGERIAL PREROGATIVES" TO LIMIT THE JURISDICTION OF THE MPSC REGARDING ISSUES PROFOUNDLY AFFECTING THE WELFARE, HEALTH AND PRIVACY OF UTILITY CUSTOMERS AND THE PUBLIC?

Appellants answer: "Yes"

III. WERE ISSUES RULED BEYOND SCOPE IN THIS CASE BASED ON PRIOR CASES PREVIOUSLY ADJUDICATED IN ANY OTHER MPSC CASE?

Appellants answer: "No"

IV. WERE APPELLANTS IMPROPERLY DENIED THE OPPORTUNITY TO ESTABLISH AN EVIDENTIARY FOUNDATION FOR THEIR COMPLAINT THAT BOTH THE "SMART METER" AND THE "NON-TRANSMITTING" OPT-OUT METER VIOLATE THE FOURTH AMENDMENT TO THE U.S. CONSTITUTION?

Appellants answer: "Yes"

STATEMENT OF FACTS

Introduction. Presently pending before this Court is an Appeal brought by Dominic and Lillian Cusumano from a May 15th, 2013 Order of the Michigan Public Service Commission under it's Case U-17053. (Appendix A). Appellants were interveners in that case, the purpose of which was to determine whether the Commission should approve a "smart meter" opt-out tariff proposed by Detroit Edison.

Edison's proposed tariff was put forward because over 400 utility customers and a large number of local units of government had complained that forcing utility customers to have AMI[1] electric meters, a.k.a. "smart meters" attached to their homes and businesses amounted to an assault on the customer's health and a violation of the customer's privacy.

These complaints centered mainly on three aspects of the AMI meters: (a) their ability to record electrical usage within a home or building in great detail, and (b) the fact they use microwave radio transmitters to relay electrical usage information to the utility in real time, and (c) the fact that AMI meters and other types of "digital" or electronic meters utilize something called a "switched mode power supply" to convert 120 volts a.c. or 240 volts a.c. to a relatively low d.c. voltage to operate the electronics. A fourth complaint centered on the fact that radio receivers in the AMI meters allow the utility to remotely turn off service or to send signals to a home or business to turn off particular appliances during, for example, peak load hours.

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1 – AMI Stands for "Advanced Metering Infrastructure"

Detroit Edison and those of its customers who have expressed disagreement with the AMI program do not agree on the privacy dangers posed by the AMI meters. Those filing complaints state that these AMI devices give the utility the means to know, in detail, not only the total amount of electricity being used at any given moment, but, more particularly, what kinds of appliances are being used at any given time. Such information is said to be available because the current drawn by each appliance has unique characteristics, not unlike a fingerprint. These characteristic patterns become visible when the utility is able to monitor the moment-by-moment consumption of the total current drawn. For each appliance, the amount of inrush current at startup, the amount of current drawn thereafter, the duration of draw, the power factor of draw, and the repetitive patterns of starts and stops provide those "fingerprints".

Such characteristics allow a "load profile" graph to be drawn based on the data reported by the AMI device that can readily differentiate between a refrigerator stopping and starting as compared to a furnace motor or electric range. These load profiles then, it is said, reveal patterns of daily activity, such as when a family sleeps, when they are not home, when children come home from school, number of persons in the household, and other household events.

Appellants argue that the foregoing claims are well documented in a report of the National Institute of Science and Technology (N.I.S.T.), part of the U.S. Department of Commerce, where such load profile graphs are presented and explained in some detail. See excerpts from NISTIR Report No. 7628, attached as Appendix D to this brief. The report also discusses at some length the authors' conclusion that such data as the AMI meters collect should be collected only with the

knowledge and consent of the utility customer and that such information not be sold to third parties without the consent of the utility customer.

Detroit Edison, on the other hand, has publicly stated that there is no privacy issue and that the new AMI meters do not reveal the sorts of detailed information complained of, and that they "only show total usage". The utility often states that more detailed information would only be available where the customer has purchased "smart appliances" and/or where the customer has signed up for "voluntary" programs to conserve energy. The utility publicly stated that it has never sold its customers' private information and would not do so in future.

Detroit Edison and those of its customers who have complained about the microwave radio transmissions disagree on whether or not these radio transmissions present any threat to the health of utility customers or more generally to the occupants of affected homes and businesses. Those asserting complaints cite the dangers they claim have been reported by virtually all independent[2] scientists and medical people who have studied the subject. Many of them also cite their own anecdotal experiences with deteriorating health following the installation of a smart meter on their own homes. A partial list of symptoms reported by them includes heart palpitations, mental confusion, and inability to sleep at night.

Detroit Edison has publicly stated that the amount of electromagnetic radiation caused by their radio transmitters falls well within limits established as safe by the F.C.C. These standards are based on the amount of radio energy that it takes to cause heating of human skin of a 200 pound male in an industrial situation. The

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2 – The term "independent" as used here means research not funded by utilities, their trade associations, or the U.S. Dept of Energy, which is a principal backer of smart grid programs.

utility and the Michigan Public Service Commission also cite studies done by industry-funded laboratories that fail to show any correlation between health symptoms and radiation at the levels used in these devices.

Detroit Edison and those of its customers who have asserted complaints about the switched mode power supplies in AMI meters and in many other types of "digital" or electronic meters disagree on the significance of these power supplies. Detroit Edison has never acknowledged that they present any problem at all. Those asserting complaints assert that power supplies of this type cause harmonics of the basic 60 cycle current to flow through a building's wiring and also spikes or pulses.

