STATE OF MICHIGAN

IN THE COURT OF APPEALS

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

CYNTHIA EDWARDS and LINDA KURTZ,

Intervenors, Appellants,

and

LESLIE PANZICA-GLAPA,

Appellant, Court of Appeals No. 316728

v

MICHIGAN PUBLIC SERVICE COMMISSION
and DTE ELECTRIC COMPANY
f/k/a THE DETROIT EDISON COMPANY

Appellees.
_____/ CONSOLIDATED CASES

DOMINIC CUSUMANO AND LILLIAN CUSUMANO

Intervenors, Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION and DTE ELECTRIC COMPANY
f/k/a THE DETROIT EDISON COMPANY — Court of Appeals No. 316781

Appellees.
_____/

In the matter of the application of
THE DETROIT EDISON COMPANY
seeking approval and authority to implement its proposed advanced metering infrastructure Opt-Out Program — MPSC Case No. U-17053
_____/

APPELLANTS' BRIEF ON APPEAL IN DOCKET NO. 316728
ORAL ARGUMENT REQUESTED

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STATEMENT ON JURISDICTION

On June 14, 2013 Appellants Cynthia Edwards, Linda Kurtz, and Leslie Panzica-Glapa claimed an appeal of right from the May 15, 2013 order of the Michigan Public Service Commission (PSC) in Docket No. U-17053. That order approved, with modifications, the application of The Detroit Edison Company[1] (DTE), to implement an opt-out program for its residential customers from its deployment of Advanced Metering Technology (AMI) meters.[2] The order fixed the rate for the opt-out and approved a tariff to be added to DTE's rate book fixing the practices, terms, and conditions of the opt-out program.

The Court of Appeals "has jurisdiction of an appeal of right filed by an aggrieved party." MCR 7.203(A). The Court of Appeals has jurisdiction over "a judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule." MCR 7.203(A)(2). Multiple statutes state that any order or decree of the PSC shall be subject to review under MCL 462.26. MCL 460.4; MCL 460.557(7); MCL 460.59; *Attorney General v Pub Service Comm No. 1*, 237 Mich App 27, 39; 602 NW2d 207 (1999). MCL 462.26 establishes an appeal of right to the Court of Appeals from orders of the PSC. *Sullivan v Pub Service Comm*, 93 Mich App 391, 396-97; 287 NW2d 188 (1979). The ability to appeal an order of the PSC under MCL 462.26 is dependent on whether that order fits within the statute's language. *Great Lakes Steel Division of National Steel Corp v Pub Service Comm*, 416 Mich 166, 178-79; 330 NW2d 380 (1982); *Attorney General*, 237 Mich App at 37.

First, it requires that the appellant be a party in interest who is dissatisfied with the order. MCR 7.203(A) requires that they be aggrieved by that order. Dissatisfied and aggrieved appear

[1] The Detroit Edison Company changed its legal name to DTE Electric Company on January 1, 2013. (Appellee's Appearance (DTE) 2 n 1, June 17, 2013.)
[2] AMI meters are commonly referred to a smart meters.

to be interchangeable words. *Attorney General*, 237 Mich App at 34-40. A party is aggrieved by an agency order when that order operates on the party's rights or property, or bears directly on the party's interest. *Midland Cogeneration Venture Ltd Partnership v Pub Service Comm*, 199 Mich App 286, 304; 501 NW2d 573 (1993). A party is aggrieved if the order will inhibit the party's ability to alter its activity or practice. *Midland Cogeneration Venture Ltd Partnership*, Mich App at 304. The concept is similar to standing, except that, the injury of an aggrieved party arises from the order or judgment of the lower court or agency rather than the underlying facts of the case. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006). An aggrieved party is one that suffers a concrete and particularized injury from the order or judgment appealed. *Federated Ins Co*, 475 Mich at 291-92. This last portion of the aggrieved party standard is borrowed from the federal constitutional approach to the standing doctrine that was adopted by the Michigan Supreme Court in *Lee v Macomb Co Bd of Comm*, 464 Mich 726; 629 NW2d 900 (2001) and *National Wildlife Federation v. Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004). The Michigan Supreme Court overturned *Lee* and *Cleveland Cliffs* in 2010 and returned to the looser prudential standing doctrine where standing exists when a cause of action exists or where a declaratory judgment is available under MCR 2.605. *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010).

All three appellants are aggrieved parties in interest. Cynthia Edwards and Linda Kurtz are residential customers of DTE from Ann Arbor, Michigan and were granted intervenor status in U-17053 on September 10, 2012. (1 Tr. 15:8-12.) Leslie Panzica-Glapa is a residential customer of DTE from Dexter, Michigan and participated in U-17053 at the Pre-hearing Conference on September 10, 2012 under Commission Rule 207. Mich Admin Code, R 460.17207; (1 Tr. 90-91.) She attempted to give testimony offered by Cynthia Edwards and

Linda Kurtz that ultimately was not admitted into evidence. (2 Tr. 187-188.) Though she did not formally intervene in the proceeding, formal intervention is not required for a party to be an aggrieved party in interest where the proceedings below and the order directly affect the interests of the appellant. *In re Freeman Estate*, 218 Mich App 151, 154-55; 553 NW2d 664 (1996); *Tucker v Clare Bros Ltd*, 196 Mich App 513, 517-20; 493 NW2d 918 (1992); *Ass'n of Businesses Advocating Tariff Equity v Mich Pub Service Comm*, unpublished opinion per curiam of the Court of Appeals, issued June 24, 2004 (Docket Nos. 246912, 247078). As evidenced in *ABATE* intervention is not mandatory to protect a litigant's interest in proceedings before the PSC. Mich Admin Code, R 460.17201. In this case Ms. Panzica-Glapa participated in the proceedings under rule 207, submitted testimony, and she could have intervened.

Edwards, Kurtz, and Panzica-Glapa have both a pecuniary and a property interest. All three wish to participate in the opt-out program, but object to the terms and conditions established by the order. The order affects their pecuniary interest by requiring them to pay a new fee to opt-out. (Order Ex. A, U-17053, May 15, 2013.) They do not want any form of AMI meter installed on their homes; they want to keep their current electromechanical meter which measures the same data as the AMI meter. (4 Tr. 508-510.) However, DTE is replacing all electromechanical meters with AMI meters and is not proposing an opt-out allowing customers keep their current electromechanical meter. (3 Tr. 273:16-21, 294:6-16.) Under the opt-out the new AMI meter's radio transmitter will be disabled during the customer's participation, but it is still an AMI meter. (3 Tr. 260:3-19, 273:9-10, 349:3-9; 4 Tr. 518:4-5.) If they refuse to accept any form of the AMI meter they face having their electricity shut-off. (3 Tr. 386:2-8.); Mich Admin Code, R 460.137(e). Sections C5.3 and C5.4 of the DTE Rate book approved by the PSC, Mich Admin Code, R 460.3409(1), MCL 460.9q(e), Mich Admin Code, R 460.116(4), MCL

750.383a, and MCL 750.282 arguably make removal of the meter a violation of the terms of service and also allow the utility to shut off electricity. Customers in Michigan are not allowed to choose their utility. Mich Admin Code, R 460.3411. The confluence of the PSC's order and these statutes, rules, and contracts places them in the unreasonable position of 1) going without electricity or 2) receiving an AMI meter that aggravates their disability. They are aggrieved.

Second, the order appealed under MCL 462.26 must fix rates, fares, charges, classifications, joint rates, regulations, practices, or services. *Attorney General*, *supra* at 29, 38-39; *Marshall v Consumers Power Co*, 206 Mich App 666, 674-75; 523 NW2d 483 (1994). To fix means, among other things, to adjust or regulate or to enact changes in enforcement practices. *In re Federal Preemption of Provisions of the Motor Carrier Act*, 223 Mich App 288, 297-98; 566 NW2d 299 (1997). The PSC by its May 15, 2013 order approving DTE's application fixed 1) the service of distributing electricity utilizing a non-transmitting AMI meter as the opt-out meter, 2) a rate to be charged to customers opting out, and 3) fixed the tariff language containing the practices, terms, and conditions of that service. (Order 19, Ex. A, U-17053, May 15, 2013.)

Third, this appeal concerns the general application of the service, rate, terms, and conditions fixed by the order. Venue is proper in this Court and not the circuit court. MCL 462.26(7). Lastly, MCL 462.26 jurisdictionally requires that appeals from the PSC order must be filed within 30 days from the issuance and mailing of notice of that order. MCL 462.26(1); *Attorney General v. Pub Service Comm*, 172 Mich App 778, 782; 432 NW2d 437 (1988). The order of the commission was issued, noticed, and mailed on May 15, 2013. This appeal was filed within 30 days of that date on June 14, 2013. (Claim of Appeal, June 14, 2013.)

STATEMENT OF QUESTIONS PRESENTED

I. The May 15, 2013 PSC order approved DTE's AMI opt-out program in which the radio transmitter on the AMI meter is temporarily disabled. DTE stated that acceptance of the AMI meter is a condition of service allowing it to shut off service to customers who refuse both the standard and the opt-out AMI meters. Did the PSC exceed its statutory authority in approving an opt-out program that enables DTE to effectively make AMI meters compulsory?

The Appellant's Answer:	Yes
The Appellee DTE's Answer:	No
The Appellee Commission's Answer:	No

II. A PSC order is unreasonable if it is not supported by competent, material, and substantial evidence. This standard requires a cost/benefit analysis before approval in order for AMI programs to be supported by competent, material and substantial evidence under *In re Application of Detroit Edison Co to Increase Rates*, 296 Mich App 101, 114-115; 817 NW2d 630 (2012). Was there evidence DTE's AMI opt-out program benefits participating customers?

The Appellant's Answer:	No
The Appellee DTE's answer:	Yes
The Appellee Commission's answer:	Yes

III. Unlawful PSC orders violate a mandatory statute. The Americans with Disabilities Act (ADA) and the Persons with Disabilities Civil Rights Act (PWDCRA) are mandatory statutes requiring reasonable accommodations without cost for disabled persons and an individualized determination of disability. Does the PSC's order violate these statutes by rendering it more difficult for disabled customers to access electricity service and by not providing a reasonable accommodation for persons with disabilities and an individualized determination of disability?

The Appellant's Answer:	Yes
The Appellee DTE's answer:	No
The Appellee Commission's answer:	No

STATEMENT OF FACTS

DTE is a public utility that generates, transmits, and distributes electricity and other services to "approximately two million residential, commercial and industrial customers within the State of Michigan." (Application 1 ¶ 1, U-17053, July 31, 2012.) The PSC regulates all investor-owned public utilities in Michigan. MCL 460.6. This agency proceeding on appeal, U-17053, was initiated when the DTE filed an application with the PSC for authority and approval to implement a program allowing customers to opt-out of receiving a transmitting AMI meter. (Application 1-2, U-17053, July 31, 2012.)

