STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's own motion, to establish a workgroup to review the Technical Standards for Electric Service and to recommend potential improvements to the standards.	)))))	Case No. U-20630

COMMENTS OF THE ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY REGARDING RULE 411

The Association of Businesses Advocating Tariff Equity ("ABATE") by its attorneys, CLARK HILL PLC, files these Comments in connection with changes to Rule 411 ("R 460.3411").

I. BACKGROUND

On September 11, 2019, the Michigan Public Service Commission ("Commission") approved an Order Opening Dockets in Case U-20629 and Case U-20630. Among other things, the Commission's Order required the Staff to provide a report to the Commission following its initial presentation to the Grid Security and Reliability Standards Workgroup. The first such meeting of the workgroup was held on December 3, 2019 and Staff asked that comments pertaining to the Technical Standards for Electric Service be filed by interested parties in Case U-20630 on or before December 20, 2019. These Comments are in response to that invitation.

II. RULE 411 (R 460.3411)

Rule 411 was first enacted in 1983 and later updated in 1996. Since that time there has been no further changes to the Rule which, as explained below, is now antiquated, obsolete, and without statutory basis. Rule 411 is entitled "Extension of Electric Service in Areas Served by

Two or More Utilities" and establishes -- from regulatory whole cloth -- an intricate scheme that limits a customer's electric utility choice to only that electric utility which provided the first-in-time electric service. Among other things, Rule 411 facially prohibits an existing customer (defined as a building or facility) of a first-in-time utility from ever being able to take electric service from another utility.[1] The Rule then further proscribes that "the first utility serving a customer . . . is entitled to service the entire electric load on the premises of that customer even if another utility is closer to a portion of the customer's load," and premises includes the entire parcel of the premises even if a large undivided parcel.

First, the Rule has nothing to do with "technical standards". The ostensible justification historically for Rule 411 appears to have been a desire on behalf of the Commission to prevent duplication of existing distribution facilities by another utility. This Rule was promulgated last century, long before the era of competitive utility service fostered by both federal and state policy which has recognized a higher policy, to wit **efficiency and economy**, rather than blind adherence to avoiding duplicate facilities. However, the Rule's protectionist measures apply regardless of the age, efficiency, or suitability of the existing distribution facilities and regardless of whether another utility is capable of providing lower-cost or more reliable electric service. Thus, in practice, Rule 411 has been used to insulate and protect existing monopoly utilities from the efficiencies demanded by competition by reducing the service options available to customers even though the Commission's primary charge is to protect customers from the monopoly power of regulated utilities. See subsection (14). By arbitrarily and capriciously limiting the electric-service options of customers, the anti-competitive impact of

[1] Michigan's largest and most established public utilities, however, have interpreted Rule 411 to give them the absolute perpetual right to serve a particular parcel of land even if there is no customer or building located on the premises.

Rule 411 has been to stifle economic growth and otherwise impede economic expansion in Michigan.

III. THERE IS NO LEGAL AUTHORITY FOR THE ISSUANCE OF THIS RULE

It is not at all clear what statute authorizes the customer constraints imposed by Rule 411. The Commission's jurisdiction and authority goes to regulation in the public's interest of the monopoly power held by public utilities. There is no statutory authority for regulating, let alone restricting, utility customers' choices of service providers, and at the same time extending the monopoly power the Commission is supposed to restrain. Countless Michigan appellate courts, however, have held that, as a creature of statute, the Commission has only those powers that are conferred by the Legislature in "clear and unmistakable language." *Union Carbide Corp v PSC*, 431 Mich 135, 147; 428 NW2d 322 (1988).[2] And, it follows that "where powers are specifically conferred [on an agency] they cannot be extended by inference." *Alcona Co v Wolverine Envtl Prod, Inc*, 233 Mich App 238, 247; 590 NW2d 586 (1998); *see also Herrick Dist Library v Library of Mich*, 293 Mich App 571, 574; 810 NW2d 110 (2011) ("[T]he powers of

[2] *See also Consumers Power Co v PSC*, 460 Mich 148, 164; 596 NW2d 126 (1999) ("[T]he PSC has only those powers conferred by clear statutory language"); *G & A Truck Line, Inc v PSC*, 337 Mich 300, 305; 60 NW2d 285 (1953) ("The Commission can do only those things authorized by statute"); *Sparta Foundry Co v Pub Utilities Comm'n*, 275 Mich 562, 564; 267 NW 736 (1936) ("The Michigan public utilities commission is an administrative body created by statute and the warrant for the exercise of all its power and authority must be found in statutory enactments"); *Taylor v Pub Utilities Comm'n*, 217 Mich 400, 402; 186 NW 485 (1922) (holding that the PUC's jurisdiction "must affirmatively appear in the statute before it can be invoked or exercised"); *Grand Rapids & I Ry Co v Mich RR Comm'n*, 183 Mich 383, 392; 150 NW 154 (1914) ("The Michigan Railroad Commission is a body possessing limited powers, to be ascertained by reference to the statute creating it"); *In re Application of Detroit Edison Co*, 311 Mich App 204, 216; 874 NW2d 398 (2015) ("The Legislature must grant authority by clear and unmistakable statutory language"); *Att'y Gen v PSC*, 269 Mich App 473, 482; 713 NW2d 290 (2005) (holding that PSC exceeded its authority where no statute "specifically authorize[d]" the PSC's action); *Booth v Consumers Power Co*, 226 Mich App 368, 373; 573 NW2d 333 (1997) ("As a creation of the Legislature, [the PSC] possesses only that authority specifically granted by statute").