These additional frequencies, sometimes referred to as "dirty electricity" or as "poor power quality" are said to cause low frequency[3] electromagnetic fields within a home or building that can cause occupants to become ill and often experience some of the same symptoms as were mentioned earlier in connection with radio frequencies. Many have reported anecdotal accounts of such symptoms experienced even with electronic meters that did not contain a radio transmitter or where the transmitter had been turned off. Interveners were, Appellants argue, improperly prevented from getting evidence on the record to show that the non-transmitting AMI meters were not a solution when the pre-filed testimonies[4] of Cynthia Edwards, Linda Kurtz, and Rebecca Morr were stricken.

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3 – The frequencies of current caused by switched mode power supplies are generally multiples of the 60 cycle frequency, such as 120, 240, 480, 960 cycles per second and pulses or transients. Whenever such currents travel through a building's wiring, electromagnetic fields are generated perpendicular to the direction of current flow. These can have an effect on the human body and are thought to cause many of the symptoms being alleged.

4 – U-17053 case, entry 171, page 13, 5-34 and page 14, 1-18, and entry 173, page 8, 1-34.

The fact that the AMI devices also contain a radio receiver and a disconnect switch allows the utility to remotely turn off a customer's power when, for example, a bill has not been paid, or upon request of police or fire responders. This has been viewed as a benefit by the utility but is seen as posing a potential for abuse by those filing complaints. They question what will happen when medical equipment needed for life support is turned off remotely by mistake or as a result of some computer malfunction.

Another area of disagreement centers on plans for most appliances in the future to contain "smart chips". These chips, when combined with the radio receiver in the AMI device, will allow a utility to turn off particular appliances within a home in order to balance its load during periods of peak demand. Such programs are called "demand response" programs by the utility industry and are seen as a benefit by the industry, but seen as a threat to homeowner autonomy by many of those who have filed complaints.

Background. Detroit Edison is currently in the process of converting all customers in its service territory to AMI electric meters, a.k.a. "smart meters". This has come about as a result of federal legislation promoting a "smarter grid", specifically the "Energy Policy Act of 2005", the "Energy Independence Act of 2007", and Obama's stimulus bill of 2009. It is noteworthy that all these federal laws encouraged the idea of "smart meters" but also stipulated that these meters were to be voluntary, that utilities were to offer smart meters to their customers as part of programs to give customers incentives to conserve energy.

For 100 years, whenever the public demanded more energy, the job of the utilities was to supply that increased demand. There now appears to be a new way of

thinking, based in part on the idea of "global warming" and in part on the need to achieve independence from mideast oil, that we have to find ways to dampen demand down to what the available supply is, minimizing the need for new power plants. These goals were articulated, respectively, in the federal laws above cited. Because the demand for new power plants depends greatly on peak load, it will be important, it is said by advocates of the new thinking, to shift consumption of electricity to off peak hours to better utilize existing generator capacity. It is not at all clear that the public buys into these new concepts or, indeed, was ever really consulted about this new direction.

The implications of the new thinking are that severe rationing, in one form or another may need to take place. There may be limits on the total amount of electricity a home or business is allowed to consume, and especially limits on how much energy can be consumed during peak load hours. Efforts will be made to cause customers to shift some of their consumption to off peak hours for, by example, running their dishwasher or laundry machines after 9 pm.

A prime purpose of "smart meters" is to have a way for utilities to know exactly how people are using electricity and to use "time-of-use pricing" to encourage shifting demand to off peak. Where such an incentive fails to change behaviors sufficiently, the "smart appliances" soon to come will give utilities the means to simply turn off particular appliances deemed to be unnecessary during times of peak load. Such practices are part of a utility industry policy known as "demand-response". Detrit Edison asserts that another purpose of these new meters is to provide rapid detection of outages after a storm. Still another purpose is to eliminate the costs of manual meter reading.

A byproduct of smart meters is that utilities accumulate much detailed information about the daily habits of their customers and this information is all to be stored in a database. There is ongoing controversy about whether utilities should be allowed to sell this information to third parties such as marketing companies, insurance companies and banks, for example.

A central contention of Detroit Edison has been that all the data it collects will be encrypted, both in transmission and in storage, and that it has no plans to sell such information to third parties.

The opposing contention of many customers of Detroit Edison is that the utility has no right to collect such information without customer consent, and that customers should in no way be dependant on the promises of a utility about what uses it will put to such information in the future.

If, as a society, we stick to concepts such as the sanctity of the home and the Fourth Amendment protections our founders devised to protect us in our homes and in our persons and personal effects, then there is no place for this type of data collection.

Opt-Out Program. The Order of May 15th, 2013, now being appealed, establishes a new opt-out tariff for residential customers of Detroit Edison who do not want an AMI or "smart meter" attached to their home. For these customers the utility will install a "non-transmitting meter" which is defined as an AMI meter with the radio transmitter turned off. The utility will exact "opt-out fees" for customers requesting this option, amounting to $67 initially plus a monthly charge of $9.80/month to continue indefinitely or until the next rate increase. This was not the kind of opt-out being demanded by 400 written complaints or the type of opt-out

most city governments and county governments were calling upon the MPSC to provide. The opt-out almost universally being demanded was for customers to be able to keep their analog meters and not be charged for opting out. The analog meter is a simple electro-mechanical device that does not invade privacy, does not transmit radio frequency waves, and does not cause the kind of power quality problems that can still make people ill even when the radio transmitter is off.