I. THE APPELLANTS

Cynthia Edwards was an intervenor in this proceeding before the agency. (1 Tr. 15:8-12.) She is a residential customer of DTE in Ann Arbor, Michigan. (Proposed Testimony of Cynthia Edwards Doc. No. 198 1, U-17053, Dec. 6, 2012.)[3] Ms. Edwards does not currently have a smart meter installed on her residence, but she has been exposed to them at work and around town since they were installed in Ann Arbor. *Id*. at 2-4. She suffers from immune and digestive problems, an irregular heartbeat, fatigue, and sleep issues. *Id*. at 3. Her symptoms were minor before AMI meters were installed in Ann Arbor. *Id*. When Ms. Edwards enters buildings with AMI meters she experiences heart palpitations, tightness in the chest, headaches, mental confusion, and tinnitus (ringing in the ears). *Id*. Her doctor advised her to limit her exposure to all radio frequency devices and that it would not be safe for her to have a smart meter installed on her home. *Id*. Ms. Edwards also suffers similar symptoms from exposure to solid state digital meters without a radio transmitter. *Id*. at 4-5. When she first called DTE she was told that

[3] This testimony was stricken on January 8, 2013. (2 Tr.185-186.) However, excluded testimony is still part of the record on appeal. MCR 7.210(A)(3). This testimony is cited to establish standing and that the appellants are aggrieved parties on appeal. In this brief citations to proposed testimony will indicate that the testimony was stricken from the record.

nothing could stop the installation of an AMI meter on her house even with her doctor's recommendation. *Id*. at 3. After mailing DTE a certified letter on the matter she was placed on an informal opt-out list. *Id*.

Leslie Panzica Glapa participated in this proceeding before the agency under Rule 207 and submitted proposed testimony. (1 Tr. 90-91; 2 Tr. 187-188.) She also submitted a comment in this proceeding. (Panzica-Glapa Comment, Doc No. 297, March 4, 2013.) She has been a residential customer of DTE in Dexter, Michigan since 1981. Ms. Panzica-Glapa runs a landscaping business that brings clients into and through her home to see the model garden she keeps in her backyard. (Proposed Testimony of Leslie Panzica-Glapa Doc. No. 173 1-2 (55-56 in PDF), U-17053, Nov. 8, 2012.) An AMI meter was installed on her home on July 18, 2012. (Proposed Testimony of Leslie Panzica-Glapa Doc. No. 173 2 (56 in PDF), U-17053, Nov. 8, 2012.) Subsequently, she had significant difficulty sleeping for the first time in her life. *Id*. at 2. She called DTE, but this did not resolve the situation. *Id*. at 3. Her difficulty sleeping forced her to sleep in a tent in her backyard which improved her sleep, but she had to return indoors when high winds repeatedly blew her tent down. *Id*. at 4. She still has difficulty sleeping due to vibrations going through her body and tinnitus when in the proximity of an AMI meter. *Id*. Her memory, concentration, ability to interact with others, and reading ability have also been substantially and negatively affected and her productivity at work has decreased. *Id*. at 4-6. Her sixteen year-old son, a diabetic who sleeps a few feet from the AMI meter, had his blood sugar level spike upwards after the AMI meter was installed. *Id*. at 6.

Linda Kurtz participated in the proceedings before the agency as an intervenor. (1 Tr. 15:8-12.) Ms. Kurtz owns and runs a biodynamic craniosacral therapy and massage business in her home, visits with clients there, and edits a journal there. (Proposed Testimony of Linda

Kurtz Doc No. 171 9 (21 in PDF), U-17053, Nov. 8, 2012.) She is a residential customer of DTE. *Id*. at 1-2. An AMI meter has not yet been installed on her home. *Id*. at 15 (27 in PDF). After as little as 10-15 minutes in the proximity of AMI meters she suffers from severe insomnia lasting up to three nights that gets progressively worse with prolonged exposure, heart palpitations, cognitive dysfunction and memory problems, anxiety, headaches, and tinnitus. *Id*. at 2-3. On both days of cross-examination in this case she asked that the microphone be removed as it made participating in the proceeding difficult for her and Judge Mack accommodated her by doing so. (3 Tr. 429:22-25, 430:1-15; 4 Tr. 580:20-22.) Her symptoms have become far worse due to AMI meter installation in Ann Arbor and substantially interfere with her ability to work, concentrate, read, learn, sleep, think, interact with others, and care for herself. *Id*. at 12-13. She has experienced similar symptoms, especially tinnitus, in the presence of non-transmitting digital meters. *Id*. at 13 (25 in PDF.)

II. METERING EQUIPMENT

Today, electromechanical meters have a 43 year book depreciation life. (4 Tr. 473:6-8.) Recent developments in metering have involved wireless technology and solid state electronics. The AMI meter is part of a two-way fixed communication network. (3 Tr. 226:1-7.) The meter automatically transmits meter readings, monitors and transmits alerts on outages and power quality, allows remote disconnect and reconnection, allows for load management, and distribution optimization. (3 Tr. 226:1-7.) DTE selected the Itron Openway Centron AMI meter and signed a contract with Itron on July 18, 2008. (3 Tr. 226:17-25.) The Itron Openway Centron meter is a solid state, single-phase electric meter equipped with AMI technology. (Ex. I-JH-3 [Ex. 3].); U.S. Patent No. 7701199 (filed Mar. 15, 2005.). The Openway Centron meter contains two wireless communications devices. (Ex. I-JH-6, admitted at 3 Tr. 569:6-8.) The first device is a direct connect GPRS RFLAN communications module and the second is a Zigbee

wireless component. (Ex. I-JH-6 [Ex. 6], admitted at 3 Tr. 569:6-8.) The meters are bought from the factory with the AMI radio activated. (3 Tr. 290:4-9.) By January 2013 DTE expected to have 965,000 electric AMI meters installed. (3 Tr. 433.) DTE has about 2.1 million residential meters total. (3 Tr. 432:22.) Additional installations will continue through 2019 (2 Tr. 134:3-9, U-15768 After Remand.)

III. METERING EQUIPMENT IN NATIONAL POLICY

In 2005 Congress passed the Energy Policy Act. It directed each state regulatory agency to conduct an investigation and issue a decision on the appropriateness of electric utilities providing time-based meters and communication devices to enable time based pricing and other demand response programs. 16 USC § 2625(i). This law led the MPSC to find that DTE and all but two Michigan utilities were compliant with federal law by offering time based rates. (Order 4, U-15183, January 30, 2007.) In 2009 Congress granted 50% in matching funds to utilities deploying AMI. 42 USC § 17386.

IV. MICHIGAN PUBLIC SERVICE COMMISSION AMI CASES

Since U-15183, the PSC has reviewed various AMI issues in approximately 20 cases including U-15244 (DTE's Electric AMI Pilot program), U-15278 (Smart Grid Collaborative), U-15620 (AMI minimum functionality), U-15645 (Consumers Energy Electric AMI Pilot), U-15768 (DTE Rate Case Electric AMI deployment), U-15986 (Consumer's Energy Gas AMI), U-16117 (DTE Electric AMI and Electromechanical Meter Depreciation), U-16180 (Indiana-Michigan Power Electric AMI Pilot), U-16191 (Consumers Energy Electric AMI Pilots and Full Deployment), U-16287 (DTE Waiver of Meter Testing rules), U-16400 (MichCon Gas AMI), U-16418 (Consumers Energy Gas Rate Case and Gas AMI), U-16472 (DTE Rate Case Electric AMI Full Deployment), U-16489 (DTE Electric AMI Consolidated with U-16472), U-16794

(Consumers Energy Electric AMI Pilot and Full Deployment), U-16999 (MichCon Gas AMI), U-17000 (AMI Privacy, Health, Opt-out issues), U-17053 (DTE AMI Opt-out), U-17087 (Consumers Energy AMI Opt-out), and U-17102 (AMI Privacy Policies).

The PSC approved DTE's AMI pilot program in U-15244 in 2008. The first stage of the pilot involved 6,000 electric AMI meters and 4,000 gas AMI modules in the fall of 2008. (2 Tr. 49:8-25, U-15768 After Remand.) The MPSC viewed the program favorably. It allowed DTE to recover the costs of the pilot program, but deferred further recovery for future rate cases. (Order 62-63, U-15244, Dec. 23, 2008.) After completing the pilot program DTE began a full deployment of electric AMI meters to replace all of its electromechanical meters in an 11 year installation period running from 2008-2019. (2 Tr. 134:3-9, U-15768 After Remand.)

Smart Grid infrastructure was the topic of the smart grid collaborative in U-15278 opened in 2007. (Order, U-15278, April 24, 2007.) The Staff report recommended that the cost causation method of ratemaking apply to AMI cost recovery. (Staff Rep. 48, U-15278, Feb. 1, 2012.) The collaborative found that concerns about a linkage between health problems and AMI persisted despite federal standards. *Id*. at 17. It recommended that the utilities and the MPSC continue to explore the issue as additional scientific research becomes available. *Id*. In its 2008 report on AMI functionality in U-15620 the PSC Staff presciently observed:

> Although various comments were received, the remaining issue that Staff considers most important involves the effects of AMI on the relationship between the utility and its customers, especially as it relates to collection and shut-off protection. Through long experience, the Commission has well-established procedures to ensure an equitable relationship between a utility and its customers. These procedures are necessary because, unlike most other businesses, a utility is, by definition, a natural monopoly. [(Staff Rep 15-16, U-15620, Oct. 1, 2008.)]

The PSC smart meter collaborative report observed that this relationship between could be fostered through case-by-case accommodation noting, "[n]o policy will be developed for Opt-

out, Customers with issues are being addressed case-by[-]case with positive results." (Smart Grid Collaborative Report, 126, U-15278, Feb. 1, 2012.)

V. COMMISSION'S INVESTIGATION OF AMI CUSTOMER CONCERNS U-17000.

The present case arises from developments in another agency proceeding relating to AMI meters. The PSC, in response to nine resolutions[4] passed by municipalities and concerns expressed at its consumer forums, issued an order opening a comment case, U-17000, on January 12, 2012 requesting that the utilities subject to its regulation and other parties comment on various issues raised by the deployment of AMI meters including costs, savings, privacy, safety, and opt-out issues. (Order 1-2, U-17000, January 12, 2012.) The order did not cite any basis for the commission's jurisdiction. The MPSC received 397 comments from unique parties. (Staff Rep. 3-4, U-17000, June 29, 2012.) A total of 250 of comments came from DTE customers. *Id*. at 4. Of the 397 comments 77% of the comments expressed health concerns about AMI meters and 84% of comments supported an opt-out. *Id*. Privacy concerns were expressed in 49%. *Id*.

The report noted that "[i]ndividuals with EHS [Electromagnetic hypersensitivity] report real symptoms; however health research has been unable to consistently attribute those symptoms to EMF exposure." *Id*. at 10. It noted that RF emissions were below the FCC maximum exposure standards in and decreased with distance from the meter.[5] *Id*. at 9. The Staff noted that AMI meters are only one device of many with RF emissions. Others include cell phones, microwaves, baby monitors, garage door openers, fluorescent lighting, electrical wires,

[4] The Commission attached the first nine municipal resolutions to the January 12, 2012 order, but the number of resolutions passed by local communities increased after that order was entered. (Docket Entries 1, 30, 49, 133, 160, 165, 167, 171, 263, 287, 459, U-17000; 4 Tr. 552:99-117.)

[5] FCC regulations on human exposure to RF waves to protect against adverse health effects due to tissue heating are found in 47 CFR §§ 1.1307(b), 1.1310, 2.1091, 2.1093, 15.247. These regulations do not address non-thermal health issues with RF energy emissions.

wireless laptops, and routers. *Id.* at 10. The Staff concluded that "the health risk from the installation and operation of metering systems using radio transmitters is insignificant." *Id*. at 28.

Nevertheless, the Staff concluded that the best solution to customer concerns was to offer an opt-out program. The Staff noted that "[e]lectromechanical meters may be a viable opt-out option for some customers; however, maintaining electromechanical test facilities, inventory, and manual meter reading could result in higher incremental costs." *Id*. at 27. The Staff opined that the electromechanical meter is obsolete and not currently in production and as such it was not a long-term solution. *Id*. The report also suggested the installation of an AMI meter without a communicating radio, relocating the meter, or hard wiring the AMI meter instead of using the radio. *Id*. It noted that an AMI meter without a communicating radio would allow the utility to maintain just one type of meter, but it would require manual meter reading. *Id*. The Staff recommended that the costs of any opt-out proposal should reflect the actual cost and that ratemaking should follow cost-of-service principles. *Id*.

