STATE OF MICHIGAN

IN THE COURT OF APPEALS

CYNTHIA EDWARDS and LINDA KURTZ,

Intervenors/Appellants,

and

LESLIE PANZICA-GLAPA,

Court of Appeals No. 316728

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION and THE DETROIT EDISON COMPANY,

Appellees.

DOMINIC CUSUMONO and LILLIAN CUSUMANO,

Appellants,

Court of Appeals No. 316781

v

MICHIGAN PUBLIC SERVICE COMMISSION and THE DETROIT EDISON COMPANY,

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

THE DETROIT EDISON COMPANY'S BRIEF OF APPELLEE

*** * * ORAL ARGUMENT REQUESTED * * ***

TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

JURISDICTIONAL STATEMENT v

COUNTER-STATEMENT OF QUESTIONS INVOLVED vii

INTRODUCTION 1

COUNTER-STATEMENT OF FACTS 1

A. Background Regarding This Case and Other AMI Cases. 1

B. Overview of this AMI Opt-Out Case. 4

C. Record Support for the Commission's AMI Opt-Out Order in this Case 6

STANDARDS OF REVIEW 8

ARGUMENT 11

I. THE MPSC HAS RATEMAKING AUTHORITY TO SET CHARGES FOR THE OPT-OUT PROGRAM, BUT LACKS MANAGEMENT AUTHORITY TO ORDER EDISON TO USE DIFFERENT METERS. 11

II. THE COMMISSION'S ORDER IS SUPPORTED BY COMPETENT, MATERIAL AND SUBSTANTIAL EVIDENCE. 17

III. THE MPSC PROPERLY EXCLUDED EVIDENCE THAT WAS BEYOND THE SCOPE OF THIS CASE. 19

IV. EDISON'S OPT-OUT PROGRAM DOES NOT VIOLATE THE AMERICANS WITH DISABILITIES ACT OR THE PERSONS WITH DISABILITIES CIVIL RIGHTS ACT. 25

RELIEF REQUESTED 31

INDEX OF AUTHORITIES

Cases

ABATE v Public Service Comm, 208 Mich App 248, 258; 527 NW2d 533 (1994) 11

ABATE v Public Service Comm, unpublished opinion *per curiam* of the Court of Appeals, decided June 24, 2004 (Docket Nos. 246912 and 247078) v

Admiral Ins Co v Columbia Casualty Ins Co, 194 Mich App 300, 305; 486 NW2d 351 (1992).....17

Ambs v Kalamazoo County Road Comm, 255 Mich App 637, 650; 662 NW2d 424 (2003).....15

Attorney General v Public Service Comm #2, 133 Mich App 790, 798-99; 350 NW2d 320 (1984).....10

Attorney General v Public Service Comm, 141 Mich App 505, 508-509; 367 NW2d 341 (1984).....27

Attorney General v Public Service Comm, 269 Mich App 473; 713 NW2d 290 (2005) 13

Bagley Acquisition Corp v Public Service Comm, 229 Mich App 172, 175-76; 581 NW2d 286 (1998) 27

Bd of Public Utility Comm'rs v New York Telephone Co, 271 US 23, 32: 46 S Ct 363; 70 L Ed 2d 808 (1926).....13

Boyer-Campbell v Fry, 271 Mich 282, 296-97; 260 NW 165 (1935) 10

Clonlara, Inc v State Bd of Educ, 442 Mich 230, 239; 501 NW2d 88 (1993).....16

Consumers Power Co v Public Service Comm, 189 Mich App 151, 153; 472 NW2d 77 (1991), *lv den* 439 Mich 922 (1992) 9, 17

Consumers Power Co v Public Service Comm, 415 Mich 134, 172; 327 NW2d 875 (1982).....10

Consumers Power Co v Public Service Comm, 460 Mich 148; 596 NW2d 126 (1999) 12

Dep't of Environmental Quality v Worth Twp, 491 Mich 227, 237-38; 814 NW2d 646 (2012).....9

Di Benedetto v West Shore Hosp, 461 Mich 394, 402; 605 NW2d 300 (2000) 15

Elozovic v Ford Motor Co, 472 Mich 408, 421-22, 425; 697 NW2d 851 (2005) 15

Ford Motor Co v Public Service Comm, 221 Mich App 370, 385, 387-88; 562 NW2d 224 (1997).....12, 13, 17

Grant v AAA Michigan /Wisconsin, Inc, 272 Mich App 142, 148-49; 724 NW2d 498 (2006)..... vi

Great Lakes Steel Div of Nat Steel Corp v Public Service Comm, 130 Mich App 470, 480; 344 NW2d 321 (1983) 10, 17

Gross v General Motors Corp, 448 Mich 147, 161-62, n 8; 528 NW2d 707 (1995) 10, 20

Hanson v Mecosta Co Road Comm'rs, 465 Mich 492, 504; 638 NW2d 326 (2002) 15

Huron Portland Cement Co v Public Service Comm, 351 Mich 255, 263; 88 NW2d 492 (1958) 15

In re Application of Consumers Energy Co, 281 Mich App 352, 357; 761 NW2d346 (2008) 9, 22

In re Application of Consumers Energy Co, 291 Mich App 106, 122; 804 NW2d 574 (2010) 20

In re Application of Detroit Edison Co, 296 Mich App 101, 114-16; 817 NW2d 630 (2012) 18

In re Application of Indiana Michigan Power Co, 275 Mich App 369, 376; 738 NW2d 289, 293-96 (2007), *lv den* 480 Mich 1032 (2008), *cert den* 555 US 994 (2008) 22

In re Application of Michigan Consolidated Gas, 281 Mich App 545, 548; 761 NW2d 482 (2008) 10

In re Complaint of Rovas Against SBC Michigan, 482 Mich 90, 97; 754 NW2d 259 (2008) 9, 10

Isagholian v Transmerica, 208 Mich App 9, 14; 527 NW2d 13 (1994) 20

Lorencz v Ford Motor Co, 439 Mich 370, 376; 483 NW2d 844 (1992) 15

Macomb Co Rd Comm'n v Fisher, 170 Mich App 697, 700; 428 NW2d 744 (1988) 16

Missouri ex rel Southwestern Bell Telephone Co v Public Service Comm, 262 U.S. 276, 289; 43 S Ct 544, 547; 67 L. Ed. 981 (1923) 12

Mitcham v Detroit, 355 Mich 182, 203; 94 NW2d 388 (1959) 20

Mull v Equitable Life Assur Society, 444 Mich 508, 519; 510 NW2d 184 (1994) 16

Pennwalt Corp v Public Service Comm, 166 Mich App 1, 9; 420 NW2d 156 (1988) 20

People v Rocha, 110 Mich App 1, 16-18; 312 NW2d 657 (1981) 25

Residential Ratepayer Consortium v Public Service Comm, 239 Mich App 1, 6; 607 NW2d 391 (1999) 11

SBC Michigan v Public Service Comm, unpublished opinion *per curiam* of the Court of Appeals, decided November 3, 2005 (Docket No. 256177) vi

Silverman v United States, 365 US 505, 511; 81 S Ct 679; 5 L Ed 2d 734 (1961) 24

Southfield Twp v Drainage Bd, 357 Mich 59, 76-77; 97 NW2d 281 (1959) 16

Union Carbide v Public Service Comm, 431 Mich 135; 428 NW2d 322 (1988) 11, 12, 15, 29

Wilson v Taylor, 457 Mich 232, 243; 577 NW2d 100 (1998) 20

Statutes

42 USC 12131(1) 25

42 USC 12131(2) 28

42 USC 12132 25
42 USC 12181(7) 26
42 USC 12182(a) 26
MCL 14.28 v
MCL 24.27 22
MCL 37.1301 30
MCL 37.1302 30
MCL 460.6 15
MCL 460.6a 11
MCL 460.11 29
MCL 460.58 15
MCL 460.557 15
MCL 462.22(a) 15
MCL 462.26 ..... v, vi, 17
MCL 462.26(8) 9, 17

Other Authorities

28 CFR 36.207 26
Const 1963, art 6, § 28 8
MCR 2.613(A) 23
MCR 7.210 17
MPSC Rule 13(1), R 460.113(1) 15
MPSC Rule 15, R 460.115 16
MPSC Rule 325, R 460.17325 22
MRE 103(a) 23
MRE 402 22
US Const Am XIV 23

JURISDICTIONAL STATEMENT

Appellants Dominic and Lillian Cusumano (the "Cusumanos") submitted a Statement of Jurisdictional Basis and Appellants Cynthia Edwards and Linda Kurtz ("Edwards and Kurtz") submitted a Statement of Jurisdiction, which accurately reflect that on May 15, 2013, the Michigan Public Service Commission ("MPSC" or "Commission") issued the Order that is the subject of these appeals, those Appellants filed timely claims of appeal and this Court has jurisdiction to review the appeals under MCL 462.26.