The opt-out now being offered is deemed unsatisfactory because:

(a) the AMI meter with its radio turned off still has the ability to record electrical usage in detail for upload to the utility by means other than radio transmissions. This information may be uploaded to a handheld device carried by the person doing the once/month manual meter reads.

(b) The AMI meter with its radio turned off still contains a switched mode power supply and will cause harmonic currents and pulses to travel through a home's wiring resulting in illness for some electro-sensitive persons.

(c) The AMI meter with its radio turned off still contains a functioning radio receiver. This means the utility will be able to turn off all power remotely and, as smart appliances become increasingly common, will be able to turn off particular appliances in the customer's home or business remotely.

(d) The plan makes no provision for business and professional practices to opt-out. This means that no health care practitioner, for example, can offer an environment that would be safe for his electro-sensitive patients.

(e) The payment of a fee to avoid a harm knowingly inflicted by the utility does not appear justified.

(f) The opt-out plan contains no requirement that Detroit Edison must notify its customers that they have a choice to opt-out or that an opt-out plan even exists. Appellants have seen a number of examples of letters Detroit Edison sent, since the MPSC Order of May 15th, on a mass basis to all customers in new neighborhoods where their installers would be working, and also a number of examples of the letter the utility sends to selected customers who previously refused a smart meter. The select group of customers receive a letter informing them that the MPSC has approved an opt-out plan and they may choose between having a n AMI meter with the radio turned on, or, upon payment of stated initial and monthly opt-out fees, may an AMI meter with the radio turned off. This practice was the subject of a Motion for Reconsideration where the relief requested was denied by the Commission.

Procedural History. The case now being appealed, U-17053, was a direct result of an earlier smart meter case, U-17000, which in turn was the result of resolutions passed by 9 units of local government. Their resolutions are a matter of record in the Order that opened the U-17000 case. (See Appendix B) That case was not a contested case or an evidentiary proceeding and did not follow rule-making procedures as specified in the Administrative Procedures Act. The case was solicited to gather public comments, utility industry comments, and to provide for MPSC staff to conduct an investigation into some of the complaints about smart meters and submit a report to the Commission. Over 400 written complaints were submitted to the U-17000 docket against the smart meters by utility customers, including both residential customers and professional practioners. (See Appendix C)

All but a few of the 400 submissions were severely critical of smart meters and demanded some form of relief. The staff report was submitted on June 28th, 2012. (See Appendix D). The staff had been charged with investigating the complaints against smart meters and, after considering only reports written by or for the utility industry and reports written by or for the U.S. Department of Energy, concluded that the health concerns were "inconsequential". Staff ignored volumes of studies published in peer reviewed journals by scientists all over the world expressing opinions that health concerns are in fact severe, both for electro-sensitive people in the short run and for the entire population in the long run. Long run risks are for increased cancer and neurological illnesses. The staff allowed that privacy concerns warranted investigation in future cases but needed no immediate remedy. The staff recommended in its June 28th report that an opt-out program should be provided.

On July 31st Detroit Edison submitted its opt-out proposal. This began the contested case U-17053 to determine whether the MPSC would accept this proposal establishing a new tariff for customers wishing to have a "non-transmitting meter". On September 10th there was a pre-hearing on this case.

The Commission issued an Order on September 11th, 2012 that all Michigan utilities deploying smart meters must offer an opt-out plan "based on cost-of-service principles". (See Appendix E). This Order would eventually be used to define the scope of the previously opened U-17053 case.

ARGUMENT:

I. THE SCOPE OF THIS PROCEEDING WAS IMPROPERLY LIMITED TO ONLY THE QUESTION OF THE RATES TO BE IMPOSED ON PERSONS OPTING OUT OF HAVING A "SMART METER".

Standard of Review. Michigan Constitution, Article 6, Section 28: "All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record."

Discussion. This case was to determine whether or not the Commission should accept a proposal from Detroit Edison that would allow customers objecting to AMI meters, a.k.a. "smart meters" to have an alternative or opt-out meter installed and pay certain fees for this privilege. The proposal specified (a) that the type of meter to be installed for opt-out customers would be the same AMI meter all other customers would be receiving but with the radio transmitter turned off and would be referred to as the "non-transmitting" meter; (b) that this option would be available only to residential customers; and (c) that there would be a certain up front installation fee plus monthly fees designed to cover the cost of special meter reads and other costs alleged by the utility.

The Administrative Law Judge in this case decided that the scope of hearings on this opt-out proposal would consider only the opt-out rates, and not allow any evidence concerning the first two issues, i.e. the type of meter to be offered opt-out customers and the fact that the plan covered only residential customers. (Tr 2, page 183, 5-21). The Commission indicated its acceptance of this scope in its final Order on

this case. The ALJ presented three arguments as to why the scope of the hearings would be so limited:

(A) That the Commission had so defined and limited this case by their Order of September 11th in the U-17000 case. See his Proposal for Decision, page 18:

> "The analysis of the issues raised in this case must be made under a number of controlling legal principles. The first is the scope of this case: which under the Commission's Order in Case No U-17000 is limited to consideration of the proposed Opt-Out Program under cost-of-service principles."