VI. DTE'S APPLICATION TO IMPLEMENT OPT-OUT PROGRAM.

A month after the staff filed its report in U-17000, DTE filed its application for approval and authority to implement an opt-out program.(Application 1, U-17053, July 31, 2012.) DTE's AMI manager Robert Sitkauskas testified, "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 Tr. 230:14-15.) DTE's application proposed that opt-out customers would pay an $87 initial charge and a $15 monthly fee. (Application 2, U-17053, July 31, 2012.) Also reflected in the proposed monthly fee was a $0.45 credit of the standard meter reading fee to prevent a duplicate charge and a $0.15 credit reflecting the AMI costs included in the current rates. (Ex. A-1.) The proposal did not require customers to provide a reason for opting out. (4 Tr. 488:1-9.) The Prehearing

conference in U-17053 was held on September 10, 2012. (1 Tr. 1-97.) Intervention was granted to the Attorney General, John and Pauline Holeton, Lillian and Dominic Cusumano, Richard Meltzer, Linda Kurtz, Cynthia Edwards, Sharon Schmidt, and Karen Spranger. (1 Tr. 15:8-12.)

On September 11, 2012 the MPSC issued its order in U-17000 where it accepted the staff report "as a practical point of departure for further discussion and Commission action." (Order 4, U-17000, Sept. 11, 2012.) The MPSC ordered that electric utilities owned by investors "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." *Id*. at 5. The order also stated an intention to open a case for the commission to consider AMI meter privacy issues. *Id*. at 6. On October 31, 2012 the commission followed through and issued an order opening U-17102. (Order, U-17102, Oct. 31, 2012.) In June 2013 DTE and Consumers Energy were ordered to submit tariffs containing privacy policies. (Order, U-17102, June 28, 2013.)

The Staff and DTE filed several motions on December 14, 2012 and December 20, 2012 to strike testimony offered by the intervenors contending that they contained inadmissible testimony concerning health and privacy issues. A hearing on the motions to strike was held on January 8, 2013. (2 Tr. 98.) The ALJ ruled that most of the proffered evidence was not admissible because it was outside the scope of the case, contained hearsay, and was improper expert testimony from a lay witness. (2 Tr. 180-196.)

Cross-examination was held on January 15 and January 16, 2013. Robert Sitkauskas testified that 1,100 customers contacted DTE to express their concerns about AMI meters through mid-July 2012 leading DTE to consider an opt-out as an appropriate business practice. (3 Tr. 230:7-15.) By January 2013 the number of customer contacting DTE about AMI meter installations had climbed to 3,269. (4 Tr. 473:15-20.) DTE also determined that the

electromechanical meter would not remain in service. (3 Tr. 273:16-21). Sitkauskas testified they are not in production, but that he had not verified that with all suppliers. (3 Tr. 294:25.) Customers who opt-out will receive an AMI meter with the radio disabled. (3 Tr. 260:10-19, 273:9-10.) He also testified that the initial fee was based on part the 45 minutes it takes to disable the radio inclusive of travel. (3 Tr. 349:3-24.) But he also testified that replacing an electromechanical meter with an AMI meter takes five minutes. (3 Tr. 444:19-25.) The electromechanical meter records the same information that the AMI meter does and there is no distinction between them on the basic function of recording electricity nor is replacement of the meter required to get a reading. (4 Tr. 508-510.) He noted that customers refusing both the regular and the opt-out meter may be "liable for shut-off in some respect." (3 Tr. 386:2-8.) Sitkauskas testified that the tariff included references to non-transmitting AMI meters to establish the type of meter used for the opt-out. (4 Tr. 518:4-5.) The monthly fee was based on the assumption that 4,000 customers would opt-out. (3 Tr. 233:1-4.)

The Staff's witness recommended reducing the initial fee to $67.20 and the monthly fee $9.80 based on a higher estimated opt-out participation rate of 15,500 that was based on estimates by Consumers Energy and other utilities. (4 Tr. 578:3-4.)

On briefs Linda Kurtz and Cynthia Edwards argued among other things that DTE's proposed opt-out fee violates the Americans with Disabilities Act (ADA) and is not a reasonable accommodation. (Kurtz & Edwards Initial Br., U-17053, Feb. 12, 2013.) The Attorney General argued that it was most cost effective to allow opt-out customers to keep their electromechanical meters. DTE argued that its cost recovery was just and reasonable. The Staff argued that its monthly fee reflected a better estimate of participation in the opt-out.

The ALJ issued a proposal for decision (PFD) on March 22, 2013 adopting the staff's recommendation to lower the initial fee to $67.20 and the monthly fee to $9.80. (PFD 35, U-17053, Mar. 22, 2013.) The PFD ruled that most of the legal challenges under the ADA and other statutes were outside the scope "in a proceeding whose sole purpose is to establish an Opt-Out Program under cost-of-service principles." (PFD 24, U-17053, Mar. 22, 2013.)

Ms. Kurtz and Ms. Edwards filed 16 exceptions to the PFD on April 12, 2013 challenging, among other things, the PFD's determination on scope, its characterization of the type of meter used in the opt-out as a managerial decision under *Union Carbide*, and its findings regarding the ADA. (Kurtz and Edwards Exceptions, U-17053, April 12, 2013.)

The Commission issued an order on May 15, 2013. The order ruled that exceptions as to the scope of the proceeding were unpersuasive noting that "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 has proposed an appropriate plan and tariff for customers who want a non-transmitting meter." (Order 17, U-17053, May 15, 2013.) The MPSC adopted the PFD's ruling that allowing customers to keep their electromechanical meter would infringe on DTE's managerial prerogatives. *Id*. at 18. The MPSC adopted the findings and recommendations in the PFD including lowering the initial fee for the opt-out to $67.20 and the monthly fee $9.80. It also adopted the staff's minor changes to the tariff language. *Id*. at Exhibit A.

Ms. Kurtz and Ms. Edwards filed a petition for rehearing on June 14, 2013 noting that DTE had imposed a 30 day deadline to opt-out in letters it was sending to customers that was not in the May 15, 2013 order. (Pet. Rehearing, U-17053, June 14, 2013.) They also complained that DTE was not informing all its customers of the opt-out. On July 29, 2013 the MPSC granted

the petition for rehearing, but denied the relief requested and ordered DTE to conform its communications with customers to the May 15, 2013 order. (Order 5, U-17053, July 29, 2013.)

In the September 11, 2012 order Consumer's Energy was also ordered to file an opt-out program application with the Commission. (Order, U-17000, Sept. 11, 2012.) The Consumers Energy opt-out allowed customers to keep their electromechanical meter. (4 Tr. 549:2-5, U-17087.) The MPSC approved the Consumers Energy opt-out program in its June 28, 2013 order with a $9.72 monthly fee and a $69.39 initial charge if an AMI meter has not yet been installed on the customer's premises or a $123.91 initial charge if an AMI meter must be removed and replaced with an electromechanical meter. (Order 9, U-17087, June 28, 2013.) The June 28, 2013 order is currently on appeal to this Court in Dockets 317434 and 317460, and 317456.

ARGUMENT

This appeal emerged from the regrettable deterioration of that critical relationship between utility and customer at the crossroads of monopoly, new technology, miscommunication, disability, and the sanctity of the home. The May 15, 2013 order of the PSC is unreasonable because substantial, competent, and material evidence does not exist to support it as to how it benefits customers. The PSC's order is unlawful, because it exceeded the scope of its statutory authority by enabling DTE to mandate AMI meters for all customers by approving an opt-out that still requires customers to receive an AMI meter with its radio temporarily disabled. The PSC's order is also unlawful, because it does not provide a reasonable accommodation for individuals with qualified disabilities in violation of the ADA.

I. THE PSC EXCEEDED ITS STATUTORY AUTHORITY BY ENABLING DTE TO MAKE AMI METERS COMPULSORY WHEN IT APPROVED AN OPT-OUT PROGRAM THAT STILL REQUIRES CUSTOMERS TO RECEIVE AN AMI METER WITH THE RADIO DISABLED.

The opt-out program approved by the PSC from DTE's deployment of its new standard AMI meter allows customers the option of having the radio transmitter disabled on the new AMI meter, but still demands that its customers have an AMI meter on their homes. DTE's expert witness Robert Sitkauskas testified that it was a condition of service that the customer must accept either 1) the standard AMI meter or 2) the same AMI standard meter with the radio transmitter manually disabled as part of DTE's opt-out program. (3 Tr. 260:10-19, 273:9-10, 290:4-9, 294:6-9.) Sitkauskas admitted that an AMI meter records the same information that the existing electromechanical meter does. (4 Tr. 508:13-25, 509:1-11.) He further testified that customers would be subject to power shut-off if they did not comply with the installation of the AMI meter through either the normal service or the opt-out program. (3 Tr. 386:2-8.) Furthermore, the PSC forbids customers from changing electric service providers. Mich Admin Code, R 460.3411. Through the combination an illusory opt-out program and the PSC's shut-off regulations, the PSC has promulgated a de facto mandate without statutory authorization.

A. STANDARD OF REVIEW

The PSC has no common law powers; but is limited to only those powers explicitly granted to it by statute. *Union Carbide Corp v Pub Service Comm*, 431 Mich 135, 146; 428 NW2d 322 (1988). Powers conferred upon the PSC by statute are strictly construed by the courts. *Consumers Power Co v Public Service Comm*, 460 Mich 148, 155; 596 NW2d 126 (1999). These statutory powers must be conferred by "clear and unmistakable language" as the courts have held "a doubtful power does not exist." *Union Carbide Corp*, 431 Mich at 146. The courts do not weigh the economic and policy implications and public policy factors that underlie the PSC's action. *Consumers Power Co v Pub Service Comm*, 460 Mich 148, 156; 596 NW2d

126 (1999). Courts review the scope of the PSC's statutory authority de novo as a question of law. *Id*. An agency order exceeding the agency's authority is unlawful.

B. THE PSC LACKS THE STATUTORY AUTHORITY TO MAKE AMI METERS COMPULSORY BY APPROVING AN ILLUSORY OPT-OUT.

Aside from the first AMI case in U-15183 that dealt with a federal law, the PSC has not cited a statute that grants it authority to do anything other than to consider rates and allow cost recovery of AMI pilot and full deployment expenses.

1. ENERGY POLICY ACT OF 2005

Congress passed the Energy Policy Act of 2005 requiring that every state regulatory ratemaking authority consider, after public notice and hearing, implementing 19 federal energy policy standards. 16 USC § 2621(a). Congress did not require the state agencies to adopt the federal policies. *Id*. AMI was mentioned specifically in relation to time-based rates in that if the state agency chose to require time-based rates then the utilities must enable customers' ability to manage energy usage through advanced metering and communications technology. 16 USC § 2621(d)(A). Electric utilities must provide customers voluntarily requesting time-based rates an advanced meter capable of enabling that rate. 16 USC § 2621(d)(C). The Act also directed state agencies to investigate and issue a decision on the appropriateness of electric utilities providing and installing time-based meters and communications devices for their customers to enable them to participate in time-based rate pricing and demand response schedules. 16 USC § 2625(i). This language does not authorize a mandate.