Proposed Appellant Leslie Panzica-Glapa incorrectly asserts standing to appeal (Edwards brief, pp 2-3). She relies primarily on *ABATE v Public Service Comm*, unpublished opinion *per curiam* of the Court of Appeals, decided June 24, 2004 (Docket Nos. 246912 and 247078) (slip opinion attached as Appendix 9), for the proposition that an aggrieved party may appeal an MPSC decision, even if that party was not a party in the MPSC proceedings. The *ABATE* Court instead held that the Attorney General was a party in interest pursuant to a specific statute that applies only to the Attorney General. MCL 14.28:

> "The attorney general . . . may . . . intervene in and appear for the people of this state in any other court or tribunal, in any case or matter, civil or criminal, in which the people of this state may be a party or interested." MCL 14.28.

Based on MCL 14.28, the *ABATE* Court reasoned that the Attorney General was a "party in interest," so the Court had jurisdiction to hear his appeal. The Court expressly declined to address whether it would have jurisdiction over ABATE's parallel appeal:

> "The Attorney General is therefore a party in interest with regard to the subject matter of the [MPSC's] order.
>
> "Because the Attorney General is a party in interest, the denial of intervention by the PSC is not a bar to this Court's exercise of jurisdiction . . .

> "Given that we have jurisdiction over the Attorney General's appeal and can therefore decide the questions presented, we decline to address the jurisdictional issue as it pertains to ABATE" (2004 WL 1416258 at *2-3).

Similarly, Edwards and Kurtz have standing to appeal, so the Court need not reach the jurisdictional issue as it pertains to Ms. Panzica-Glapa. For completeness, however, Edison notes that unlike the Attorney General and ABATE, Ms. Panzica-Glapa did not attempt to intervene in the proceedings before the Commission. Instead she chose to make a statement pursuant to Rule 207 of the Commission's Rules of Practice and Procedure, R 460.17207 (acknowledged at Edwards brief, pp 2-3). Rule 207 relevantly provides: "An appearance pursuant to this rule entitles the person to make a statement at the time provided for that purpose by the presiding officer, but the person shall not be regarded as a party to the proceeding."

Under analogous circumstances in *SBC Michigan v Public Service Comm*, unpublished opinion *per curiam* of the Court of Appeals, decided November 3, 2005 (Docket No. 256177) (slip opinion attached as Appendix 10), this Court held that it had no jurisdiction over SBC's attempted appeal from MPSC proceedings in which it had not been a party:

> "SBC was not a "party" to [the MPSC proceedings.] Instead, SBC merely submitted comments and suggestions for consideration, which the PSC declined to adopt." MCL 462.26 does not provide a basis for this Court to exercise its jurisdiction in this appeal." (2005 WL 2895526 at *3).[1]

The remainder of Edwards and Kurtz's Statement of Jurisdiction consists of argument with which Edison disagrees, as discussed in the Argument section of this brief.

[1] *See also, Grant v AAA Michigan /Wisconsin, Inc*, 272 Mich App 142, 148-49; 724 NW2d 498 (2006) (following the principle that "[a] party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal" because otherwise, that party "would essentially gain an advantage from a disputed issue it waived in the trial court.").

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. DID THE MPSC HAVE RATEMAKING AUTHORITY TO SET CHARGES FOR CUSTOMERS TO OPT-OUT OF AN AMI METER, BUT NO MANAGEMENT AUTHORITY TO ORDER EDISON TO USE A DIFFERENT KIND OF METER?

   The Cusumanos answer: No

   Edwards and Kurtz answer: No

   Edison answers: Yes

   The MPSC answered: Yes

2. IS THE MPSC'S ORDER SUPPORTED BY SUBSTANTIAL EVIDENCE?

   The Cusumanos do not answer this question.

   Edwards and Kurtz answers: No

   Edison answers: Yes

   The MPSC answered: Yes

3. DID THE MPSC PROPERLY EXCLUDE EVIDENCE THAT WAS BEYOND THE SCOPE OF THIS CASE?

   The Cusumanos answer: No

   Edwards and Kurtz do not answer this question.

   Edison answers: Yes

   The MPSC answered: Yes

4. DOES THE OPT-OUT PROGRAM VIOLATE THE AMERICANS WITH DISABILITIES ACT AND THE PERSONS WITH DISABILITIES CIVIL RIGHTS ACT?

   The Cusumanos do not answer this question.

   Edwards and Kurtz answer: Yes

   Edison answers: No

   The MPSC answered: No

INTRODUCTION

On May 15, 2013, the Michigan Public Service Commission ("MPSC" or "Commission") issued an Order in Case U-17053 (attached as Appendix 7). On June 14, 2013, Appellants Cynthia Edwards and Linda Kurtz ("Edwards and Kurtz") and Appellants Dominic and Lillian Cusumano (the "Cusumanos") filed appeals to this Court (Docket Nos. 316728 and 316781), which are consolidated. Appellants subsequently filed their briefs on appeal. In response, The Detroit Edison Company ("Edison")[2] submits this brief explaining that Appellants' arguments lack merit, so the Commission's Order should be affirmed.

COUNTER-STATEMENT OF FACTS

Edison submits this Counter-Statement of Facts to correct and balance the factual presentation and focus on the issues presented to the Court. Edison's corresponding failure to address every issue or position suggested by Appellants should not be deemed as agreement with those positions.

A. Background Regarding This Case and Other AMI Cases.

This case only concerns the cost-based charges that Edison's residential electric customers will pay if they choose (for any reason) to not have a transmitting Advanced Metering Infrastructure ("AMI") meter used to measure the electricity they buy from Edison. Other aspects of Edison's AMI project have been and continue to be addressed in other cases. Appellants attempt to inject various issues that are beyond the scope of this case, so some discussion of other cases is necessary to focus on the relevant subject matter of this case, as distinguished from issues that may be presented in other separate cases.

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

Edison is in the process of implementing AMI meters (also known as "smart meters") to increase reliability, reduce outage time and provide other benefits as compared to obsolete electromechanical (or "analog") meters. (Appendix 2, Staff Report in Case U-17000). Edison's AMI meters automatically read, monitor and control meters, instead of relying on manual actions (such as meter readers). The Commission reviewed the AMI project and approved incremental funding for Edison's AMI infrastructure investments in a number of Edison's successive general rate cases, beginning with the December 23, 2008 Order in Case U-15244, p 62.

On January 12, 2012, the Commission issued an Order Opening Docket in Case U-17000 (Appendix 1), directing utilities to provide information on the deployment of smart meters, including the potential for customers to opt out of having a smart meter. The Commission also allowed interested parties to comment and directed its professional Staff to issue a report.