Appellants do not find in their copy of the above referenced Order any indication that only residential customers were to have an opt-out choice, or that the type of meter was not to be considered, as can be seen from the "directive" in the Order of September 11th, 2012, docket item 461 (Appendix E):

> "As the Staff pointed out, a small minority of customers has significant concerns about AMI, and for those customers, the Staff recommends that an opt-out option be provided by the electric utilities. The Commission agrees that the investor-owned electric utilities (i.e. Alpena, Consumers, Detroit Edison, I&M, NSP-W, PPCo, WEPCo, and WPSC) shall make available an opt-out option, based on cost-of-service principles, for their customers if or when the provider elects to implement AMI. The Commission observes that only Consumers and Detroit Edison are currently installing AMI thus, at this point in time, only these providers are affected by this directive. Detroit Edison has already filed a proposed opt-out tariff. See, Case No. U-17053. In the case of Consumers, within 60 days of the date of this order, or in Consumers' next general rate case filing, whichever occurs first, the Commission directs the company to include a proposed opt-out tariff."

The argument that the Commission limited this case to only rate making in its initiating Order in U-17000 is incorrect. The Commission itself has admitted in its final Order in the U-17053 case that it's Order in U-17000 never limited this case to residential customers, though the Commission argues that this mis-interpretation of its Order is without consequence in that the Commission is not aware of any non residential customers seeking an opt-out. Appellants note, however, that a number of health care

practitioners had submitted written complaints asking for an opt-out in both the U-17000 docket and the U-17053 docket.

The only limitation on this case that might be inferred from the Order in U-17000 is that the Commission had determined that persons opting out of AMI meters would have to pay any additional costs incurred by the utility in providing an alternate method of metering. This was the meaning and, we argue, *the only meaning* of the phrase "based on cost-of-service principles" in the above Order. Appellants argue that even that limitation might be overcome upon a showing that some class of affected customers might be exempt from such extra charges under applicable state or federal law, such as the federal Americans with Disabilities Act. It was, arguably, one of the purposes of the U-17053 case to explore any such issues. Further the cost allocation indicated in U-17000 might be overcome by a showing that the extra charges to all the opt-out customers are illegal under state or federal law or under the U.S. Constitution.

The ALJ's reliance on the U-17000 Order as a "controlling legal principle" for U-17053 should also be questioned on the basis that the Order was not issued until after the U-17053 case had begun and had its initial hearing. Arguably the governing law in U-17053 should be that which existed when that case began, and not on a retroactive application of an MPSC Order not issued until a later time. At the initial hearing of U-17053 no reference was made to the Order that was to be announced later in the U-17000 case. As a result none of the interveners in U-17053 had notice that such "controlling legal authority" was to be applied until the hearing on Motions to Strike that took place on January 8, 2013.

The Commission, in its final Order in U-17053 noted that none of the interveners applied for leave to appeal when the ALJ announced his ruling on the scope of the case at

the motions hearing on January 8th. While this is true, it should be noted that interveners had nearly all their pre-filed testimony stricken at that hearing and had only 7 days to prepare for cross-examinations of the DTE and MPSC witnesses held on January 15th and 16th. In an application for leave for an interlocutory appeal 14 days is allowed. Moreover these appellants were well aware that there was no possibility that the Commission would or could act on such an appeal quickly enough to obtain any postponement of the cross-examinations scheduled for the following week.

Appellants argue, therefore, that they preserved the issue of the scope of these hearings in the best way that they could by raising the issue in their Initial Brief (pages 9-11), in their Reply Brief (page 6) and again under their Exceptions to the PFD (pages 1-9).

Had the "directive" in the U-17000 case stated that only the rates could be considered in any opt-out proposal, these appellants would have appealed that Order. Such an appeal would have been based on the fact that the Commission had not conducted any evidentiary proceeding or lawful rule-making proceeding to resolve issues other than rates as required under the Administrative Procedures Act.

(B) The doctrine that the Commission's authority is limited to rate-making and that it may not intrude into management prerogatives. Appellants counter this doctrine in Argument II below.

(C) The argument that other (past or current) MPSC smart meter cases somehow limit the issues that can be raised in this case. Appellants counter this assertion in Argument III below.

II. THE ADMINISTRATIVE JUDGE IN THIS PROCEEDING INCORRECTLY APPLIED A DOCTRINE OF "MANAGERIAL PREROGATIVES" TO LIMIT THE JURISDICTION OF THE MPSC REGARDING ISSUES PROFOUNDLY AFFECTING THE WELFARE, HEALTH AND PRIVACY OF UTILITY CUSTOMERS AND THE PUBLIC.

Standard of Review. The issue here is how the Commission interprets the scope of its own authority. **That is a question of law that this Court hears de novo.** Great deference is customarily accorded the interpretation of a statute by the agency or commission charged with executing it. However the courts will not ignore the plain meaning of a statute.

The jurisdiction of the Michigan Public Service Commission, as established by Section 6 of Act No. 3 of the Public Acts of 1939 is very broad and endows the Commission with "power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, *conditions of service"* (emphasis added).

Michigan Courts have held that the above is only an outline of jurisdiction and not a grant of specific powers. Specific powers have, however, been delegated to the Commission by the Electric Transmission Act of 1909, P.A. 106, MSA 460.551 *et seq*, by the Railroad Commission Act of 1909, P.A. 300, and by the Public Utilities Commission Act, P.A. 419 of 1919, among others.