2. CLEAN, RENEWABLE, AND EFFICIENT ENERGY ACT OF 2008

The Michigan statutes dealing with meter type are found in the Clean, Renewable, and Efficient Energy Act of 2008. As part of its general definitions section MCL 460.1003(j) defines a customer meter as: "[A]n electric meter of the provider's retail customer. Customer meter does not include a municipal water pumping meter or additional meters at a single site that were

installed specifically to support interruptible air conditioning, interruptible water heating, net metering, or time-of-day tariffs." Interruptible rates for air conditioning and water heating, net metering, and time-of-day tariffs are all rate programs that require AMI meters. The Itron Openway Centron meter, DTE's standard AMI meter, is capable of net metering and time-of-day tariffs. (Ex. I-JH-6 [Ex. 6].) This act contemplates that AMI meters would replace or supplement existing meters for customers that choose to participate in specific optional rate programs that are not possible without AMI meters.

Net metering is a program where a customer pays for energy from the utility, but gets a credit for energy the customer generates and contributes into the grid. The net metering statute only requires that the utility provide and install advanced meters capable of measuring bi-directional energy flow where the customer participates in a net metering rate program and is capable of generating more than 20 kilowatts. MCL 460.1177(1). Again, a mandate is authorized only when a customer selects an optional rate plan that is not possible without the AMI meter. Under state law the PSC is barred from prohibiting an electric utility from metering and billing its customers for services provided by that utility. MCL 460.10q(5). This statute makes no reference to the method of metering. AMI meters collect the same usage data that electromechanical meters and other types of meters do. (4 Tr. 508-509.) The law bars utilities from refusing to provide service to a customer based solely on the customer's participation in net metering. MCL 460.1173(4). In MCL 460.9q there are parallel procedures for shut-off using conventional methods and one specific clause for AMI remote shut-off in subsection 13.

3. CUSTOMER CHOICE AND ELECTRIC RELIABILITY ACT

As part of the Consumer Choice and Electricity Reliability Act adopted in 2000, the legislature directed that the PSC "shall establish rates, terms, and conditions of electric service that promote and enhance the development of new generation, transmission, and distribution

technologies." MCL 460.10b(1). AMI meters are a new technology in distribution. However, even this clause is not mandatory in nature at least in terms of customers. This Court has held that the PSC exceeded its authority in authorizing the Consumers Energy Company to impose a mandatory 5 cent monthly per meter charge on all customers for the development of renewable resource power generation. *Attorney General v Pub Service Comm*, 269 Mich App 473, 481-482; 713 NW2d 290 (2005). This charge was imposed even on customers who did not agree to pay for an additional fee for renewable energy. *Id*. at 481. This Court noted that the Legislature premised the adoption of the Consumer Choice and Electricity Reliability Act on customer choice; both statutes cited were adopted as part of that act. *Id*. at 482. This Court found that the legislature intended customer participation to be voluntary and ruled that "[n]either MCL 460.10b(1) nor MCL 460.10r(6) specifically authorizes the PSC to enable a utility to compel customers to pay to support a voluntary renewable resource energy program even if they have not chosen to receive power for the program." *Id*. That the fee might be helpful to the economy or public policy was not considered by this Court as courts must not consider policy implications while weighing the extent of the statutory authority of the PSC. *Id*. In 2008 the legislature passed a statute that allowed for the collection of a renewable energy fee. MCL 460.1045.

Just as the PSC enabled Consumers Power Company to impose a mandatory renewable energy fee on all its customers in *Attorney General v. Public Service Commission*, the PSC in this case has enabled DTE's AMI meter mandate as a condition of service by approving an opt-out program that still requires customers to receive a modified AMI meter. The PSC's approval of DTE's opt-out program in the context of DTE's intent to classify meter type as a condition of service and pre-existing PSC rules and regulations leave the objecting customer, who does not want an AMI meter of any kind, with no option but service termination. In approving DTE's

opt-out program with only AMI meters the PSC has exercised powers not granted to it by statute to create a de facto mandate. The statutory language and legislative intent that does exist, as noted above, supports neither a de jure nor a de facto AMI mandate on individual customers.

4. ECONOMICS AND POLICY ARE NOT CONSIDERED BY COURTS TO DETERMINE THE PSC'S AUTHORITY

DTE may not experience all of the efficiencies of having a one-meter type operation if it cannot mandate AMI meters, but this is an economic policy issue that courts must ignore when construing whether the PSC acted within its statutory authority. *Consumers Power Co v Pub Service Comm*, 460 Mich 148, 156, 168; 596 NW2d 126 (1999); *Attorney General*, 269 Mich App at 482. The same is true of the supposed short supply of electromechanical meters. (3 Tr. 294:5-25; 4 Tr. 521:91-17.) This factor cannot be considered by the Court in determining the scope of the PSC's authority as it is an economic matter. *Attorney General*, 269 Mich App at 482. In any event even with a mandate DTE will effectively be a multi-meter company at least through the end of its initial installation phase in 2019. (2 Tr. 134:3-9, U-15768 After Remand.) DTE will have an ample supply of electromechanical meters at least through the end of the initial installation as it removes over a million of them from residences receiving the new AMI meter. DTE was also confident enough in the reliability of its currently installed electromechanical meters that it requested and received from the PSC a waiver of testing requirements for them noting that testing consistently yields results above 99%. (DTE Application 3, U-16287, May 21, 2010; Order, U-16287, Dec. 2, 2010; Order, U-16287, Oct. 31, 2012.)

Other regulatory commissions and utilities across the country are adopting AMI opt-outs with electromechanical meters as an option. Maine is one example.[6] California is another. [7]

[6] In Maine customers may opt-out by 1) retaining their existing analog meter for a $40 initial fee and $12 monthly, 2) receive the standard smart meter with the radio transmitter turned off for a $20 initial fee and $10.50 monthly or 3) relocate the standard smart meter on the customer's

Vermont established a customer right to opt-out without a fee and allows customers to have AMI meters removed from their home at no charge. VT STAT tit 30, § 2811. New Hampshire requires the written consent of the home or business owner to install an AMI meter and allows the home or business owner to have an AMI meter removed.. N.H. REV. STAT. § 374:62. Nevada's trial opt-out program allows customers to keep an electromechanical meter rather than an AMI meter.[8] The PSC approved Consumers Energy Company's opt-out plan that allowed customers to keep their existing electromechanical meter. (4 Tr. 549:2-5, U-17087; Order 9, 11, U-17087, June 28, 2013.)

C. THE MANAGERIAL DECISION LIMITATION ON THE PSC'S RATEMAKING POWER IS NOT APPLICABLE.

In its reply brief before the PSC DTE raised the issue of the legal prohibition on the PSC making management decisions for the utility through its ratemaking power. (DTE Reply Br. 5-6, Feb. 26, 2013.) DTE contends that the PSC cannot force it to make equipment decisions such as the decision to deploy AMI generally or more specifically to this case DTE argues that the PSC may not compel it to offer an electromechanical meter as part of its opt-out program to AMI meters. This rule is not applicable here. The issue is the PSC's enabling of DTE to de facto mandate its customers to receive AMI meters. The PSC's May 15, 2013 did not compel DTE to make any management decisions as DTE voluntarily applied for the approval of its program.

In any event the PSC may use its ratemaking power to encourage, but not compel a utility to make certain management decisions. *Union Carbide*, 431 Mich at 148. The PSC may

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premises at customer expense. (Order, Maine Public Utilities Comm, Docket 2010-00345, May 19, 2011.) The Maine Public Utilities Commission was ordered by the Maine Supreme Judicial Court to determine AMI meter safety. *Friedman v Pub Utilities Comm*, 48 A3d 794 (2012).

[7] California included the electromechanical meter as a meter available in the opt-out program. (Decision 20-21, California Pub Utilities Comm, A.11-03-014, Feb. 1, 2012.)

[8] The Nevada Public Utilities Commission issued an order adopting a four-year trial opt-out program with an initial fee of between $52.44 and $52.86 and a monthly fee from $8.72 to $9.26 depending on the customer's utility. (Order, Nev Pub Utilities Comm, 12-05003, Jan. 9, 2013.)

preclude the utility from passing on costs to its customers, but may not directly order a utility to cease an operation using its ratemaking power. *Consumers Power Co v Public Service Comm*, 460 Mich 148, 158; 596 NW2d 126 (1999); *Union Carbide*, *supra* at 148. This limitation on the PSC's power is really just a combination of prohibiting the PSC from making management decisions while using its ratemaking power and a restatement of the general rule that the PSC only has the powers explicitly granted to it by statute. The management decisions limitation on the PSC's ratemaking power only applies absent a statute that clearly confers on the PSC the power to order the utility to do something that is considered a management decision. *Consumers Power Co*, 460 Mich at 158; *Union Carbide*, 431 Mich at 151; *Huron Portland Cement Co v Pub Service Comm*, 351 Mich 255, 261; 88 NW2d 492 (1958). Justice Brickley noted in his dissent in *Consumers Power Co v Public Service Commission* that the *Union Carbide* decision was based on the lack of any specific statute granting the PSC the power to forbid the operation of the facility. *Consumers Power Co*, 460 Mich at 177 (Brickley, J. dissenting). There was no need in *Union Carbide* for the PSC to go further and bar operation of the facility. *Id*. The issue of whether a decision was a management decision is only relevant if the PSC invokes its ratemaking power and there is no other statute empowering the PSC independent of the ratemaking statutes. *Id*. Where a statute grants a power separate from ratemaking *Union Carbide* does not apply. *Attorney General v Pub Service Comm No. 1*, 171 Mich App 696, 698; 431 NW2d 47 (1988).

Separate and independent from its ratemaking power, the PSC has the discretionary power, "to see that their [the utility's] property is maintained and operated for the security and accommodation of the public and in compliance with the provisions of law." MCL 460.556; *Huron Portland Cement Co*, 351 Mich at 265. The ADA and PWDCRA are other mandatory

statute that the PSC must comply with as discussed later in this brief. DTE owns all the meters used by its customers. MCL 460.10q(4); (3 Tr. 293:10-12, 386:17, 387:12-13.) DTE does not, however, own the homes of its customers. The meter is installed on the home as a condition of service under DTE's sections C5.3 and C5.4 of the rate book and tariffs as approved by the PSC. (3 Tr. 386:2-8.).

In its testimony DTE states that it made a management decision to provide an opt-out before the PSC issued its order. DTE's expert witness Robert Sitkauskas testified, "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 Tr. 230:14-15.) DTE made the optional management decision to generally deploy AMI meters. DTE made the management decision to offer an opt-out program before the PSC ordered it. (Application, U-17053, July 31, 2013.) DTE knew the PSC's order in U-17000 was premised on customer concerns about AMI meters primarily relating to health and privacy; it also knew that the majority of the comments in that case were from its customers. (Staff Report 4, U-17000, June 29, 2012.) Under these circumstances DTE has already made the management decision to offer an opt-out program to address the concerns of its customers. 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.

The PSC lacks the statutory authority to enable DTE to de facto mandate AMI meters by approving an AMI opt-out program that still requires customers to receive an AMI meter with its radio temporarily disabled. *Attorney General*, 269 Mich App at 481-482. The legislative intent that exists indicates that the legislature intended customer participation in AMI to be voluntary.

II. THE MAY 15, 2013 ORDER OF THE PSC IS UNREASONABLE. IT IS NOT SUPPORTED BY THE COMPETENT, MATERIAL, AND SUBSTANTIAL EVIDENCE AND IT CONSTITUTES AN ABUSE OF DISCRETION.