On June 29, 2012, the Staff issued a Report (Appendix 2), which summarized the filings in Case U-17000, discussed the Staff's independent review regarding smart meters and made recommendations to the Commission. With regard to health and safety concerns (which are beyond the scope of the present case, but apparently of major interest to Appellants), the Staff Report in Case U-17000 concluded that smart meters are safe (Appendix 2, Staff Report, pp 2, 8, 10, 28). The Staff further concluded that providing an opt-out alternative is the best solution for customers who have concerns about smart meters and that customers choosing the opt-out alternative should pay charges that reflect the corresponding costs (Appendix 2, Staff Report, p 30). The Staff explained in part:

> "The traditional electromechanical meter is obsolete and currently not in production. Offering customers an electromechanical meter as an alternative to a smart meter is not a long-term solution.
>
> "Other options are the installation of a smart meter that does not have a communicating radio … A smart meter without a communicating radio allows the

> utility to maintain one type of meter. However, manual meter reading would still be required. Customers with a non-communicating meter will not receive some benefits of AMI, and would not, for example, be able to fully participate in the new rate structures …
>
> "Staff believes that ratemaking for the opt-out provision should be based on cost-of-service principles. If AMI meters result in a reduced cost of service, this could be accounted for by either an additional charge for those customers choosing to opt-out or a discount for those customers with an AMI meter" (Appendix 2, Staff Report, p 27).

The Commission later found "the Staff's report to be thoughtful and comprehensive; and the report should be accepted as a practical point of departure for further discussion and Commission action" (Appendix 4, September 11, 2012 Order in Case U-17000, p 4). With regard to opt-out alternatives, the Commission agreed with the Staff that "a small minority of customers has significant concerns about AMI," and that investor-owned electric utilities including Edison, which the Commission noted had already filed an opt-out tariff in this Case U-17053, "shall make available an opt-out alternative, based on cost-of-service principles, for their customers if or when the provider elects to implement AMI" (*Id*, p 5).

The Commission also agreed with the Staff that "AMI and smart grid investments should be reviewed in the context of general rate case proceedings" (*Id*, p 4) and that "issues concerning customer data collection, privacy and cyber security are complex and sufficiently important to merit the creation of a future docket limited to these issues" (*Id*, p 6). There was no appeal from the Commission's Order in Case U-17000.

Data privacy is beyond the scope of this case, but apparently of concern for the Cusumanos, so it should be noted that the Commission opened Case U-17102 to address customer data privacy (Appendix 5, October 31, 2012 Order in Case U-17102). Edison and others provided comments on the Commission's proposed customer privacy framework, and responded to several questions related to customer data privacy. The Commission then issued a

model privacy policy (Appendix 8, June 28, 2013 Order in Case U-17102, Exhibit A) and directed Edison and others to file proposed customer data privacy tariffs. On August 27, 2013, Edison filed its proposed customer data privacy tariff. On October 17, 2013, the Commission found that Edison's proposed tariff complied with the Commission's data privacy framework, and directed Edison to file a tariff corresponding with its proposal (Appendix 12, October 17, 2013 Order in Case U-17102, p 4).

B. Overview of this AMI Opt-Out Case.

This Case U-17053 began on July 31, 2012, when Edison, in response to the Staff Report in Case U-17000 (Appendix 2), filed an Application (Appendix 3) for Commission approval of its proposed charges for an AMI opt-out program. Edison proposed that individual residential customers would be able to voluntarily request Edison to install a non-transmitting AMI meter at their residential service address, instead of one of Edison's transmitting AMI meters. The Application provided that customers would have to pay the corresponding costs resulting from their choice to participate in the opt-out program, including an initial charge for infrastructure costs and metering changes, and a monthly charge to cover incremental costs of manual meter reading. Edison also proposed that: "Customers may opt out for any reason and will not be required to communicate the reason to the Company" (Appendix 3, Application, p 2).

The Commission subsequently issued its September 11, 2012 Order in Case U-17000 (Appendix 4), directing investor-owned electric utilities to provide a cost-based opt-out alternative for the small minority of customers who have concerns about AMI. Since Edison's Application was consistent with the Staff's Report and the Commission's Order adopted the Staff's recommendations, Edison's Application was consistent with the Commission's Order.

On September 10, 2012, Administrative Law Judge Dennis W. Mack (the "ALJ") conducted a prehearing conference and granted intervenor status to Edwards, Kurtz and the Cusumanos (as well as the Attorney General, John and Pauline Holeton, Karen Spranger, Richard Meltzer, and Sharon Schmidt, who have not appealed) (1 Tr 15). The Commission's Staff also participated. Other individuals made statements under MPSC Rule 207 (R 460.17207), including proposed appellant Panzica-Glapa (1 Tr 90-91).

Edison sponsored the testimony of Robert Sitkauskas (direct testimony at 3 T 222-36; rebuttal testimony at 3 T 237-56). Staff sponsored the testimony of Steven Q. McLean (direct testimony at 4 T 573-79). Mr. Holeton filed testimony (4 T 546-56). Mr. Meltzer filed surrebuttal testimony in response to Mr. Sitkauskas' rebuttal testimony (4 T 535-42).

Several other individuals filed proposed testimony and exhibits, largely concerning alleged health effects of AMI meters, which were stricken pursuant to motions by Edison and the Staff. The ALJ issued a detailed opinion from the bench (2 T 180-96), explaining in part that evidence going beyond the issue of setting cost-based charges for Edison's opt-out program was irrelevant and inadmissible.

On January 15 and 16, 2013, the witnesses' testimony was bound into the record, their exhibits were admitted into evidence and they were tendered for cross examination.

On March 22, 2013, the ALJ issued a Proposal for Decision ("PFD," Appendix 6) that recommended approval of lower charges for the AMI opt-out program than those proposed by Edison ($67.20 initial charge and $9.80 monthly charge), as recommended by the Staff. Following exceptions by Kurtz, Edwards and the Cusumanos (and others, but not proposed appellant Panzica-Glapa) and replies, the Commission issued an Order adopting the PFD's recommendations (Appendix 7, May 15, 2013 Order in Case U-17053; see also Appendix 11,

Edison residential tariff section C5.7). The Commission explained in part that the ALJ ruled correctly with regard to the limited scope of this case, particularly in light of other cases addressing other AMI issues (Appendix 7, May 15, 2013 Order in Case U-17053, pp 17-18).

On June 14, 2013, Edwards and Kurtz (with proposed appellant Ms. Panzica-Glapa) and the Cusumanos filed appeals to this Court (Docket Nos. 316728 and 316781), which are consolidated.

On August 29 and September 26, 2013, Appellants filed their briefs on appeal. Edison now submits this brief in response to Appellants' briefs and in support of the Commission's Order.

C. Record Support for the Commission's AMI Opt-Out Order in this Case.

In accordance with the Staff's Report (and Commission' subsequent Order) in Case U-17000 (Appendices 2 and 4, as discussed above), Edison proposed an AMI opt-out program. Mr. Sitkauskas explained that Edison received approximately 1,100 concerns during the installation of approximately 800,000 AMI meters and modules,[3] which reflected that "the overwhelming majority of our customers fully support AMI. However, in response to the small group of concerned customers and consistent with the recommendation of the Staff in its U-17000 report, Detroit Edison felt it was an appropriate business practice to provide them with an option to opt out of having a transmitting AMI meter" (3 T 230).

Edison's AMI opt-out program allows residential customers to choose to have Edison install a non-transmitting AMI meter at their residential service address instead of one of

[3] Edison has approximately 2 million customers (Appendix 3, Application, paragraph 1), approximately 1.9 million of whom are residential customers (3 T 432).

Edison's transmitting AMI meters.[4] Customers may opt out for any reason and will not be required to communicate the reason to Edison (3 T 230, 255). Mr. Sitkauskas noted that customers electing to opt out would give up numerous benefits of AMI (discussed at 3 T 227-29): "However, if customers still want to opt out for any reason, the Company has developed a program to accommodate them" (3 T 235).

Customers choosing to opt-out must pay the costs associated with their choice. Edison developed proposed charges that reflected the actual cost of maintaining a non-transmitting AMI meter for opt-out customers, without shifting costs onto Edison's other customers. These proposed charges were consistent with the Staff Report's recommendation for cost-based ratemaking, as well as other states' proposed or adopted opt-out programs. It would not be appropriate for other customers to subsidize opt-out customers who request and receive a more expensive level of service. Such a scenario would be unfair and would contradict basic principles of cost causation. The opt-out program is voluntary, so customers concerned about the additional costs are not required to opt out (3 T 231-32, 234).