administrative agencies . . . are limited to those expressly granted by the Legislature"). Moreover, the Michigan Administrative Procedures Act of 1969, as amended, provides that in promulgating a rule the Commission must clearly identify the particular statute under which it has the authority to promulgate a new rule. See MCL 24.241(1)(a). Therefore, the Commission and/or any commenter advocating in support of a continuation of Rule 411 should be required to identify the particular statute alleged to support the Rule .

To the extent it is argued that Section 6(1) of the Michigan Public Service Commission Act authorizes the issuance of Rule 411, that argument should be rejected. The Michigan Supreme Court has held that "the broad language of § 6 serves as an outline of the PSC's jurisdiction, not a grant of specific powers." *Consumers Power*, 460 Mich at 160; *see also Union Carbide*, 431 Mich at 147 ("Although its language is broad, § 6 merely serves as an outline of the commission's jurisdiction, not as a grant of specific authority or powers"); *Midland Cogeneration Venture Ltd P'ship v PSC*, 199 Mich App 286, 302; 501 NW2d 573 (1993) (holding that "the broad language of § 6 . . . provides no support for the PSC's conditions, because the statute merely serves as an outline of the PSC's jurisdiction, not as a grant of specific authority or powers"); *Att'y Gen v PSC*, 189 Mich App 138, 145; 472 NW2d 53 (1991) ("Although broadly stated, § 6(1) is not a grant of specific power. It is merely an outline of the PSC's jurisdiction"); *Detroit Edison Co v Richmond Twp*, 150 Mich App 40, 49; 388 NW2d 296 (1986) (recognizing that § 6(1) "has been determined by the Supreme Court to be merely an outline of the commission's jurisdiction and not a grant of specific powers to the commission"); *Ram Broad of Mich, Inc v PSC*, 113 Mich App 79, 85–86; 317 NW2d 295 (1982) (holding that "the public service commission act . . . grants no regulatory powers absent other statutes granting specific regulatory jurisdiction").

IV. IN THE ALTERNATIVE, AMENDMENTS TO RULE 411

First, the definition of "customer" must be revised to reflect that it means only the individual, association, partnership, or corporation served by a public utility at one time and if that individual, association, partnership, or corporation changes then the customer ceases to exist and may be served by any utility willing to provide service to the new entity. Alternatively, if the current definition is retained, then it must be made clear that if the buildings and facilities are removed from the premises, there is no longer a customer.

Second, Rule 411(2) should be eliminated in its entirety. There should be no blanket prohibition regarding the ability of customers to transfer from one utility to another. See Section III above.

Third, subsections (7) and (8) are unneeded and should be eliminated in their entirety. They are overly restrictive and add complicated measurement requirements. The overall purpose of any amendments should be to allow customers to have a choice of service from any nearby utility that is willing to construct the necessary facilities, especially those customers taking 3-phase service at transmission voltage levels. In many instances these customers are not even interconnected to the utility's distribution system and only require local distribution equipment (i.e. a substation at the customer's site and radial line connection to the ITC or METC owned transmission system). These customers should not be restricted through an administrative rule from choosing which Michigan based utility they take electric service.

Fourth, Rule 411(11) should be eliminated in its entirety because there should be no perpetual entitlement of a public utility to serve what essentially is dirt. There is no need to define the "premises" that may be served by a public utility. If the economics of service from

another utility provides greater economic efficiencies and lower costs than that should be the right of the customer to transfer to the more efficient alternative source of electricity.

The Commission was created to protect customers from the monopoly power of regulated utilities. Any rules promulgated by the Commission should not be used to protect the incumbent monopoly but rather provide the flexibility for customers to choose their electric service provider.

Fifth, new connected load of an existing customer of 500 kW or more should have its choice of service from any nearby utility that is willing to construct the necessary facilities. The 500 kW is somewhat arbitrary in that it is assumed that a load must be of a certain size in order to be attractive to a nearby utility such that it would be willing to undertake the construction of new interconnections. This level is simply a floor.

V. RELIEF

WHEREFORE, ABATE requests that Rule 411 be eliminated in its entirety or ABATE's requested amendments be implemented.

Respectfully submitted,

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