A. STANDARD OF REVIEW

The standard for appellate review of orders from the Michigan Public Service Commission is narrow. All rates, fares, charges, classifications, joint rates, regulations, practices, and services proscribed by the Public Service Commission are presumed on appeal, prima facie, lawful and reasonable. MCL 462.25. A party aggrieved by an order of the PSC has the burden of proving by clear and satisfactory evidence that the order of the Commission is unlawful or unreasonable. MCL 462.26(8). To declare an order unlawful there must be a showing that the MPSC failed to follow a mandatory statutory provision or abused its discretion. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 386 (1999). An order is unlawful if it is based on an erroneous interpretation of the law and it is unreasonable in instances where it is not supported by the evidence. *Associated Truck Lines, Inc. v Pub Service Comm*, 377 Mich 259, 269; 140 NW2d 515 (1966). To the extent that an administrative agency order conflicts with a statute the order is void. *Manufacturers Nat'l Bank v Director of Dep't of Natural Resources*, 420 Mich 128, 146; 362 NW2d 572 (1984). Where the PSC has jurisdiction there is a "broad range or 'zone' of reasonableness within which the PSC may operate." *In re MCI Telecom Complaint*, 460 Mich at 427. An order is unlawful or unreasonable when "it is arbitrary, capricious, an abuse of discretion, or not supported by the record." *In re Filing Requirements for Complaint and Applications Filed Under the Michigan Telecommunications Act*, 210 Mich App 681, 692; 534 NW2d 234 (1995). An arbitrary and capricious order is unreasonable. *Attorney General v Michigan Pub Service Comm*, 269 Mich App 473; 713 NW2d 290 (2005).

The function an agency plays in a case aids in ascertaining the proper standard of review. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 101-02; 754 NW2d 259 (2008). When an agency engages in fact-finding the courts will give deference to the administrative

expertise of the agency and may not substitute its judgment for that of the MPSC. *Giaras v Michigan Pub Service Comm*, 301 Mich 262, 269; 3 NW2d 268 (1942). However, final orders of the PSC involving fact-finding still "must be authorized by law and if, a hearing is required, supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Great Wolf Lodge of Traverse City, LLC v Pub Service Comm*, 489 Mich 27, 37-38; 799 NW2d 155 (2011).

When an agency engages in legislative functions such as ratemaking the courts do not apply the substantial evidence test, but will defer to the expertise of the administrative agency unless there is a violation of a constitutional provision, a mandatory statute or limiting statute. *Consumers Power Co v Pub Service Comm*, 226 Mich App 12, 21; 572 NW2d 222 (1997); *Ass'n of Businesses Advocating Tariff Equity v Public Service Comm*, 205 Mich App 383, 390; 522 NW2d 140 (1994). Legislative policy decisions are reviewable only for unlawfulness or clear abuses of discretion involving no choice between reasonably differing viewpoints. *Consumers Power Co*, 226 Mich App at 32. Courts will not disturb a legislative decision of rate structure unless it is shown to be arbitrary, capricious, or an abuse of discretion. *Detroit Edison Co v Public Service Comm*, 221 Mich App 370, 381-82; 562 NW2d 224 (1997).

Questions of statutory interpretation are reviewed de novo as questions of law. *County of Wayne v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004). The statutory interpretation of an administrative agency is reviewed de novo with respectful consideration, but not deference. *In re Complaint of Rovas, supra* at 103; *Boyer-Campbell v Fry*, 271 Mich 282; 260 NW 165 (1935); *In re Application of Detroit Edison Co to Increase Rates*, 296 Mich App 101,107; 817 NW2d 630 (2012). The agency's interpretation is not binding on the courts and cannot conflict with legislative intent expressed in the statute. *In re Complaint of Rovas*, 482 Mich at 103. If

persuasive it may it will not be overruled without cogent reasons, but if it is vague or obscure it may simply serve as an aide in determining legislative intent. *Id*. Where the administrative order defeats the public policy purposes of legislative intent the court does not defer to the agency and must enforce the legislature's intent. *Ass'n of Businesses Advocating Tariff Equity v Pub Service Comm*, 297 Mich App 377; 823 NW2d 433 (2012) (Saad, J. dissenting) (pending before the Michigan Supreme Court as Docket No. 145750). Issues concerning the jurisdiction or authority of the PSC are questions of law and are reviewed de novo. *In Michigan Consol Gas Co to Increase Rates Application* , 293 Mich App 360, 364-365; 810 NW2d 123 (2011).

B. *IN RE APPLICATION OF DETROIT EDISON CO TO INCREASE RATES* APPLIES THE COMPETENT, MATERIAL, AND SUBSTANTIAL EVIDENCE STANDARD TO AMI PROGRAMS REQUIRING PROOF OF BENEFITS TO THE CUSTOMER. NO BENEFIT HAS BEEN SHOWN.

The Michigan Constitution established a minimum level of review for actions and orders of administrative agencies, if a hearing is required, mandating that the order must be 1) authorized by law, and 2) if a hearing is required that the findings be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6,§ 28. This standard applies to fact-finding. A different standard applies to legislative functions such as ratemaking. *Consumers Power Co*, 226 Mich App at 21. However recently, this Court has applied the competent, material and substantial evidence standard in rate cases for AMI meter cost recovery. *In re Application of Detroit Edison Co to Increase Rates*, 296 Mich at 101.

Substantial evidence is "any evidence that reasonable minds would accept as adequate to support the decision." *Battiste v Dep't of Social Services*, 154 Mich App 486, 492; 398 NW2d 447 (1986). It is more than "a mere scintilla of evidence, but may be less than a preponderance of evidence." *In re Complaint of Pelland Against Ameritech Michigan*, 254 Mich App 675, 685; 658 NW2d 849 (2003). Testimony by even a single expert witness is substantial if the expert is

qualified and has a rational basis for his or her views regardless of whether other experts disagree. *Great Lakes Steel Division of Nat'l Steel Corp v Michigan Pub Service Comm*, 130 Mich App 470, 481; 344 NW2d 321 (1983). It falls to the PSC to weigh conflicting testimony and exhibits to make its determination of how the evidence preponderated. *Id*. Unsupported speculation in fact-findings by an agency requires the reviewing court to reverse. *Ameritech Michigan v Michigan Pub Service Comm*, 254 Mich App 675, 685-686; 658 NW2d 849 (2003). Substantial evidence in the context of AMI programs must be more than aspirational in nature. *In re Application of Detroit Edison Co to Increase Rates, supra* at 114-115.

1. THE AMI METER STANDARD OF *IN RE APPLICATION OF DETROIT EDISON CO TO INCREASE RATES* APPLIES HERE.

The standard for substantial and competent evidence in AMI cases before the PSC was set in this Court's review of agency docket U-15768. *Id*. at 101. In U-15768 the MPSC allowed DTE to recover the full expenses of the AMI program that it had incurred and classified some full deployment expenses as part of the pilot program. The PSC accepted a staff recommendation that DTE file a detailed cost/benefit analysis and business case for AMI meter deployment in its next rate case. Problematically, staff witness Robert Ozar testified that AMI was "commercially untested and highly capital intensive." *Id*. at 114-115. The Court categorized the copious evidence in U-15768 as "aspirational testimony describing the AMI program in optimistic, but speculative terms." *Id*. Without a cost/benefit analysis in the record this Court refused to approve of "such a substantial expenditure" which was "not properly supported." *Id*. at 116. The Court ruled that the MPSC may "allow recovery of a utility's costs only when the utility proves that recovery of the costs is just and reasonable." *Id*. The court remanded the case to the agency for "a full hearing on the AMI program."

2. CASES APPLYING IN RE APPLICATION OF DETROIT EDISON CO TO INCREASE RATES

Three unpublished cases from this Court have cited to *In re Application of Detroit Edison Co to Increase Rates*. The first involved Consumers Energy's electric rate case U-15645 and its gas rate case U-15986. In U-15645 Consumers sought recovery of its AMI pilot program costs of $25,219,000 in 2008 and $38,475,000 in 2009 plus $3,000,000 in operation and maintenance expenses. (7 Tr. 443, U-15645.) The PSC granted the full cost recovery requested by Consumers finding that the AMI project was "essential to the future of Michigan." (Order 59, U-15645, Nov. 2, 2009.) In U-15986 Consumers sought almost $31,000,000 from 2009-2010 for its gas AMI pilot program. (6 Tr. 1147:14-19, U-15986.) The PSC approved half of the cost recovery Consumers sought and ordered it to file a cost/benefit analysis in its next rate case. (Order 7, U-15986, May 17, 2010.) The Court of Appeals applied *In re Application of Detroit Edison Co to Increase Rates* and characterized the testimony of the five witnesses as aspirational concerning the expectations of the project. They testified to potential benefits that were not yet available. *In re Applications of Consumers Energy to Increase Rates*, unpublished per curiam opinion of the Court of Appeals 10-11, issued October 30, 2012 (Docket Nos. 295287, 296625, 296633, 296640, 298476). The Court reversed and remanded the case a full hearing in accordance with *In re Application of Detroit Edison*. *Id*.

The second unpublished case citing *In re Application of Detroit Edison* arose from another Consumers Energy rate case U-16191. In U-16191 Consumers sought $28.3 million in funding for its AMI pilot in 2010 and the first half of 2011. (3 Tr. 936:14-23.) The Staff noted that Consumers was proposing to spend 80% of the IT costs for the entire project in the pilot phase. *In re Application of Consumers Energy Company to Increase Rates*, unpublished per curiam opinion of the Court of Appeals 5, issued November 20, 2012 (Docket Nos. 301318, 301381). In its order the PSC established eleven guidelines for AMI meter and smart grid rate

recovery. (Order 16-17, 19-20, U-16191, Nov. 4, 2010.) The PSC approved expenses related to the AMI pilot of $3,297,000, but did not approve full deployment costs and indicated it would not do so until a full business plan and cost/benefit analysis was available from the pilot. *In re Application of Consumers Energy Company to Increase Rates, supra* at 5-6. The benefits cited from testimony by the Court were of the same nature that the other courts reject in that they were aspirational and potential benefits. *Id*. at 3-4. The Court concluded the witnesses gave more particulars as to timing, the staff witnesses were guarded in their estimates, and that the amount approved was considerably smaller. *Id* at 6. Also significant was that the PSC did not approve a full deployment of AMI meters without a cost/benefit analysis as it had in other cases and it adopted the eleven guidelines for AMI and smart grid cost recovery in this case.

The last of the unpublished cases citing *In re Application of Detroit Edison Co to Increase Rates* was the appeal from the consolidated agency rate cases U-16472 and U-16489. The PSC approved $71,564,000 in cost expense recovery for DTE expenses related to the full deployment of electric AMI meters and disallowed $3.9 million. (Order 22, U-16472, Oct. 20, 2011.) However, the Commission also found that DTE's cost/benefit analysis was not reliable due to a significant difference with the Staff's cost/benefit model. *Id*. at 23-24. The Court noted the staff's showed a negative net present value of $52.3 million while DTE's had a positive net present value of $82.9 million. *In re Application of Detroit Edison Company to Increase Rates*, unpublished per curiam opinion of the Court of Appeals 5, issued July 30, 2013 (Docket Nos. 308130, 308154, 308156). The lack of a credible cost/benefit model prior to approving significant AMI expenses resulted in reversal and a remand. *Id*.

3. OPT-OUT MUST ADDRESS AND ALLEVIATE CUSTOMER CONCERNS ABOUT AMI METERS TO BENEFIT CUSTOMERS CHOOSING TO OPT-OUT.

In U-16191 the PSC adopted guidelines for cost recovery in AMI deployment cases. (Order 16-17, 19, U-16191, Nov. 4, 2010.) One of those guidelines was that during the pilot phase costs had to be reasonably required to achieve the objectives of the pilot and that during the full deployment phase the project risk is borne by shareholders and that incremental costs that exceed benefits are not used and useful and not recoverable from ratepayers. (Order 16-17, U-16191, Nov. 4, 2010; 5 Tr. 1288, U-16191.) Guidelines bind the agency, but no other parties. MCL 24.203(7). The benefits of an AMI program must exceed incremental costs.