Edison proposed that customers electing to opt-out would pay an initial charge of $87 based on the costs to train employees to modify the transmitter located inside the AMI meter, the modification of the transmitter inside the meter and information technology expenses associated with billing. Customers electing to opt out would also pay a $15 monthly charge to cover the incremental costs of maintaining a manual meter-reading infrastructure and of manually reading meters. Both of these charges were based on Edison's experience-based estimate that 4,000

[4] Customers electing to opt out and who already have a transmitting AMI meter installed at their residence will have their meter changed to a non-transmitting AMI meter. Customers electing to opt out and who have not had their current meter replaced by an AMI meter will temporarily retain their current meter, and later will receive a non-transmitting AMI meter when AMI meters are installed in their area (3 T 231).

customers would opt out of having a transmitting AMI meter, consistent with other utilities (3 T 230-35, 239-40).

Staff witness Mr. McLean testified that the Staff essentially supported Edison's proposal:

> "The Staff reviewed the Company's proposal and determined that, apart from a few alterations to the Company's tariff and charges, the proposal is consistent with the September 11, 2012 Commission Order in Case No. U-17000 requiring MPSC-regulated investor owned utilities to propose a cost-based option for residential customers to permit them to choose a non-transmitting meter as opposed to the Company's standard transmitting AMI meter" (4 T 577).

The Staff recommended, however, that Edison's proposed initial ($87.00) and monthly ($15.00) charges should be reduced (to $67.20 and $9.80), based on the Staff's higher projected level of participation in the opt-out program (estimate of 15,500 rather than 4,000 customers) (4 T 578-79). Mr. McLean explained that Edison's rate-setting methodology was appropriate, but Staff's forecasted higher level of opt-out participation resulted in lower costs per customer:

> "The Staff has reviewed the Company's cost estimates and determined that they are based on the Company's experiences and past practices with meter reading and associated functions and are reasonable. Furthermore, the costs are consistent with other jurisdictions. However, the Staff recommends that the resulting charges be reduced to reflect a higher projected customer participation rate. The charges that the Company has developed are based on a forecasted participation level of 4,000 customers. This participation level has a direct impact on the charges. Several of the costs associated with allowing residential customers to choose a non-transmitting meter are fixed. These costs are spread to all participating customers. By increasing the forecasted participation level, the cost per customer and resulting charges decrease" (4 T 578).

The Commission approved the charges recommended by the Staff for Edison's proposed Opt-Out Program (Appendix 7, May 15, 2012 Order in Case U-17053). Additional detail will be discussed below where it is best understood in context.

STANDARDS OF REVIEW

These appeals present the judicial review of a ratemaking decision by the MPSC, a state administrative agency. Const 1963, art 6, § 28 provides that judicial review of administrative

agency decisions shall include whether those decisions are "authorized by law; and in cases where a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record." Under MCL 462.26(8), the Appellants must prove by clear and satisfactory evidence that the MPSC's Order is "unlawful or unreasonable."

A Commission decision is supported by substantial evidence if it is based on expert opinion testimony by a qualified expert who has a rational basis for that opinion, regardless of whether other experts disagree. *Consumers Power Co v Public Service Comm*, 189 Mich App 151, 153; 472 NW2d 77 (1991), *lv den* 439 Mich 922 (1992).

Evidentiary decisions striking proffered evidence are reviewed for abuse of discretion. *In re Application of Consumers Energy Co*, 281 Mich App 352, 357; 761 NW2d346 (2008).

Our Supreme Court recently summarized the applicable rules of statutory construction in *Dep't of Environmental Quality v Worth Twp*, 491 Mich 227, 237-38; 814 NW2d 646 (2012):

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

This Court reviews legal questions, including issues of statutory interpretation, *de novo*. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 97; 754 NW2d 259 (2008). In *Rovas*, the Court also reaffirmed that "respectful consideration" is due to the statutory interpretations by administrative agencies charged with the administration of the statute, as

earlier stated by the Court in *Boyer-Campbell v Fry*, 271 Mich 282, 296-97; 260 NW 165 (1935), which held:

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

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

When Appellants cite no authority for their propositions, there is no sound basis for this Court to consider them. *Gross v General Motors Corp*, 448 Mich 147, 161-62, n 8; 528 NW2d 707 (1995) ("Failure to properly brief an issue on appeal constitutes abandonment of the question").

ARGUMENT

I. THE MPSC HAS RATEMAKING AUTHORITY TO SET CHARGES FOR THE OPT-OUT PROGRAM, BUT LACKS MANAGEMENT AUTHORITY TO ORDER EDISON TO USE DIFFERENT METERS.

Edwards and Kurtz assert that the Commission exceeded its statutory authority by enabling Edison to make AMI meters compulsory and suggest (without citation of any applicable authority) that Edison should instead be ordered to continue to provide electromechanical meters (Edwards brief, Argument I, pp 17-24). The Cusumanos somewhat similarly assert that the scope of this case was improperly limited to setting charges for Edison's AMI opt-out program (Cusumano brief, Argument I, pp 10-14) and that the doctrine of "managerial prerogatives" was incorrectly applied to limit the Commission's jurisdiction (*Id*, Argument II, pp 15-21). These arguments reflect a fundamental misperception of controlling law.

The Commission approved and set charges for Edison's proposed AMI opt-out program. Under MCL 460.6a, the Commission possesses express statutory ratemaking authority. Ratemaking is a legislative function, and the Commission is not bound to apply any particular formula or use any specific method in setting rates. *Residential Ratepayer Consortium v Public Service Comm*, 239 Mich App 1, 6; 607 NW2d 391 (1999); *Ford Motor Co v Public Service Comm*, 221 Mich App 370, 373, 381; 562 NW2d 224 (1997); *ABATE v Public Service Comm*, 208 Mich App 248, 258; 527 NW2d 533 (1994).

Appellants rely on *Union Carbide v Public Service Comm*, 431 Mich 135; 428 NW2d 322 (1988) (*e.g.*, Edwards brief, pp 17, 22-23; Cusumanos brief, pp 16-19), but neglect to acknowledge the Commission's statutory ratemaking authority, and that our Supreme Court in *Union Carbide* expressly limited that authority from encroaching on matters of the management and control of the property of privately-owned utility companies:

> "The power to fix and regulate rates, however, does not carry with it, either explicitly or by necessary implication, the power to make management decisions.
>
> "'It must never be forgotten that while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership.' *Missouri ex rel Southwestern Bell Telephone Co v Public Service Comm*, 262 U.S. 276, 289; 43 S Ct 544, 547; 67 L. Ed. 981 (1923)." 431 Mich at 148-49.

Appellants also rely on *Consumers Power Co v Public Service Comm*, 460 Mich 148; 596 NW2d 126 (1999) (Edwards brief, pp 17, 21, 23; Cusumanos brief, p 16), but again neglect to acknowledge that our Supreme Court in *Consumers Power* expressly rejected an unlawful attempt by the Commission to force a management decision on a utility, explaining that the Commission's ratemaking authority did not authorize that action because it did not "involve ratemaking." 460 Mich at 157.

Edwards and Kurtz erroneously propose: "A modification of DTE's proposal to fully address the concerns of DTE's customers on remand would not impinge on DTE's management prerogatives" (Edwards brief, p 24). The Cusumanos wrongly seek to have the Commission compel Edison to use a different type of meter (Cusumanos brief, p 18). Appellants' proposals are illegal, as the Commission recognized:

> "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" (Appendix 7, May 15, 2013 Order in Case U-17053, p 18).

The distinction between permissible ratemaking authority (which the Commission exercised) and unlawful encroachment on utility management (which Appellants propose) is further illustrated by *Ford Motor Co v Public Service Comm*, 221 Mich App 370, 385, 387-88; 562 NW2d 224 (1997), where Edison proposed a Demand Side Management ("DSM") program.