There is also case law establishing how far and under what circumstances the above regulatory powers may be permitted to encroach upon a utility's management prerogatives with respect to its privately owned facilities. The test for where regulation ends and management prerogatives begin turns on whether the issue at hand does or does not impact rates, for example, or impact *conditions of service* to existing customers. The extent of the Commission's powers also depends on whether or not it is conducting an investigation and prescribing a remedy *pursuant to a*

written complaint. See, for example, *Huron Portland Cement Co v. Michigan Public Service Commission, 351 Mich. 255, 88 N.W.2d 492 (1958), Union Carbide v. Public Service Commission,* 431 Mich. 135, 428 N.W.2d 322 (1988), and *Consumers Power Co v. Michigan Public Service Commission,* 460 Mich. 148, 596 N.W.2d 126 (1999).

The utility could not be compelled, in the first case, to extend its transmission line to serve a new customer in an area not previously served. The utility could not be told, in the second case, how much fuel oil to buy for one of its generating plants to meet peak loads. The utility could not be compelled, in the third case, to participate in a "retail wheeling" experimental plan, whereby it would be required to transmit electricity from another company over its lines to its own local customers.

The Supreme Court's analysis in *Union Carbide*, supra, explored the three major statutes (supra) that gave the Commission specific authority to go beyond rate making under certain conditions.

At page 153 of this case the Court quotes section 5 of the Public Utilities Commission Act:

> "*Upon complaint in writing* that any rate, classification, regulation or practice charged, made or observed by any public utility is unjust, inaccurate, or improper, to the prejudice of the complainant, the commission shall proceed to investigate the matter. … Upon the completion of any such hearing, the *commission shall have authority to make an order or decree dismissing the complaint or directing that the rate, charge, practice or other matter complained of shall be removed, modified or altered,* as the commission deems just, equitable and in accordance with the rights of the parties concerned." (emphasis added)

At page 156 of this case the Court notes a similar requirement in section 22 of the Railroad Act that, for the Commission's authority to extend beyond rate making, its Order must have been the result of an investigation begun on a written complaint.

At page 161 of this case the Court yet again notes a requirement in section 7 of the Electric Transmission Act that, for the Commission's authority to extend beyond rate making, its Order must have been the result of an investigation begun on a written complaint.

In testing the Commission's Order in *Union Carbide* against each of those enactments, it was found that none of them provided authority for the Order in this case because the Commission was not acting pursuant to a written complaint, a necessary requirement for authority beyond rate making under all three acts.

The Supreme Court's analysis in Consumers Power v MPSC was that the use of a utility's distribution system to deliver another utility's power to retail customers in its own territory was not a *condition of service*.

Discussion. The only reason this opt-out tariff was proposed by Detroit Edison and under consideration by the Commission was because nine city governments had, by passing resolutions, complained in writing to the Commission. Eight of these nine resolutions may be found as appendices to the Order opening the docket in the U-17000 case (Appendix B). In that Order may also be found a statement by the Commission that the nine resolutions, together with complaints by individual utility customers, were the cause of this docket being opened. Once the docket was opened for comments under the U-17000 case over 400 citizens added their written complaints and the number of city and county governments grew to 23.

(See Appendix H) The main issues in nearly all of these complaints were health and privacy and the type of meter being forced upon utility customers, with the overwhelming preference of both customers and municipal governments being that customers be allowed to keep their analog meters. Therefore the type of meter to be allowed for customers in an opt-out plan was the very essence of the issue to be decided in approving any opt-out plan.

There was at no time any evidence presented to the Commission, either in this case or any other case, that the "non-transmitting" AMI meter Detroit Edison proposed to install for opt-out customers would address either the privacy issue or the health issues that were the subject of so many concerns and complaints by the public, city governments and two county governments.

The Administrative Law Judge in this case consistently ruled all attempts to discuss the type of meter being offered to opt-out customers under Detroit Edison's opt-out plan to be "beyond the scope" of the case. One of his justifications for such a ruling was the assertion that the type of meter was a "management prerogative" and therefore beyond the jurisdiction of the Commission. In his Proposal for Decision[5], he quotes from *Union Carbide* that the "Commission's authority "to fix and regulate rates…does not carry with it, either explicitly or by necessary implication, the power to make management decisions". In this quote the ALJ is echoing an argument made earlier based on the same quote in the Reply Brief of DTE Electric Company[6].

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5 – U-17053, docket item 301, page 21.

6 - U-17053, docket item 289.

Let us look then at the quote from Union Carbide in the context in which the Supreme Court made it. The Court's statement was made in direct response to one of the Commission's arguments on the same page, immediately preceding opposing counsel's quote:

> " … the commission argues that its authority to fix and regulate reasonable utility rates, of necessity, encompasses the power to prevent non economic management practices which threaten the integrity of the ratemaking process."

The quotation from Union Carbide by opposing counsel only establishes that the Court was refuting the argument made by the Commission that the *Commission's rate-making authority* necessarily implied ability to interfere with management decisions. This case does not in any way establish that the Commission has *no authority other than rate making*, or that the Commission may never issue Orders that might, in some way, impinge on management decisions. The Court analyzed, in the same Union Carbide case, at considerable length the authority granted to the Commission by three statutory enactments that would, in fact, allow the Commission to impinge on management decisions, *provided that it was doing so pursuant to a written complaint*.

In this case there would have been no opt-out proposal under consideration had there not first been written complaints by many utility customers and nine city or county governments, as was acknowledged by the MPSC in its Order beginning Case U-17000. Therefore the Commission had the necessary authority under the three statutes discussed under "Standard of Review".