In the PSC Staff's Report in U-17000 the staff concluded that "providing an opt-out option is the best solution for customers who have concerns about smart meters." (PSC Staff Report 27, U-17000, June 29, 2012.) The staff also concluded the opt-out should be based on cost-of-service principles. *Id*. The same report identified customer concerns of which following were mentioned in over 20% of the comments: the need for an opt-out (84%), health concerns (77%), privacy (49%), and the legality of smart meters (27%). *Id*. at 4. Twenty-four local governments in DTE's service area expressed similar concerns about AMI meters. (4 Tr. 541:135-136, 552:99-117.) The report discussed some opt-out possibilities, but never analyzed how any of them actually addressed customer concerns. *Id*. at 27. The PSC's order on September 11, 2012 in U-17000 agreed with the Staff Report finding that it "should be accepted as a practical point of departure for further discussion and Commission action." (Order 4, U-17000, Sept. 11, 2012.) The PSC ordered investor-owned utilities to, "make available an opt-out option, based on cost-of-service principles, for their customers if or when the provider elects to implement AMI." *Id*. at 4-5. In order to approve the opt-out program the PSC had to find that the overall opt-out fee was just and reasonable. Because the opt-out program was specifically for customers with significant concerns about AMI and it is those customers who will bear the cost

of the program, some evidence of benefit is necessary showing that the proposed opt-out actually addresses and alleviates those customer concerns. If that is lacking then the order in U-17000 is not satisfied. If there is no cost/benefit analysis then the costs of the program will not be just or reasonable. It is true that the May 15, 2013 order found in approving DTE's opt-out proposal that it satisfied the September 11, 2012 order in U-17000. (Order 18, U-17053, May 15, 2013.) However, while courts defer substantially to the PSC's interpretations of its orders, those interpretations must still be supported by the record or be otherwise reasonable. *In re MCI Telecomm Corp Complaint*, 240 Mich App 292, 303; 612 NW2d 826 (2000). Here if no evidence exists showing that DTE's opt-out program benefits customers choosing to opt-out , then the PSC's interpretation of its prior order is not supported by the record. *In re Application of Detroit Edison Co to Increase Rates* and the three unpublished decisions interpreting it also make clear that this cost/benefit analysis cannot wait until the next general rate case. *In re Application of Detroit Edison Co to Increase Rates*, 296 Mich App at 116.

Although this case involves less overall money than the *In re Application of Detroit Edison Co to Increase Rates* case its effect on individual ratepayers wishing to opt-out is much more significant than the effect on the individual ratepayers was in those cases. DTE estimated the per capita cost of the AMI deployment program in the $0.15 monthly credit it included in its proposed opt-out fee along with the $0.45 credit for AMI based automatic meter reading that opt-out customers will not participate in. (Ex. A-1 Sch. 1; 3 Tr. 234:1-7.) By comparison the PSC approved DTE opt-out program costs $9.80 per month with a $67.20. (Order Ex A, U-17053, May 15, 2013.) Non-acceptance of the AMI meter in either the standard or opt-out form is also grounds for shut-off. (3 Tr. 386:2-8.) In light of the significantly higher individual costs this

case is similar to *In re Application of Detroit Edison Co to Increase Rates* and record evidence of benefits to opt-out customers is required.

4. NO EVIDENCE IN THE RECORD SHOWS THAT THE OPT-OUT PROGRAM BENEFITS CUSTOMERS.

In this case there is no record evidence of any benefit to opt-out customers from DTE's opt-out in its current form. Although DTE does not require customers to give a reason for opting out, record evidence is still required to show that customers opting out will benefit from it by having their concerns addressed. Without any evidence that opt-out program in its current form actually benefits opt-out customers by addressing their concerns there is not a real cost/benefit analysis in the record. All we have are DTE's costs. But that was not enough under the *In re Application of Detroit Edison Co to Increase Rates* standard.

The number of complaints that DTE has received about the installation of AMI meters does not establish that DTE's particular opt-out program benefits customers. Initially, Sitkauskas stated that 1,100 customers had expressed concern, mostly about health or data privacy, about AMI meters at the time the application in July 2012 was filed. (3 Tr. 230:7-15.) By January 2013 that number had nearly tripled to 3,269. (4 Tr. 473:15-20.) DTE's witness acknowledged that some of these instances included instances where the installer "couldn't get in for a gate purpose." (4 Tr. 475:2-8.) The Staff witness estimated 15,500 might participate by referencing the experience of other utilities. (4 Tr. 579:13-16.) All parties accepted that there is an inverse correlation between the number of customers opting out and the monthly fee. If the program does not address their reasons seeking an opt-out program from AMI meter installation, one can be sure the number will be small and discontent.

In this case DTE is not actually offering an opt-out from AMI meters. It is offering an opt-out that disables the radio transmitter on the AMI meter that will still be installed on the

customer's home. (3 Tr. 260:10-19, 273:9-21, 294:6-9.) DTE and the PSC Staff provided no evidence of how or even whether this would address customer concerns about AMI meters. DTE did provide testimony from Robert Sitkauskas who testified as follows in his pre-filed rebuttal:

> The Company has recognized that a small customer group does not want a transmitting AMI meter. To address these concerns, Detroit Edison has developed an Opt Out plan and associated fee structure that reflects actual costs of maintaining a non-transmitting AMI meter without causing incremental costs and expenses to those customers who choose not to Opt Out. [3 Tr. 243:6-11.]

This is conclusory aspirational testimony. It does not tell us how DTE's opt-out plan addresses the concerns of customers. It merely assumes that it does.

C. IF THE LEGISLATIVE RATEMAKING STANDARD OF REVIEW APPLIES, THE ORDER IS ALSO UNREASONABLE.

The precedent of *In re Application of Detroit Edison Co to Increase Rates* applies the competent, material, and substantial evidence standard to AMI proceedings and rejected the standard of review used for legislative acts including rate structure and experimental projects. However, even if the ratemaking standard of review for the legislative acts of the PSC applies, the order approving DTE's opt-out program is still unreasonable. The standard of review of the exercise of legislative powers by an agency is the rule of rationality and reasonableness whereby a court will defer to an agency's ratemaking power unless it was used in an arbitrary or capricious manner, or was an abuse of discretion. *Detroit Edison Co*, 221 Mich App at 381-82; *Great Lakes Steel*, 130 Mich App at 480. The abuse of discretion standard "subsumes" the competent, material, and substantial evidence test and the arbitrary, capricious, and abuse of discretion test. *Great Lakes Steel*, 130 Mich App at 480. As such the lack of any evidence of a benefit to customers opting out from DTE's opt-out program will render the order an abuse of discretion as described in the previous section. Also the fact that order failed to consider the benefits side of the cost/benefit analysis makes it arbitrary as it does not consider the totality of

circumstances of the cost/benefits duality leaving it without an adequate determining principle. *Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 63-64; 678 NW2d 444 (2003).

III. THE AMERICANS WITH DISABILITIES ACT (ADA) AND THE PERSONS WITH DISABILITIES CIVIL RIGHTS ACT (PWDCRA) ARE MANDATORY STATUTES. THE MAY 15, 2013 PSC ORDER IS UNLAWFUL, BECAUSE THE PROGRAM IT APPROVES LACKS A MECHANISM TO RECOGNIZE DISABILITY AND PROVIDE REASONABLE ACCOMMODATION.

A. STANDARD OF REVIEW

Orders of the PSC are presumed lawful and reasonable. MCL 462.25. An order of the PSC is subject to reversal if shown to be unlawful by clear and substantial evidence. MCL 462.26(8). An order of the PSC is unlawful when the PSC fails to follow a statutory requirement or abuses its discretion. *In re MCI Telecom Complaint*, 460 Mich at 427. It is also unlawful if it is based on an erroneous interpretation or application of the law. *Associated Truck Lines*, 377 Mich at 269. To the extent that an administrative order conflicts with a statute the order is void. *Manufacturers Nat'l Bank v Director of Dep't of Nat. Resources*, 420 Mich 128, 146; 362 NW2d 572 (1984). Questions of statutory interpretation are questions of law reviewed de novo. *County of Wayne v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004). This includes the question of whether an MPSC order is lawful. *Detroit Edison Co v Pub Service Comm*, 264 Mich App 462, 465; 691 NW2d 61 (2004).

An administrative agency's interpretation of a statute is reviewed de novo with respectful consideration, but not deference. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich at 103; *Boyer*-Campbell, 271 Mich at 282. If the agency's interpretation is persuasive and concerns a statute that the agency is empowered to execute, it will not be overturned except for cogent reasons. *In Re Complaint of Rovas*, 482 Mich at 103. If the statute's language is ambiguous or vague the agency's interpretation is an aide in determining legislative intent. *Id.* The agency's

interpretation is not, however, binding on the courts. *Id*. The agency's interpretation may not conflict with the legislature's intent as expressed in the statute. *Id*. Where an agency's ruling defeats public policy the court must not defer to the agency. *Ass'n of Businesses Advocating Tariff* Equity, 297 Mich App at 387 (Saad, J. Dissenting). The agency cannot determine the public interest as that power belongs to the legislature. *Attorney General*, 269 Mich App 473; 713 NW2d 290 (2005).

Civil rights statutes are remedial and must be construed liberally for the broadest possible remedy. *Neal v Michigan Dep't of Corrections*, 232 Mich App 730, 738; 592 NW2d 370 (1998) (decided on rehearing). In adopting the ADA Congress intended that the ADA grant at least as much protection as the Rehabilitation Act of 1973 and that case law and regulations relating to the Rehabilitation Act of 1973 should also apply to cases under the ADA. 42 USC § 12201(a); *Bragdon v Abbott*, US 624, 631-32; 118 SCt 2916; 141 LEd2d 540 (1998). States are free to adopt equal or greater protection for the disabled. The ADA is intended as a floor for the protection of the disabled. 42 USC § 12201(b). State courts have concurrent jurisdiction over federal statutes. *Peden v Detroit*, 470 Mich 195, 201 n 4; 680 NW2d 857 (2004). Federal regulations promulgated under the ADA are given legislative weight and are controlling unless they are arbitrary, capricious, or clearly contrary to the statute. *United States v Morton*, 467 US 822, 834; 104 SCt 2769; 81 LEd 2d 680 (1984). Appellants Ms. Kurtz and Ms. Edwards exhausted their remedies before the PSC by raising this issue in their brief before the MPSC. (Kurtz and Edwards Br. 23-26, U-17053, Feb. 12, 2013.) They preserved the issue for appeal by raising it as Exception 9 in their exceptions to the ALJ's Proposal for Decision. (Kurtz and Edwards Excep. 2, 13, U-17053, April 12, 2013; Order 4, U-17053, May 15, 2013.)

B. THE ADA REQUIRES AN INDIVIDUALIZED ASSESSMENT OF DISABILITY. THE MAY 15, 2013 PSC ORDER DOES NOT.

Title I of the ADA prohibits discrimination in employment. 42 USC § 12111. Title II requires that disabled persons have access to the services, programs, and activities of public entities. 42 USC § 12132. Title III requires that disabled persons have access to places of public accommodation. 42 USC § 12182. To establish a claim under Title II of the ADA it is necessary for a claimant to establish 1) that the person is a qualified individual with a disability, 2) that the defendants are subject to the ADA, and 3) that the claimant was denied the opportunity to participate in or benefit from the defendant's services, programs, activities, or was otherwise discriminated against by reason of the claimant's disability. *Henrietta D v Bloomberg*, 331 F3d 261, 272 (2d Cir 2003). For Title III claims the first two elements are the same, but third element requires that the claimant was denied 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 on the basis of disability. 42 USC § 12182(a).