The Commission modified Edison's proposed program and set charges for it. This Court held that the Commission's attempted modification of Edison's DSM program was unlawful, explaining that: "The PSC here exceeded its ratemaking authority by, in effect, requiring Detroit Edison's management to adopt the DSM program the PSC thought best." 221 Mich App at 387-88. This Court approved the Commission's setting of rates for Edison's DSM program, however, explaining:

> "While it is true that the PSC has only those powers granted to it by the Legislature [citations omitted], setting rates for the cost of a DSM program is nothing more than the fixing of rates, which is a principal function of the PSC." 221 Mich App at 385.

Similarly, in *Attorney General v Public Service Comm*, 269 Mich App 473; 713 NW2d 290 (2005) (upon which Kurtz and Edwards attempt to rely at brief, pp 20, 21 and 25), the Commission properly approved the utility's proposed "green power" program. 269 Mich App at 477. The Commission exceeded its authority, however, when it ordered the utility to expand the program and required customers who did not participate in that expanded program to subsidize its costs. 269 Mich App at 481.

Edwards and Kurtz acknowledge that Edison "owns all the meters used by its customers" (brief, p 24) and the record further reflects that Edison uses its meters to provide safe, reliable and efficient service to its customers. (3 T 293, 385, 416; 4 T 485). The Cusumanos wrongly suggest, however, that they should be allowed to "keep their analog meters" (brief, p 18). In *Bd of Public Utility Comm'rs v New York Telephone Co*, 271 US 23, 32: 46 S Ct 363; 70 L Ed 2d 808 (1926), the United States Supreme Court explained:

> "***Customers pay for service, not the property used to render it***. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. ***By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company***" (emphasis added).

There is similarly no merit in Appellants' various suggestions that Edison is somehow unreasonable in requiring the measurement of the electricity it sells, or in objecting to the removal and/or destruction of meters that it uses for this purpose (*e.g.*, Edwards brief, pp 3-4, 46). Instead, Edison is required by State law to accurately measure its customers' electrical usage, as further discussed below. Edison's rights to measure the electricity it sells and protect its meters are reflected, for example, in the applicable tariff for Edison's residential customers (see tariff section C5.3, attached as Appendix 11).

The record reflects that Edison made a management decision to offer an AMI opt-out program using its meters to accommodate the small minority of customers who had concerns about AMI transmissions. Mr. Sitkauskas explained that Edison received approximately 1,100 concerns during the installation of approximately 800,000 AMI meters and modules, which reflected that "the overwhelming majority of our customers fully support AMI. However, in response to the small group of concerned customers, and consistent with the recommendation of the Staff in its U-17000 report, Detroit Edison felt it was an appropriate business practice to provide them with an option to opt out of having a transmitting AMI meter" (3 T 230).

The Cusumanos incorrectly suggest that the Commission derived some additional authority based on customer "complaints" (brief, pp 15-21), but they neglect to recognize that a "complaint" is a pleading that initiates a legal proceeding (assuming it satisfies *prima facie* criteria). The Cusumanos instead rely on *comments* stating, for example: "Over 400 written complaints were submitted to the U-17000 docket against the smart meters by utility customers … (See Appendix C) … Once the docket was opened for comments under the U-17000 case over 400 citizens added their written complaints …" (Cusumanos brief, pp 9, 17). The Cusumanos'

Appendix C is the docket listing from Case U-17000, which reflects comments, not complaints, which did not expand the Commission's authority.

This proceeding was in initiated by Edison's Application for its proposed AMI opt-out program (Appendix 3). The Cusumanos attempt to rely on the Commission's authority based on a "complaint in writing" under MCL 460.58; MCL 462.22(a); MCL 460.557. In *Union Carbide*, *supra*, our Supreme Court explained that all three statutes did not apply where, like here, the case was initiated by a utility's application and the Commission attempted to take action on its own motion. 431 Mich at 153, 158, 162 (acknowledged in Cusumanos at brief, p 17).[5] The comments in Case U-17000, like the Commission's motion in *Union Carbide*, did not satisfy the statutory requirements for a complaint, so they could not expand the Commission's authority.[6]

Edwards and Kurtz's further assertions that the Commission imposed a "mandate" are mere hyperbole, and their suggestion to order Edison to continue to use obsolete meters is unfounded and illegal. Edison sells electricity to its customers, and must measure their electrical usage in order to bill them accurately. MPSC Rule 13(1), R 460.113(1), provides:

> "Except as specified in this rule [for estimated meter readings in limited circumstances not applicable here], a utility shall provide all residential customers with an actual monthly meter reading as defined in R 460.102."[7]

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[5] The Cusumanos also reference MCL 460.6, but acknowledge that the statute is merely an outline of the MPSC's jurisdiction, and not a grant of specific powers (Cusumanos brief, p 15). *See also, Huron Portland Cement Co v Public Service Comm*, 351 Mich 255, 263; 88 NW2d 492 (1958).

[6] Other aspects of the statutes were also not satisfied by the comments, and the statutes cannot be re-written by the Commission or the courts. *Elozovic v Ford Motor Co*, 472 Mich 408, 421-22, 425; 697 NW2d 851 (2005); *Di Benedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000); *Hanson v Mecosta Co Road Comm'rs*, 465 Mich 492, 504; 638 NW2d 326 (2002); *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992); *Ambs v Kalamazoo County Road Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003).

[7] Rule 2 defines "actual meter reading" as: "(a) 'Actual meter reading' means a gas or electric meter reading that is based on the customer's actual use during the period reported and that was

Although customers may report readings under certain circumstances, utilities still must obtain actual meter readings to verify accuracy and utilities retain the right to read meters regularly. MPSC Rule 15, R 460.115 relevantly states:

> "At least once every 12 months, a utility shall obtain an actual meter reading of energy usage to verify the accuracy of [readings reported by customers]. Notwithstanding the provisions of this rule, a utility company representative may read meters on a regular basis."[8]

These rules have the force and effect of law.[9]

Contrary to Appellants' suggestions, they do not represent Edison's customers. They speak only for themselves. The record reflects that Edison did accommodate the small minority of its customers who indicated concerns about AMI, as Mr. Sitkauskas testified (3 T 230). The broader interests of Edison's customers were also represented before the Commission by the Attorney General, who did not appeal the Commission's decision, and the Commission's Staff, which supported Edison's proposal (4 T 577). The Staff also previously recognized that AMI meters are safe (Appendix 2, Staff Report, pp 8, 10) and that Edison's analog meters are "obsolete and currently not in production. Offering customers an electromechanical meter as an alternative to a smart meter is not a long-term solution" (*Id*, p 27).

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performed by a utility representative, by the customer and communicated to the company by mail, telephone, fax, on a secure company website, or other reasonable means, or that was transmitted to the utility by an automated or remote meter reading device" (R 460.102(a)).

[8] The term "shall" denotes a mandatory duty, and excludes the idea of discretion. *Macomb Co Rd Comm'n v Fisher*, 170 Mich App 697, 700; 428 NW2d 744 (1988); *Southfield Twp v Drainage Bd*, 357 Mich 59, 76-77; 97 NW2d 281 (1959) ("the word 'shall' is mandatory and imperative and, when used in a command to a public official, it excludes the idea of discretion"). "As a general rule, the word 'may' will not be treated as a word of command unless there is something in the context or subject matter of the act to indicate that it was used in such a sense." *Mull v Equitable Life Assur Society*, 444 Mich 508, 519; 510 NW2d 184 (1994).

[9] *Clonlara, Inc v State Bd of Educ*, 442 Mich 230, 239; 501 NW2d 88 (1993).