Yet the Commission in the Order appealed from, has adopted the doctrine advanced by Detroit Edison and by the ALJ in the following:

> "As has been noted repeatedly in the various AMI related proceedings, while the Commission may not encroach on the managerial decision to commence the AMI program and to select the equipment attendant thereto, it will continue to protect the interests of ratepayers through review of the expenditures associated with the program for reasonableness and prudence."

Another area in which the ALJ incorrectly applied the doctrine of managerial prerogatives was when interveners in the case sought to raise the issue of why the opt-out plan was being limited to residential customers. See, for example, the Proposal for Decision, docket item 301 at page 23:

> "… Other arguments are raised concerning the operational decisions of the Company. For example, Ms. Kurtz and Ms. Edwards, along with Mr. & Mrs. Cusumano, take issue with the fact the Company is only proposing an Opt-Out Program for its residential customers, and seek a Final Order that requires the Program be extended to "businesses". Except for the contention that it was never explained or is somehow inequitable, no legal basis for this relief is provided. Obviously, the customer classes that will, or will not, be included in AMI is an operational and management issue for the Company to determine."

First it should be noted that the issue is not which customer classes will be included in AMI (as stated in PFD) but rather which customer classes will be given the freedom to opt-out of AMI. There was no evidence before the Commission that business and professional practices were being excluded from the AMI program. They were only to be excluded from the ability to opt-out of the program. The legal basis for giving relief to business and professional practices is the same as the legal basis for giving relief to residential customers, namely that the Commission ordered utilities to

provide such relief to their customers in the U-17000 case without making any distinction in that Order that the relief was to be limited to any one class of customers.

The conclusion of the ALJ that it is somehow obvious that this is "an operational and management issue for the Company" is a complete non-sequiter. We have already established that the Commission's authority extends well beyond rate making when it is proceeding in response to a written complaint. In this case there were numerous written complaints from not only residential customers, but from small business people and health care practitioners.

The Commission admits in its final Order, that:

> "Although the opt-out mandate set in the September 11 order was not limited to residential customers, the Commission is unaware of any evidence showing that commercial and industrial customers seek an opt-out option, and finds that DTE Electric's residential non -transmitting meter option satisfies the requirement of the September 11 order."

The Commission is ignoring in the above statement that numerous health care practioners did insist on an opt-out in written complaints posted to the case log in the U-17000 case. The Commission also is ignoring that whether or not professional practices can opt-out will have a profound effect on the same individuals who are being given the opt-out for their homes. The Commission is ignoring the obvious fact that DTE's opt-out proposal is NOT in compliance with the September 11th Order, and the fact that the ALJ did not permit anyone to introduce evidence through direct testimony or cross-examination to show that an opt-out for professional practices was needed.

III. ISSUES RULED BEYOND SCOPE IN THIS CASE BASED ON PRIOR CASES WERE NOT PREVIOUSLY ADJUDICATED IN ANY OTHER MPSC CASE.

Standard of Review. *"It is established law in this state that the doctrines of res judicata and collateral estoppel apply to administrative determinations which are adjudicatory in nature, where a method of appeal is provided, and where it is clear that it was the legislative intention to make the determination final in the absence of an appeal." Senior Accountants, Analysts and Appraisers Assoc v. Detroit, 399 Mich 449, 457-458.*

More generally, in Westlaw's *Restatement (First) of the Law – Judgments*, Chapter 3, Section 68, "Questions of Fact", (updated through June 2013), we find "*Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action…"* and *"A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action."*

A more specific list of requirements for collateral estoppel is found in *Matter of McMillin, 579 F.2d 289, U.S. Court of Appeals (1978)*, where the court ruled *"… there are at least four requirements which must be met before collateral estoppel effect can be given to a prior action: (1) the issue sought to be precluded must be the same as that involved in the prior action; (2) That issue must have been actually litigated; (3) it must have been determined by a valid and final judgment; and (4) the determination must have been essential to the prior judgment."*

Discussion. Appellants argue that establishing evidence concerning the health effects the "non-transmitting" AMI meter being offered as an opt-out is

essential to a proper consideration of whether the type of opt-out meter being offered addresses any of the concerns that gave rise to this case. Further, consideration of the health effects of the standard transmitting AMI meter is essential toward establishing why people find it imperative to opt-out and whether or not it is just to charge them a fee to opt-out when they are opting out to avoid a provable harm. The Commission could not determine that the "non-transmitting" smart meter addresses these issues and is in conformity with its own prior order without hearing such evidence. Yet the ALJ in this case ruled any attempt to introduce such evidence as "outside the scope" of this case.

We see, for example, that all of the following pre filed testimonies were stricken: Ben-Bassat (Tr 2, page 183, 24-25 and page 184, 1-8), Cynthia Edwards (Tr 2, page 185, 19-25 and page 186, 1-12), Karen Strode (Tr 2, page 187, 10-12), Leslie Panzica-Glopa (Tr 2, page 188, 7-10), Linda Kurtz (Tr 2, page 189, 2-5), Loretta Yoskovitz (Tr 2, page 189, 22-25), and Rebecca Morr (Tr 2, page 190, 12-16).

The ALJ also ruled the testimony of all the foregoing persons to be "hearsay" even though they were testifying in their own words about what they themselves experienced following installation of a smart meter. The ALJ further disqualified their testimony of all the foregoing persons on grounds they were not qualified as experts to speak about what they themselves experienced following installation of a smart meter. Appellants argue there was no need to qualify these people as experts since they were only reporting their own experiences and not attempting to make scientific conclusions based on their experiences.