1. TITLE II OF THE ADA

Title II of the ADA applies to public entities. Public entities shall not exclude persons with a qualified disability, by reason of that disability, from participating in or enjoying the benefits of the services, programs, or activities of a public entity. 42 USC § 12132.. Public entities are states and local governments, their agencies, and their other instrumentalities. 42 USC § 12131. The PSC is a Title II public entity under the ADA as an agency of the state.

Regulations have made clear that the services, activities, and programs of a public entity refer to everything that a public entity does. 28 CFR § 35.102(a). A qualified individual with a disability is one who "with or without reasonable modifications to the 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 receipt of services or participation in the programs or activities provided by the public entity." 42 USC § 12131(2). In this case the specific service at issue is the provision of electricity to residential customers with disabilities. DTE has made clear that it will shut-off power to individuals who do not accept the standard or the opt-out modified AMI meters. (3 Tr. 386:2-8.) Given that a customer is not free to change utilities, this makes electricity inaccessible for disabled persons without a reasonable accommodation. Mich Admin Code, R 460.3411. 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.

2. TITLE III OF THE ADA

Title III of the ADA prohibits discrimination against persons on the basis of disability "in the full and equal enjoyment of 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). Places of accommodation include inns, motels, hotels, restaurants, bars, theaters, concert halls, stadiums, auditoriums, convention centers, stores, shops, lawyers' offices, hospitals, service establishments, terminals and depots, museums and libraries, places of recreation and exercise, educational facilities, and social service establishments. 42 USC § 12181(7). The Supreme Court has ruled that public accommodation should be construed liberally to give persons with disabilities equal access to establishments that are available to the non-disabled. *PGA Tour v Martin*, 532 US 661, 676-77; 121 SCt 1879; 149 LEd 2d 904 (2001).

This list does not include private residences that are exclusively used for that purpose, but private residences may be places of public accommodation if a business or other place of public

accommodation is run out of the home. 28 CFR § 36.207; *Baltimore Neighborhoods, Inc v Rommel Builders, Inc*, 40 F Supp2d 700, 705-706 (D Md 1999) (a model unit in a residential real estate development could be a place of public accommodation as a sales office). The portion of the home used for goods, services, facilities, privileges, and advantages *of* a place of public accommodation is subject to Title III including sidewalks, entryways, hallways, bathrooms, and anywhere accessible to clients or customers. 28 CFR § 36.207.

Additionally, there is a circuit split on whether Title III is limited to physical places. *See Carparts Distribution Ctr. Inc. v Automotive Wholesalers Assoc of New England, Inc*., 37 F3d 12, 19-20 (1st Cir 1994) (Public accommodation is not limited to the physical structure). *But See Parker v Metro Life Ins Co*, 121 F3d 1006, 1010-11 (6th Cir. 1997) (*en banc* holding that Title III is limited to a physical structure, but also acknowledging that the insurance policy was offered through the employer rather than the insurer). It must be acknowledged, however, that the statute refers to the goods and services *of* a place of public accommodation rather than those goods and services *in* the place of accommodation itself. *See* 42 USC § 12182(a); *Nat'l Ass'n of the Deaf v Netflix, Inc*, 869 F Supp 2d 196, 201-202 (D Mass 2012) (involving closed captioning on streaming video); *Nat'l Fed of the Blind v Target Corp*, 452 F Supp 2d 946, 952-54 (ND Cal 2006) (commercial website accessibility under Title III requires a nexus between the challenged conduct and the defendant's physical space); *But See Cullen v Netflix, Inc*, 880 F Supp 2d 1017, 1023-24 (ND Cal 2012). The district of Massachusetts in *National Association of the Deaf* ruled that "while the home is not itself a place of public accommodation, entities that provide services in the home may qualify as places of public accommodation." *Nat'l Ass'n of the Deaf*, 869 F Supp 2d at 201. An entity owns, leases, or operates a place of public accommodation when it "specifically controls the modification of the [things at issue] to improve their accessibility to the

disabled." *Nat'l Ass'n of the Deaf*, 869 F Supp 2d at 202, citing *Neff v Am Dairy Queen Corp*, 58 F3d 1063, 1066 (5th Cir 1995).

DTE is engaged in the business of servicing the public by the generating, transmitting, and distributing electricity. This activity affects commerce and falls under the part of 42 USC § 12181(7)(F) which broadly states, "or other service establishment." By virtue of its terms of service and the rate book DTE has a license to place a meter on a home and access it. (2 Tr. 138-139; 3 Tr. 243:1-11) This makes DTE as a licensee in control of the modification of the meter. The meter is placed on the home for the purpose of providing the service of electricity and determining usage for billing purposes. Thus the portion of the home where the meter is located is an area of public accommodation as it is used to provide the service of electricity distribution to the customer. (3 Tr. 386-387) There is a physical nexus between DTE's license to occupy part of the home to place and operate its meter and the challenged conduct. Here the challenged conduct is that DTE refused to extend the reasonable accommodation of allowing customers to not receive an AMI meter. The portion of the home where the meter is installed is a place of public accommodation. 28 CFR § 36.207. Additionally, there are circumstances where portions of the home are used for a business as is the case with Ms. Kurtz's craniosacral massage business and Ms. Panzica-Glapa's model garden used in her landscaping business. *Id*; Proposed Testimony of Linda Kurtz Doc No. 171 9 (21 in PDF), U-17053, Nov. 8, 2012; Proposed Testimony of Leslie Panzica-Glapa Doc. No. 173 2 (55 in PDF), U-17053, Nov. 8, 2012.) Customers using part of their home for a business are covered under Title III of the ADA.

3. INDIVIDUALIZED ASSESSMENT OF QUALIFIED DISABILITY

Disability is defined by the ADA as a present physical or mental impairment that substantially limits one or more major life activities; where a record of impairment exists, or where a person is perceived as having impairment. 42 USC § 12102(1). An illustrative non-

exclusive list of major life activities includes caring for one's self, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, and major bodily functions. 42 USC § 12102(2). Major bodily functions include normal cell growth and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. 42 USC § 12102(2)(B). Only one major life function need be impaired. 42 USC § 12102(4)(C). Episodic and remitting impairments are still disabilities if they substantially limit a major life activity when active. 42 USC § 12102(4)(D). The determination of disability is made without reference to any mitigating measures. 42 USC § 12102(4)(E).

In 2008 Congress expressed its dissatisfaction with Supreme Court decisions that adopted stringent definitions of a qualifying disability in *Sutton v United Airlines, Inc.*, 527 US 471; 119 SCt 2139; 144 LEd 2d 450 (1999) and *Toyota Motor Manufacturing, Kentucky, Inc v Williams*, 534 US 184; 122 SCt 681; 151 LEd 2d 615 (2002) and amended the ADA to loosen the definition and broaden it. 42 USC § 12101; 122 Stat § 3553 (2008). Congress expressed its intent that primary focus of ADA cases should on whether covered entities have complied with their obligations under the law and that the determination of disability "should not demand extensive analysis." *Id*. Disability is to be construed in favor of broad coverage. 42 USC § 12102(4)(A). It is inappropriate to determine in one mass proceeding whether an entire class of individuals with common or similar symptoms has a qualified disability. The ADA requires an individualized determination of disability with respect to the individual and how it affects the major life activities of that individual. 42 USC 12102(2); *Bragdon*, 524 US at 657; *Chmielewski v Xermac, Inc*, 457 Mich 593, 610; 580 NW2d 817 (1998). The PSC cannot in mass determine that no disability exists.

Causation is not the standard for evaluating whether a qualified disability exists. The issue is whether the person has a physical or mental characteristic that substantially limits one or more major life activities. The PSC has erroneously added a causation element that the lack of a reasonable accommodation must cause the disability. This is not a requirement under the ADA and to impose it would be absurd. The absence of a ramp does not cause paralysis, yet the ADA still requires the ramp for a paralyzed individual in a wheelchair. An ordinance banning motor vehicles from an island does not cause Multiple Sclerosis (MS), but the Michigan Supreme Court still ordered an exception to it for a disabled cyclist with MS so he could use his motor-assisted tricycle. *Bertrand v City of Mackinac Island*, 256 Mich App 13; 662 NW2d 77 (2003).

In the case of the Appellants they have consistently stated that they suffer from electromagnetic-hypersensitivity (EHS) which manifests in the form of insomnia, fatigue, heart issues, headaches, tightness in the chest, ringing in the ears, diabetic complications, and anxiety.[9] These symptoms and aggravations of other conditions such as diabetes and substantially limit their ability to engage in the major life activities of sleeping, reading, memory, concentration, learning, interacting with others, caring for one's self, and working.[10] These issues also interfere with their major bodily functions including their circulatory, immune, and digestive systems.[11] Under the broad scope of the ADA they and other similarly situated require an individualized determination of disability. The PSC and DTE have denied them this.

[9] (1 Tr. 90-91; 3 Tr. 430:1-4; 4 Tr. 580:20-22; Proposed Testimony of Cynthia Edwards Doc. No. 198, U-17053, Dec. 6, 2012; Proposed Testimony of Leslie Panzica-Glapa Doc. No. 173, U-17053, Nov. 8, 2012.); (Proposed Testimony of Linda Kurtz Doc. No. 171, U-17053, Nov. 8, 2012; Leslie Panzica-Glapa Comment No. 297, U-17053, Mar. 4, 2013; Edwards Comment No. 299, U-17053, Mar. 4, 2013.)
[10] *Id*.
[11] *Id*.

In this case the PSC adopted its Staff's report that acknowledged that persons with EHS suffer from real symptoms, but that health research had not consistently demonstrated a linkage to AMI meters. (PSC Staff Report 10, U-17000, June 29, 2012.) On this basis the PSC concluded generally that the health concerns were insignificant. (Order 3, U-17000, Sept. 11, 2012.) In U-17053 this conclusion was used to exclude evidence of health issues from AMI meters. The PSC noted that other common household devices such as cell phones, microwaves, computers, and others also emit RF radiation. However, no one is conditioning an essential service like electricity on a person having these other devices in their home. The Appellants can easily avoid them. The PSC and DTE did not conduct and have shown no intention of allowing individualized assessments of disability. Instead they contend that individuals can opt-out for any reason so disability is irrelevant. (3 Tr. 230.)

C. AN INADEQUATE UNREASONABLE ACCOMMODATION DISCRIMINATES ON THE BASIS OF DISABILITY.

Under both Title II and Title III of the ADA there are three types of discrimination claims: disparate treatment, disparate impact, and denial of reasonable accommodation. This case falls is a reasonable accommodation claim. The reasonable accommodation claim does not rely on a disparate impact analysis and need not establish it. *Olmstead v* LC, 527 US 581, 598; 119 SCt 2176; 144 LEd 2d 540 (1999); Henrietta *D.*, 331 F3d at 273, 277. DTE claims that its AMI opt-out program is not discriminatory as customers can opt-out for any reason and it does not inquire into disability. Discrimination includes intentional discrimination, but also encompasses refusals or failures to make reasonable modifications to existing facilities and practices. 42 USC § 12101(a)(5*); PGA Tour*, 532 US at 675. Animus is not required. A plaintiff could prevail by showing either discrimination or denial of benefits. *Henrietta D.*, 331 F3d at 276. A claim for a reasonable accommodation is established by first showing, in addition

to disability and coverage under the ADA, that the disability makes it difficult for a plaintiff to access benefits or services that are available to the public regardless of disability. *Id* at 277. This is enough to establish discrimination in a reasonable accommodation claim if the plaintiff meets the essential requirements for the good or service. Third the disability must necessitate a reasonable accommodation. *Id*. at 280. The Title III analysis is similar except that it applies to the goods and services or accommodations of a place of public accommodation.