II. THE COMMISSION'S ORDER IS SUPPORTED BY COMPETENT, MATERIAL AND SUBSTANTIAL EVIDENCE.

Edwards and Kurtz's Argument II (Edwards brief, pp 24-35) suggests that the Commission's Order is unreasonable because there allegedly is no record evidence to support it. To the contrary, Mr. Sitkauskas testified among other things that Edison designed its AMI opt-out program to address the concerns indicated by a small group of Edison's approximately 2 million customers (3 T 230). Mr. Sitkauskas testified as an expert.[10] A Commission order is supported by substantial evidence if it is based on expert opinion testimony by a qualified expert who has a rational basis for that opinion, regardless of whether other experts disagree (and none did here). *Consumers Power Co v Public Service Comm*, 189 Mich App 151, 153; 472 NW2d 77 (1991), *lv den* 439 Mich 922 (1992).

Appellants bear the burden of proof on appeal. Rate decisions cannot be disturbed unless they are arbitrary, capricious or an abuse of discretion, which would also require satisfying the evidentiary standard of MCL 462.26.[11] Appellants also have the "burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable" under MCL 462.26(8), and they must carry that burden with record evidence,[12] not mere hyperbole. The applicable standard of

[10] Mr. Sitkauskas is DTE's Manager of the AMI group in the Major Enterprise Projects Organization. He holds a Bachelor of Business Administration degree and a Master of Business Administration degree. He has over thirty years of experience working for the utility in areas ranging from computer programming to distribution engineering. Mr. Sitkauskas was also responsible for integrating the customer service systems for DTE after its merger with MichCon. In 2006, he was appointed to lead the AMI project and is currently responsible for the development, administration and reporting for the project (3 T 223).

[11] *See, Ford Motor Co, supra*, 221 Mich App at 381 (affirming rate design decisions); *Great Lakes Steel, supra*, 130 Mich App at 480, 487 (affirming experimental rate design).

[12] MCR 7.210; *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 305; 486 NW2d 351 (1992) ("This Court limits its review to the record presented on appeal and will not consider

review requires affirmance of the MPSC is there is record support for its Order. There is no requirement for Appellees to disprove some alternative that Appellants would have preferred.

Edwards and Kurtz incorrectly suggest (brief, p 34) that Edison should be required to do a cost/benefit analysis based on *In re Application of Detroit Edison Co*, 296 Mich App 101, 114-16; 817 NW2d 630 (2012), where this Court remanded to the Commission for further proceedings (which have been held) to develop additional record support for funding Edison's AMI program. Edwards and Kurtz's suggestion lacks merit because *In re Application of Detroit Edison Co* arose from an Edison general rate case. The Commission has addressed funding for Edison's AMI program in general rate cases beginning with Case U-15244 (which was not appealed).

In contrast, this case is not a general rate case, and it does not concern funding for the AMI program. This case only concerns the cost-based charges for not participating in AMI. Edwards and Kurtz's suggested cost/benefit analysis is also inapplicable here because there are benefits to AMI. Mr. Sitkauskas testified that customers electing to opt out would give up numerous benefits of AMI (3 T 227-29; 4 T 527): "However, if customers still want to opt out for any reason, the Company has developed a program to accommodate them" (3 T 235).

Edison's AMI opt-out program is not concerned with the reason(s) a customer may have for opting out (3 T 230, 255). The customer only has to pay the resulting costs so that other customers do not have to subsidize those costs (3 T 230-35, 239-40). Customers choosing to opt out do not pay for the AMI program, and they receive credits reflecting the avoided costs of the AMI program (3 T 233-34). The opt-out program is also voluntary, so if a customer would not benefit from opting out, the customer can simply choose not to opt out (3 T 232).

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any alleged evidence or testimony that is not supported by the record presented to the court for review").

On cross examination, Mr. Sitkauskas further explained that Edison's AMI program is based on using a uniform type of meter throughout its service territory. Edison has not purchased analog meters since approximately 2006, and Edison's vendors no longer produce analog meters. Edison's AMI program gains efficiencies by using one type of meter. Continued use of analog meters is not compatible with Edison's new technology and the advancement of the AMI program (3 T 294-95, 385; 4 T 513-14).

No witness submitted testimony that would support an alternative proposal to utilize analog meters instead of non-transmitting AMI meters, nor did any witness identify the costs of such an option or the maintenance, inventory and testing necessary to facilitate such an option. Even if there were such testimony, however, as a matter of law Edison's meters are still Edison's private property and the Commission lacks authority to order Edison to use a different type of meter, as discussed in Argument I.

Despite Appellants' attempts to ignore or alter the nature of this case, it remains a ratemaking proceeding to set the cost-based charges for Edison's opt-out program. The Commission appropriately set those charges ($67.20 initial charge and $9.80 monthly charges) based on Edison's cost calculations and Staff's forecast that 15,500 customers would participate in the program (4 T 577-79). The Commission's decision is fully supported by the record.

III. THE MPSC PROPERLY EXCLUDED EVIDENCE THAT WAS BEYOND THE SCOPE OF THIS CASE.

The Cusumanos acknowledge that numerous other cases have addressed other aspects of AMI, but contend that none of those cases addressed or will address their concerns to their satisfaction, so somehow this case should be expanded to do so (Cusumanos brief, Argument III, pp 22-27). The Cusumanos further suggest that they were denied an opportunity to establish an evidentiary foundation to support their proposition that AMI meters violate the Fourth

Amendment to the United States Constitution (Cusumanos brief, Argument IV, pp 27-29). The Cusumanos provide no relevant support for their propositions, so the Court should decline to consider them.[13]

To the extent that the Court analyzes this issue, Edison notes that although *res judicata* and collateral estoppel do not apply in the pure sense, the Commission is not required to re-litigate its earlier decisions.[14] The Cusumanos appear to acknowledge that *res judicata* and collateral estoppel apply (Cusumanos brief, p 22).

The Commission has addressed and continues to address AMI in numerous cases, which are limited to specific topics and provide opportunities for participation as relevant to those topics. The Commission has addressed and will continue to address the costs of Edison's AMI program in Edison's general rate cases, beginning with Case U-15244. The Commission broadly addressed health and other concerns relating to AMI in Case U-17000. The Commission determined that "issues concerning customer data collection, privacy and cyber security are complex and sufficiently important to merit the creation of a future docket limited to these issues" (Appendix 4, September 11, 2012 Order in Case U-17000, p 6). The Commission subsequently opened Case U-17102 to address customer data privacy (Appendix 6, October 31, 2012 Order in Case U-17102), and issued a model privacy policy (Appendix 8, June 28, 2013

[13] "It is not sufficient for a party 'simply to announce a position or assert a claim of error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). *See also, Gross v General Motors Corp*, 448 Mich App 147, 161-62, n 8; 528 NW2d 707 (1995) ("Failure to properly brief an issue on appeal constitutes abandonment of the question"); *Isagholian v Transmerica*, 208 Mich App 9, 14; 527 NW2d 13 (1994).

[14] *In re Application of Consumers Energy Co*, 291 Mich App 106, 122; 804 NW2d 574 (2010); *Pennwalt Corp v Public Service Comm*, 166 Mich App 1, 9; 420 NW2d 156 (1988).

Order in Case U-17102, Exhibit A). With regard to opt-out alternatives, the Commission agreed with the Staff that "a small minority of customers has significant concerns about AMI," and that investor-owned electric utilities including Edison (which the Commission noted had already filed an opt-out tariff in this Case U-17053) "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" (Appendix 4, September 11, 2012 Order in Case U-17000, p 5).

Edison's opt-out program is in accordance with the Staff Report and Commission Order in Case U-17000. The ALJ issued a detailed opinion from the bench striking evidence that was irrelevant to this proceeding to set cost-based charges for Edison's opt-out alternative (2 T 180-96). The ALJ explained in part:

> "While this case was pending, the Commission entered an order on September11, 2012, in Case No. U-17000. That order dealt with a number of issues pertaining to AMI, including what if any health risks are associated with AMI meters. On page 5 of that order the Commission directly – expressly directed that investor-owned utilities provide an opt-out option to its residential customers based on 'cost of service principles.' It's my understanding those principles would entail setting the rate for opting out of the AMI at the cost Edison will incur for providing non-transmitting meters who elect to opt out.
>
> "That is the scope of this hearing. Any evidence or offer of evidence that goes beyond that issue, including the purported health effects of AMI meters, is irrelevant and thus inadmissible" (2 T 183).