The situation with the pre filed testimony of Curtis Bennett was different in that these appellants had offered him as an expert witness and provided ample

documentation of his credentials to speak about electrical matters encountered within the scope of his practice as a Red Seal electrician. The ALJ refused to qualify him as an expert and gave no reason for such ruling. In addition his testimony was stricken on grounds it was "outside the scope" as with the other witnesses.

These appellants preserved their objections to the above rulings concerning Curtis Bennett and the other witnesses in the argument of Lillian Cusumano (Tr 2, pages 128-129)

One of three reasons given by the ALJ for ruling certain issues "outside the scope" of this case was that the issues had been addressed, or would be addressed in other cases. Appellants argue that, with respect to issues the ALJ ruled "outside the scope" in this case, there was no prior determination by the Michigan Public Service Commission (MPSC) as would be required under any of the tests above outlined.

Let us consider three MPSC cases of general applicability where orders concerning "smart" electric meters have been issued to date plus a fourth case, allegedly about "privacy" that is still in process. Detroit Edison sought and obtained an Order in the U-15768 general rate case that allowed it to recover certain costs of smart meter deployments. While there had been earlier pilot projects authorized, this was the first case in which cost recovery for widespread deployment was authorized. There was nothing in that Order that made smart meters mandatory for all electric utility customers. The question of whether smart meters would be a required condition of service was never addressed in that proceeding. Also the health and privacy concerns that Appellants have raised in their affirmative defenses in this case were never addressed in that case. That Order, moreover, was remanded to the MPSC for a do-over because this Court determined that the decision in that

case was not based on substantial evidence on the whole record. The ultimate resolution of that case is still in progress.

By January of 2012, the Commission recognized, in response to resolutions passed by nine city governments, a need to address some of the controversies raging around "smart" electric meters. They opened the U-17000 case but limited it to only *soliciting opinions* from the public, from the utilities and from their own staff. There was no contested hearing, no formal rule making procedure, and certainly no procedure wherein evidence might be heard or challenged. Hence the procedure was not "adjudicatory in nature". Appellants argue further that it was the legislative intent that administrative agency decisions affecting the general public be arrived at in accordance with requirements laid down in the Administrative Procedures Act of 1969, as amended (APA). During the time when opinions were being solicited in this case the number of units of local government calling upon the MPSC to do something about smart meters grew from the original 9 to 24 and over 400 citizens posted public comments about smart meters under this docket number. Nearly all of these indicated they would not have one of the new meters on their home. The original 9 of these resolutions are a matter of record as part of the opening Order in the U-17000 case. (Appendix B)

The only Order coming out of this case in October of 2012, was one that expressed the opinion of the Commission that the staff report of June 30th be accepted and ordered that all utilities in Michigan implementing smart meters be required to offer an opt-out plan "based on cost of service principles". Appellants had no reason to appeal such an order since obtaining an opt-out plan appeared to be very much in their interest. Moreover, the Commission's acceptance of a staff report that

opined that health issues were "inconsequential", did not appear to be an Order that might be appealed, nor was there any notice that this Order was a final Order. Therefore appellants argue there can be no inference that the health issue had been, in any sense, "adjudicated".

In a third and most recent case, U-16472, the MPSC again failed to address the questions of health effects, privacy intrusions, or whether AMI meters should be mandatory for all customers. The MPSC concerned itself only with questions of costs and the impact on utility rates. Again, even its cost based decision has, like the U-15768 case, been reversed by this Court for failure to develop a substantial record of evidence in support.

In a fourth case cited by the ALJ, the Commission created a case, U-17102, "to review issues concerning customer information and data privacy related to advanced metering infrastructure deployment. Appellants note that this case really *assumes that the utility should be permitted to collect and store customer's private information* and concerns itself only with the encryption and safeguarding of that information once collected. (Appendix F). As such it does not address the issue of privacy as 400 customers, 24 city governments and these Appellants sought to address it. Moreover this is an ongoing case and nothing has been adjudicated in that case to date.

In summary none of the cases discussed here or mentioned by the ALJ in his Proposal for Decision ever adjudicated the issues of health or privacy. Yet one of the reasons the ALJ gave for considering these issues "beyond the scope" in this case was that they had either been addressed in other cases, or were in process of being addressed in one or more other cases. *It is a curious argument indeed that suggests*

that foundational questions that are necessary to the resolution of this case need not be addressed because they might be addressed in the future in some other case.

IV. APPELLANTS WERE DENIED THE OPPORTUNITY TO ESTABLISH AN EVIDENTIARY FOUNDATION FOR THEIR COMPLAINT THAT BOTH THE "SMART METER" AND THE "NON-TRANSMITTING" OPT-OUT METER VIOLATE THE FOURTH AMENDMENT TO THE U.S. CONSTITUTION.

Standard of Review. Review of an agency decision under Michigan's Constitution, as noted under Argument I above, "shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law …".

In *United States v. Antoine Jones, 132 S.Ct. 945 (2012),* the Court concluded that a Fourth Amendment violation occurred when police officers affixed a GPS tracking device to the underside of Defendant's car and used that device to track all his movements over an extended period. The Court was unanimous in this result, though the majority held to a property rights approach based on tort law of trespass, while concurring justices in the minority relied more upon an "expectation of privacy" doctrine. The majority held that the attachment of the device to the underside of the car amounted to occupying private property in order to obtain information and cited *Entick v. Carrington,* 95 Eng. Rep. 807 (C.P. 1765), which they asserted was familiar to our founders at the time our Fourth Amendment was adopted.