The obligation to reasonably accommodate arises from the statute. *Id*. at 273. The ADA defines Title III discrimination as, among other things, "[a] failure to make reasonable modifications in policies, practices, or procedures when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations." 42 USC § 12182(b)(2)(A)(ii). This form of discrimination is also applicable under Title II. 28 CFR §§ 35.130(b)(1); 35.130(b)(7); *Henrietta D*., 331 F3d at 274. Another type of Title III discrimination defined by the statute is the failure of the covered entity to take necessary steps to ensure that no one with a disability is excluded or denied services, segregated, or treated differently than other individuals "because of the absence of auxiliary aids and services unless those steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in undue burden." 42 USC § 12182(b)(2)(A)(iii). In this case a reasonable accommodation is required for DTE's customers with disabilities as determined by an individualized assessment and the ADA applies to DTE and the PSC. DTE's AMI opt-out program is an inadequate and unreasonable accommodation, because the opt-out still requires customers to receive a modified AMI meter with the radio-

disabled when they actually require a non-AMI meter. This makes it difficult for them to receive the benefit of electric service that is available to the general public. For the Ms. Kurtz, Ms. Edwards, and Ms. Panzica-Glapa even an AMI meter with the radio-off aggravates their condition and symptoms. An AMI opt-out that is a reasonable accommodation will not involve AMI meters.

Under Title II public entities are required to make reasonable modifications in policies, practices, or procedures when necessary to allow the disabled person to access its benefits, activities, and programs unless the modification would fundamentally alter the nature of the service, program, or activity. 28 CFR § 35.130(b)(7); *Henrietta D.*, 331 F3d at 280-281. Title III has the same standard requiring reasonable modification in policies, practices or procedures when necessary to allow access to the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation unless the modification changes the fundamental nature of the objects of access. 42 USC § 12182(b)(2)(ii). In terms of auxiliary aids and services an additional undue burden defense exists. 42 USC § 12182(B)(2)(iii). The plaintiff does not bear a heavy burden of proof to show the reasonable accommodation is needed. *Henrietta D*, 331 F3d at 281. After this is established the burden shifts to the defendant to show the accommodation is unreasonable as a fundamental change or undue burden. *Id.* Whether a proposed accommodation is unreasonable depends not just on the cost/benefit analysis and the budget, but on a case-by-case weighing of factors including the relative size of the program with respect to the organization, the type of operation, the workforce structure, and the nature and cost of the accommodation. *Olmstead*, 527 US at 606 n 16.

The Title II benefit and the Title III service in this case is electricity. DTE's opt-out program requires as a condition of service that customers receive either a standard AMI meter or

an AMI meter with its radio disabled. The AMI meter with the radio-off does not address the health concerns of the Appellants and others as it is a solid-state device. (Ex. I-JH-3 [Ex. 3].) Solid state devices that emit RF frequencies even with the radio turned-off. 47 CFR §§ 15.101, 15.102 (Ex I-JH-3 [Ex. 3.]) RF emissions aggravate Ms. Edwards, Ms. Kurtz, and Ms. Panzica-Glapa's conditions. DTE and the PSC may consider the health risks insignificant, but the PSC Staff in its U-17000 report acknowledged that, "[i]ndividuals with EHS [Electromagnetic hypersensitivity] report real symptoms; however, health research has been unable to consistently attribute those symptoms to EMF exposure." (Staff Report 10, U-17000, June 29, 2012.)

Customers can choose not to own cell phones, computers, microwaves, solid state hard drives, wireless routers, and other devices that emit RF frequencies, but DTE's opt-out program does not leave them with any real choice in regards to AMI meters. DTE has made accepting either a standard AMI meter or an AMI meter with the radio disabled a condition of service and refusal to accept one could lead to DTE shutting-off their power. MCL 460.9q(e); Mich Admin Code, R 460.137(e), 460.116(4), 460.3409(1) ; (3 Tr. 386:2-8.). DTE has sued at least two customers who removed their AMI meters seeking an injunction to install the AMI meter based on the rate book and regulations and $25,000 in tort damages on a violation of statute based negligence per se theory.[12] Administrative regulations preclude customers from taking electricity distribution from another company. Mich Admin Code, R 460.3411. This situation renders obtaining electricity more difficult for Ms. Edwards, Ms. Kurtz, and Ms. Panzica-Glapa. Under these circumstances a reasonable accommodation is necessary to ensure that they and others have access to the service of electricity. The restriction of their access to electricity

[12] *See Detroit Edison Co v Stenman*, before the 6th Circuit Court (Docket No. 2012-128816-CZ), *lv den* in Court of Appeals Docket No. 316431 (Partial summary judgment granted to DTE); *Detroit Edison Co v Gula*, before the 6th Circuit Court, filed Apr 25, 2012 (Docket No. 2012-126503-CZ) (Presently stayed and involving the Cusumano Appellants as defendants).

necessitates a reasonable accommodation that customers with a qualified disability like the Appellants receive an electromechanical meter as their opt-out meter.

ADA customers receiving an electromechanical meter as their opt-out meter does not fundamentally change the service electricity. Electromechanical meters have been in use for decades for the purpose of measuring usage. As DTE transitions to AMI meters it is removing functional electromechanical meters which could be used for the opt-out program. (3 Tr. 293-294, 432-433.) As noted in the previous section above other jurisdictions and Consumers Energy use the electromechanical meter as their opt-out meter meaning there will be a supply. Lastly, the number of opt-out customers is estimated at between 4000 and 15,500 out of over two million residential customers. (4 Tr. 579:1-16; 3 Tr. 432:22.)

4. QUALIFIED DISABLED PERSONS SHALL NOT BE MADE TO BEAR THE COSTS OF REASONABLE ACCOMMODATION.

The ADA prohibits public entities under Title II from imposing a surcharge on persons with disabilities "to cover the costs of measures, such as provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the non-discriminatory treatment required by the Act or this part." 28 CFR § 35.130(f). Although courts uniformly hold that Title II of the ADA abrogated Eleventh Amendment state immunity pursuant to Section 5 of the Fourteenth Amendment, the circuits are split on whether 28 CFR Section 35.130(f) does so. In *Neinast v Texas*, 217 F3d 275, 282 (5th Cir 2000) and *Brown v North Carolina Division of Motor Vehicles*, 166 F3d 698, 707 (4th Cir 1999) the fourth and fifth circuits ruled that fees for handicap parking placards could be recouped by the state, because the regulation failed to abrogate state sovereign immunity. The Sixth Circuit ruled that the handicap parking placard fees were a tax and never reached the Eleventh Amendment issue. *Hedgepeth v Tennessee*, 215 F3d 608, 616 (2000). However, the Ninth Circuit ruled that the regulation did abrogate

sovereign immunity. *Dare v California*, 191 F3d 1167, 1176 (9th Cir 1999). The Ninth Circuit holding that 28 CFR § Section 35.130(f) is the better approach on this issue.

Title III of the ADA has a nearly identical prohibition against public accommodations imposing the same surcharge. 28 CFR § 36.301(c). This regulation applies to private entities so there is no Eleventh Amendment issue. The PSC is covered by Title II and DTE is covered by Title III. The AMI opt-out charges a $67.20 initial fee and a $9.80 monthly fee. (Order Ex A, U-17053, May 15, 2013.) Where a fee is a surcharge and is meant to cover the costs of program accessibility including the cost of reasonable accommodations that fee is barred. 28 CFR §§ 35.130(f), 36.301(c). Although one court added that the regulation only bars the fee if the fee is imposed only on persons with the disability, this perspective does not comport with the precedent regarding reasonable accommodation claims. *Duprey v Connecticut*, 28 F Supp 2d 702, 706 (D Conn 1998). Reasonable accommodation claims do not require proof of disparate treatment or disparate impact as noted above. All they require is denial of the benefit or service due to increased difficulty of access. *Henrietta D.*, 331 F3d at 273, 277. In this case the initial and monthly fees cover the costs of the opt-out program for disabling the radio transmitter on the AMI meter and monthly meter reading fees. (Order 17-18, Ex. A, Order 5, U-17000, Sept. 11, 2012.) The fee is in addition to regular rates so it is by definition a surcharge. The fee is designed to cover the costs of DTE's opt-out program approved in the May 15, 2013 PSC order. In the case of persons with qualified disabilities this fee violates the regulations when it is paid to cover the costs of an accommodation for their disabilities.

In conclusion, the PSC, as a Title II entity, is not empowered to approve an opt-out fee for persons who, like the Appellants, have no choice but to opt-out due to disability. DTE, covered by Title III, is also barred from charging an opt-out fee where that fee covers the costs to

reasonably accommodate disabled customers. Both the PSC and DTE must also provide an individualized assessment of disability and reasonable accommodations to the disabled.

D. THE PWDCRA IS ALSO VIOLATED BY THE MAY 15, 2013 ORDER'S OPT-OUT PROVISION AS IT IS NOT A REASONABLE ACCOMMODATION.

In addition to the ADA claim, the Appellants also have a claim under Michigan law. Michigan adopted the Persons with Disabilities Civil Rights Act (PWDCRA) to address many of the same concerns that Congress adopted the ADA to address. MCL 37.1101; *Peden*, 470 Mich at 216-217. It involves essentially the same analysis as the ADA. *Peden*, 470 Mich at 216-217. Like the ADA, the PWDCRA mandates the "full and equal utilization of public accommodation, public services, and educational facilities without discrimination because of a disability is guaranteed by this act and is a civil right." MCL 37.1102. Accommodation is required for persons with disabilities for the purposes of employment, public accommodation, public service, education, and housing. MCL 37.1102(2). Public accommodation is defined, among other things, as a business which makes available its goods, services, facilities, privileges, advantages, or accommodations. MCL 37.1301(a). Public service includes state commissions such as the PSC. MCL 37.1301(b). MCL 37.1302(a) precludes the denial of the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodation of a place of public accommodation or public service due to a disability. MCL 37.1302. The disability must be unrelated to the ability to use and benefit from the goods or services. MCL 37.1302(a). The PSC's order violates this statute for the same reason it violates the ADA.

CONCLUSION AND RELIEF REQUESTED

In conclusion the PSC's May 15, 2013 order approving DTE's opt-out is unlawful and unreasonable. Appellants Ms. Edwards, Ms. Kurtz, and Ms. Panzica-Glapa respectfully request that the Court reverse the May 15, 2013 order of the PSC in Case U-17053 that approved DTE's

application to implement an AMI meter opt-out program. In relation to issue 1 the Appellants request a remand to the PSC with the directive to approve an opt-out program that gives customers an alternative to AMI meters so as to prevent a de facto mandate. Appellants request in relation to issue 2 that the Court remand this case to the MPSC with the direction to 1) hear and take evidence on whether the opt-out program benefits its prospective participants by adequately addressing their concerns about AMI meters. In relation to issue 3 on the ADA and the PWDCRA the Appellants request that the Court order the PSC and DTE to comply with the ADA by offering the reasonable accommodation of allowing opt-out customers to have electromechanical meters if they have a qualifying disability without the imposition of a surcharge. Further, the Appellants request an order requiring that the PSC establish a process to individually determine disability status.

Respectfully submitted,

September 26, 2013

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INDEX OF EXHIBITS

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2013, I served the Appellants' Brief on Appeal in No. 316728 on the parties listed in the table below via the Michigan Court of Appeals e-filing and electronic service system.

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September 26, 2013

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