In accordance with the ALJ's ruling, Edison withdrew Mr. Sitkauskas' testimony rebutting the stricken testimony (3 T 216, 245-50). The Commission properly upheld the ALJ's decision, explaining that the ALJ ruled correctly with regard to the limited scope of this case, particularly in light of other cases addressing other AMI issues:

> "The vast majority of the customer intervenors' exceptions address the scope of this proceeding; however, no party filed an application for leave to appeal the ALJ's evidentiary rulings addressing the scope of the proceeding. See, 1999 AC, R 460.17337. In any case, the Commission finds the exceptions to be unpersuasive. ***The ALJ correctly ruled that this proceeding is not a referendum***

> ***on the AMI program, and neither the wisdom nor the equipment requirements of the AMI program are at issue here. This is a proceeding to determine whether DTE Electric has proposed an appropriate plan and tariff for customers who want a non-transmitting meter***.
>
> "The ALJ accurately describes the history of the AMI program. The Commission approved the pilot program in Case No. U-15244, and approved rate base treatment of the reasonable and prudent costs in that case; and has continued to review expenditures according to that standard in each subsequent rate case. In the September 11, order [in Case U-17000], the Commission adopted the Staff's report as 'thoughtful and comprehensive' and as a point of departure for further discussion, singling out the continuing review of expenditures in rate cases, opt-out options, and privacy concerns for further action. September 11 order, p. 4. ***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***" (Appendix 7, May 15, 2013 Order in Case U-17053, pp 17-18. Emphasis added).

The Commission's decision is in accordance with the Michigan Rules of Evidence and the Commission's Rules of Practice and Procedure.[15] This Court has also upheld the analogous exclusion of evidence that is irrelevant to Commission proceedings. *See, for example, In re Application of Consumers Energy Company*, 281 Mich App 352, 361-62 ; 761 NW2d 346 (2008) (explaining that the Commission was within its rights to limit the scope of its proceedings and strike evidence exceeding those limits); *In re Application of Indiana Michigan Power Co*, 275 Mich App 369, 376; 738 NW2d 289, 293-96 (2007), *lv den* 480 Mich 1032 (2008), *cert den* 555 US 994 (2008) (holding that the appellants abandoned their argument that their rights were

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[15] The Commission generally follows the Michigan Rules of Evidence pursuant to MPSC Rule 325, R 460.17325.

MRE 402 relevantly provides: "Evidence which is not relevant is not admissible."

The Administrative Procedures Act similarly provides: "In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Irrelevant, immaterial and unduly repetitious evidence may be excluded." MCL 24.275.

somehow violated, where like the Cusumanos they offered no specifics on testimony stricken from the record, or how the Commission would have decided the case differently if the testimony had been on the record).

The Cusumanos vaguely indicate that if the record were bigger, then the Commission might have had a basis for some different decision, presumably ordering Edison to use a different kind of meter. Since the Commission could not make such a decision without violating the law, as discussed in Argument I, the Cusumanos essentially contend that they are entitled to an illegal decision, which is frivolous. The Commission's rate-setting for Edison's opt-out program is also supported on the record and must be affirmed under the standard of review for evidentiary support, as discussed in Argument II. Therefore, if there were an error in excluding the Cusumanos' evidence (which there was not), the error would be harmless because even if the evidence had been admitted, the Cusumanos would not be entitled to any alteration of Edison's opt-out program. See generally, MRE 103(a) and MCR 2.613(A).[16]

The Cusumanos' further argument regarding the Fourth Amendment lacks merit and relevance.[17] The Cusumanos indicate that they intended to cross examine Mr. Sitkauskas to explore their theory, but could not do so because of the limited scope of this case (Cusumanos

[16] MRE 103(a) states: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and [there is an objection and offer of proof]."

MCR 2.613(A) states: "An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice."

[17] US Const Am XIV provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

brief, pp 28-29). The record reflects that the Cusumanos each had an ample opportunity to cross examine Mr. Sitkauskas (3 T 257-346).

Edison further notes that whatever rights the Cusumanos may have to "retreat into [their] own home and there be free from unreasonable governmental intrusion"[18] might relate to a claim or defense against the government. But Edison is a private company, not the government (Appendix 3, p 1).

The Cusumanos assert that an AMI meter "is, in fact, a surveillance device … And it scarce can be doubted that in today's world that law enforcement officers, without any need for a warrant, will freely access the data once the utility has collected it and stored it in a database" (Cusumanos brief, p 29). The Cusumanos offer no support for their views, which are unfounded. This case is about the cost-based charges for Edison's non-transmitting AMI meters. These meters do not conduct "surveillance." The meters measure how much electricity Edison sells to its customers, much like a cash register measures customer purchases from a store. Moreover, a non-transmitting AMI meter simply provides a monthly (when a meter reader reads the meter) measurement of the electricity going to the residence (3 T 233-35). There is no measurement of anything coming out of the premises and Edison is not responsible for wiring inside of the customer's residence (4 T 488). Therefore, there is no basis for the Cusumanos' proposition that the use of non-transmitting AMI meters in the opt-out program "amounts to a search without a warrant" (Cusumanos brief, p 29).

The analysis is unchanged by the Cusumanos' propositions about the ability of transmitting AMI meters to record additional detail regarding electricity usage (Cusumanos brief,

[18] *Silverman v United States*, 365 US 505, 511; 81 S Ct 679; 5 L Ed 2d 734 (1961) (Fourth Amendment violation by warrantless police use of "spike mike" to physically penetrate premises and eavesdrop on conversations).

p 28). Edison's AMI opt-out program is open to all of Edison's residential customers, so none of those customers is forced to have (or not have) a transmitting AMI meter (3 T 230, 232). The Cusumanos lack standing to raise a constitutional claim on behalf of third parties particularly where, as here, any claimant is entirely hypothetical and non-existent.[19] The Commission addressed privacy concerns in Case U-17102 and the Cusumanos' underlying concerns about AMI meters being used to conduct warrantless searches are unfounded.[20]

IV. EDISON'S OPT-OUT PROGRAM DOES NOT VIOLATE THE AMERICANS WITH DISABILITIES ACT OR THE PERSONS WITH DISABILITIES CIVIL RIGHTS ACT.

Edwards and Kurtz's final argument (brief, pp 35-49) wrongly suggests that Edison's opt-out program violates the Americans with Disabilities Act ("ADA"). They first incorrectly argue that Title II of the ADA applies (brief, pp 37-38). Title II provides that:

> "… [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a ***public entity***, or be subjected to discrimination by any such entity." 42 USC 12132 (emphasis added).
>
> A "public entity" is defined under the ADA to include only:
>
> "(A) any state or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or local government; and (C) the National Railroad Passenger Corporation, and any commuter authority" 42 USC 12131(1).

[19] *People v Rocha*, 110 Mich App 1, 16-18; 312 NW2d 657 (1981).

[20] Even with transmitting AMI meters and other matters relating to customer information, the Commission has approved Edison's proposed tariff, which only provides for disclosure in response "when required by law or Commission requests or rules. This includes law enforcement requests supported by warrants or court orders specifically naming the customers whose information is sought, and judicially enforceable subpoenas. The provision of such information will be reasonably limited to the amount authorized by law or reasonably necessary to fulfill a request compelled by law" (Appendix 12, October 17, 2013 Order in Case U-17002, Exhibit A, p 2).