The United States Supreme Court also had a similar holding in *Kyllo v. United States,* 533 U.S. 27 (2001), where it was held that the use of a thermal imaging device to detect the growth of marijuana in an attic constituted an unlawful

search. In this case there was no physical intrusion or trespass, and the decision rested entirely on an "expectation of privacy" doctrine.

Discussion. Appellants argue that if they had a burden to show by evidence that both the "smart meter" and the alternative "non-transmitting meter" device are, in fact, surveillance devices, they were denied the opportunity to make such a showing by the rulings of the ALJ on the scope of the case. The argument that the smart meter is a surveillance device hinges on one or more of the propositions that:

(a) It is designed to measure not just total consumption of electricity but is designed to measure, or is at least capable of measuring, when customers use particular amounts of electricity;

(b) It is capable of detecting which kinds of electrical devices are being used at any given time of day; and

(c) Is capable of generating a profile of a homeowner's daily activities.

(d) Is capable, in the near future, with the help of "smart appliances", to reveal far more.

The foregoing are all points that should have been developed through evidence, but the ALJ's rulings prevented that. For example there is a point in the pre-filed direct testimony, later bound into the record, of Mr. Robert Sitkaukas where he states that the "customer will not have access to the detailed energy usage information …" if he opts out. (Tr 3, page 235, 19-20).

That statement strongly suggests that detailed electrical usage information is being collected by both the standard smart meter and the "non-transmitting" opt-out meter. Appellants intended to cross-examine Mr. Sitkauskas to establish beyond any possible ambiguity what he meant by the above statement in his pre-filed testimony

and also to establish whether or not that "detailed energy usage information" would still be collected by the utility by, for example, a hand held instrument carried by the company's monthly meter reading person, or by any means other than radio transmission. But they were prevented from doing so under the general ruling on scope announced earlier.

Setting aside evidentiary objections, it might also be objected that, if the "smart meter" is, in fact, a surveillance device, it is a privately owned utility and not the government that is attaching it to a customer's home. But it is the federal government that is inducing utilities to install smart meters through the provision of financial incentives. This Court is asked to take judicial notice of the fact that Detroit Edison qualified for many millions of dollars in federal subsidies for this smart meter program under Obama's stimulus act of 2009. And it can scarce be doubted in today's world that law enforcement officers, without any need to obtain a warrant, will freely access the data once the utility has collected it and stored it in a database. Therefore assurances that the data will be encrypted to protect customer's privacy are meaningless in the context of the Fourth Amendment issue.

Appellants argue that the non-consensual attachment of a device with these capabilities to a utility customer's home, amounts to a search without a warrant.

Appellants argue that it is no answer to say that subscribing to Plaintiff's electrical service is somehow a voluntary act. Hardly anyone who lives in an urban or suburban setting has any practical alternative to being a customer of Plaintiff. There is an element of compulsion involved, and when that compulsion is combined with the government's funding of the program and law enforcement's easy access to the resulting data without a warrant, you have a Fourth Amendment violation.

CONCLUSION

Issue I. The Administrative Law Judge gave three reasons for limiting the scope of hearings to only the rates to be charged opt-out customers. The first, that the Commission had so limited this case by its Order in U-17000 was shown to be incorrect. The second and third reasons were dealt with in the next two arguments and also shown to be incorrect. Therefore the ALJ improperly limited the scope of hearings to only the rates to be charged opt-out customers and thereby made it impossible for the Commission to develop competent, material and substantial evidence on the whole record needed to approve Detroit Edison's opt-out proposal.

Issue II. The Administrative Law Judge in this proceeding incorrectly applied a doctrine of "managerial prerogatives", thereby unduly limiting the authority of the Commission in a matter profoundly affecting the welfare, health and privacy of utility customers and the public.

Issue III. The Administrative Law Judge in this proceeding incorrectly alleged that issues these Appellants tried to raise were "outside the scope" because already decided in previous MPSC cases or in other current MPSC cases. In fact none of these issues had ever been adjudicated before.

Issue IV. Appellants have established, as a matter of law, that if both the transmitting smart meter and the non-transmitting smart meter are surveillance devices, that they violate the Fourth Amendment to the U.S. Constitution based on recent Supreme Court rulings. The Administrative Law Judge, by his improper rulings on scope, denied Appellants an opportunity to develop, in cross-examination, the evidence needed to support their claim that both of these meters are, in fact,

surveillance devices of the type that would be prohibited under recent Supreme Court rulings.

RELIEF REQUESTED

WHEREFORE, Appellants Dominic and Lillian Cusumano, respectfully request that this Honorable Court:

(1) Find that the Order of May 15th, 2013 of the Michigan Public Service Commission, is not supported by competent and material evidence on the whole record, and

(2) That the Order of May 15th approving Detroit Edison's proposed opt-out tariff be reversed, and the case be remanded back to the Commission to re-open for new hearings that will address the issues that were not properly considered in this case to date, including the issue of whether both the standard smart meter and the opt-out meter violate the Fourth Amendment to the U.S. Constitution.

_____ _____

Dominic Cusumano Lillian Cusumano

PROOF OF SERVICE

The undersigned certifies that a copy of the Brief of Dominic and Lillian Cusumano was served by U.S. First Class Mail upon each of the two attorneys at their addresses disclosed in the caption of this document on _____.

I declare that the statement above is true.

_____
Lillian Cusumano