Title II does not apply because Edison is a private company, not a "public entity" (Appendix 3). Edwards and Kurtz appear to concede the point regarding Edison, but incorrectly suggest that: "The PSC has a duty under the ADA as a public entity to ensure that the utilities it regulates keep electricity accessible to the disabled and provide reasonable accommodations to disabled persons" (brief, p 38). Edwards and Kurtz's proposition is based on their unfounded mischaracterization of Edison's opt-out program as a State program or activity. The Commission simply set the charges for Edison's program, in accordance with the Commission's ratemaking (but not management) authority, as discussed in Argument I. Edwards and Kurtz's proposition is also tellingly unsupported by authority, so the Court should decline to consider it.[21]

Edwards and Kurtz next suggest (brief, pp 38-40) that Tile III of the ADA applies. Title III provides:

> "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any ***place of public accommodation*** by any person who owns, leases (or leases to), or operates a ***place of public accommodation***." 42 USC 12182(a) (emphasis added).

Places of public accommodation include hotels, motels, restaurants, bars, theaters, stadiums, etc. (42 USC 12181(7)), but not public utilities (such as Edison) or private residences (where Edwards and Kurtz receive Edison's electricity). Edwards and Kurtz improperly attempt to extend Title III by contending that: "The portion of the home where the meter is installed is a place of public accommodation" (brief, p 40, citing 28 CFR 36.207). Their proposition cannot withstand reasoned analysis, since 28 CFR 36.207 provides:

> "(a) When a place of public accommodation is located in a private residence, the portion of the residence used exclusively as a residence is not covered by this part, but that portion used exclusively in the operation of the place of public

[21] See footnote 13 above.

> accommodation or that portion used both for the place of public accommodation and for residential purposes is covered by this part."

This provision cannot apply because Edison's meters are placed "on the home" (Edwards brief, pp 24, 40). Edison delivers and measures electricity at the point of delivery and is not responsible for the wiring inside a customer's residence (4 T 488). Any opening of a private residence to the public (Edwards brief, p 40) would be unrelated to and in a different location from Edison's meter. Edison's meters are also sealed to prevent tampering, and not open to anyone other than Edison's authorized personnel (See generally Appendix 11, Section C5.3 of Edison's tariff). Edison's opt-out program is only for residential customers, and does not contemplate commercial activities as suggested by Edwards and Kurtz.[22]

Edison's opt-out program also does not discriminate against anyone. It is open to all of Edison's residential customers, who may voluntarily choose to opt out for any reason and not tell that reason to Edison. The same opt-out charges apply to all participants in the program based only on the costs caused by those customers, regardless of and without inquiry into any disability or other status (3 T 230-32, 255). The suggestion that the opt-out charges somehow discriminate against opt-out customers is also contrary to case law rejecting such allegations, including *Bagley Acquisition Corp v Public Service Comm*, 229 Mich App 172, 175-76; 581 NW2d 286 (1998) (affirming Commission's dismissal of complaint challenging Edison's use of payment plans); and *Attorney General v Public Service Comm*, 141 Mich App 505, 508-509; 367 NW2d 341 (1984) (affirming differential monthly service charges for residential customers' principal residence and alternate residence).

[22] Edison has three general rate classes – residential, commercial, and industrial, which are further divided into rate schedules by voltage and other characteristics of usage.

Edwards and Kurtz next contend that the Commission should conduct assessments to determine whether individuals have qualified disabilities under the ADA (brief, pp 40-43), but cite no authority recognizing electromagnetic hypersensitivity as a disability under the ADA.[23] The Commission did direct its Staff to investigate and report on AMI issues in Case U-17000. With regard to health and safety concerns, the Staff concluded AMI meters present no significant health risk:

> "After careful review of the available literature and studies, the Staff has determined that the health risk from the installation and operation of metering systems using radio transmitters is insignificant. In addition, the appropriate federal health and safety regulations provide assurance that smart meters represent a safe technology" (Appendix 2, Staff Report, p 2. See also, p 28).

The Staff explained, in part, that radio frequency emissions are federally regulated, health research has been unable to establish a causal connection to reported health symptoms, and the transmissions from AMI meters are relatively insignificant as compared to other sources in everyday life:

> "The FCC [Federal Communications Commission] is responsible for providing licenses for RF [radio frequency] emissions. The FCC regulations cover matters relating to public health and safety and have been designed to ensure that the levels of RF emissions that consumers are exposed to are not harmful. . . .
>
> "Individuals with EHS ['electromagnetic hypersensitivity'] report real symptoms; however, health research has been unable to consistently attribute those symptoms to EMF [electromagnetic field] exposure. . .
>
> "There are multiple sources of RF exposure in our everyday environment such as cellular phones, wireless devices such as laptops and routers, microwave ovens, baby monitors, garage door openers, 'walkie talkies,' computer monitors, fluorescent lighting, and electrical wires within the home. Smart meters are a small contributors to the total environmental RF emissions to which the general

[23] 42 USC 12131(2) provides: "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."

> public is exposed. Eliminating smart meters would result in a minimal reduction in total emissions" (Appendix 2, Staff Report, pp 8, 10, footnotes omitted).

Edwards and Kurtz acknowledge elsewhere that: "The PSC has no common law powers; but is limited only to those powers explicitly granted to it by statute" (brief, p 17, citing *Union Carbide, supra*, 431 Mich at 146). Edwards and Kurtz suggest no statute that would authorize the Commission to conduct the individualized assessments that they now propose. Any such assessments would also be irrelevant here because, even assuming the existence of the reported electromagnetic hypersensitivity symptoms, there is no causal connection to any transmitting device, let alone the minimal transmissions of AMI meters, as indicated in the Staff's Report.

Edison's opt out program provides for Edison to turn off the transmitters in AMI meters so that they no longer transmit radio frequencies (3 T 233). Edwards and Kurtz suggest that this is not a "reasonable accommodation" (assuming Title II and Title III apply, which they do not) because a non-transmitting AMI meter is a solid state device (brief, pp 43-47). A solid state device is simply a device that confines electrons in a solid material (*e.g.*, a transistor or integrated circuit, rather than a vacuum tube). Edwards and Kurtz's concerns about transmissions from non-transmitting meters are unfounded. Edison further notes that it sells electricity, which by definition involves moving electrons.

Edwards and Kurtz further suggest that they should not have to pay opt-out charges, reasoning that the charges improperly recover costs to accommodate their alleged disabilities (brief, pp 47-49). The suggestion lacks merit because the same opt-out charges apply to all participants in the program based only on the costs caused by customers choosing to participate, regardless of and without inquiry into, any disability or other status (3 T 230-32, 255). Basing charges on cost causation is a fundamental principle of ratemaking. *See, for example*, MCL 460.11.

Edwards and Kurtz finally suggest that the Commission's Order violates the Persons with Disabilities Civil Rights Act ("PWDCRA"), MCL 37.1301 *et seq* (brief, p 49). They note requirements regarding a "place of public accommodation or public service" in MCL 37.1302,[24] but otherwise offer no analysis other than to suggest that the ADA analysis should be followed. Therefore, to the extent that the Court considers this issue,[25] their PWDCRA claim fails for the reasons discussed above with regard to the ADA. In summary, Edison is a private company (Appendix 3), not a "public service," and Edison's opt-out program involves outside meters measuring electrical usage at private residences, not a "place of public accommodation."[26]

[24] MCL 37.1302 provides in part: "Except as permitted by law, a person shall not . . . "(a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a ***place of public accommodation or public service*** because of a disability that is unrelated to the individual's ability to utilize and benefit from the goods, services, facilities, privileges, advantages, or accommodations or because of the use by an individual of adaptive devices or aids" (Emphasis added).

[25] See footnote 13 above.

[26] MCL 37.1301 provides: "As used in this article:

"(a) 'Place of public accommodation' means a business, educational institution, refreshment, entertainment, recreation, health, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.

"(b) 'Public service' means a public facility, department, agency, board, or commission owned, operated, or managed by or on behalf of this state or a subdivision of this state, a county, city, village, township, or independent or regional district in this state or a tax exempt private agency established to provide service to the public, except that public service does not include a state or county correctional facility with respect to actions or decisions regarding an individual serving a sentence of imprisonment."

RELIEF REQUESTED

The Detroit Edison Company respectfully requests that this Court affirm the Michigan Public Service Commission's May 15, 2013 Order in Case U-17053.

Respectfully submitted,

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