A MACKINAC CENTER REPORT

Attorney General v. Michigan Public Service Commission

An Amicus Curiae Brief to the Michigan Supreme Court

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A Mackinac Center "friend of the court" filing to the Michigan Supreme Court in a case involving the Michigan Public Service Commission's renewable-energy surcharge on electrical bills

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ABOUT THIS DOCUMENT:
A BRIEF OF AMICUS CURIAE

On March 27, 2006, the Mackinac Center for Public Policy filed a brief of amicus curiae* with the Michigan Supreme Court in the case Attorney General v. Michigan Public Service Commission. The legal dispute involves the commission's decision to place a 5 cent per-meter per-month "surcharge" on the electrical bills of all customers of Consumers Energy. The surcharge is meant to finance subsidies for Michigan-based projects in "renewable energy," such as wind, solar, geothermal, and biomass power.

While the outcome of this case will probably depend on the narrow legal question of which powers the commission has been granted under statute, the dispute also raises core constitutional questions about the powers of unelected agencies of state government. If the Michigan Supreme Court allows the Public Service Commission to levy such "surcharges," state officials will have subverted Americans' longstanding rejection of taxation without representation.

The Michigan Public Service Commission, an agency of state government, regulates Michigan's markets for electrical power, natural gas, telephone services, and intrastate trucking. The commission is composed of three people appointed by the governor and confirmed by the Michigan Senate for six-year terms. The MPSC is arguably Michigan's most powerful regulatory agency.

The MPSC levied its 5 cent "surcharge" on every Consumers Energy customer in an order dated May 18, 2004. The commission separately placed a similar charge on all customers of Detroit Edison.† The MPSC claimed that it had been empowered by the Legislature to assess these charges under the "Customer Choice and Electricity Reliability Act" of 2000, a law whose primary purpose was to establish a less regulated and more competitive market in electrical energy in Michigan.

The MPSC's program was challenged by the Michigan Attorney General on grounds that the CCERA did not in fact authorize the MPSC to levy this "surcharge." On Nov. 22, 2005, the Michigan Court of Appeals sided with the attorney general on this question and suspended the program.

The MPSC subsequently sought leave to appeal the case to the Michigan Supreme Court. The attorney general has asked the Supreme Court to deny leave to appeal, and the Mackinac Center's brief of amicus curiae, which is reprinted on Pages 1-35 of this document, requests the same result. The

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* "Amicus curiae" means "friend of the court." Thus, the Mackinac Center is not a litigant in Attorney General v. Michigan Public Service Commission, but rather an interested observer supplying additional legal reasoning for the Michigan Supreme Court to consider.

† The MPSC's imposition of this surcharge on Detroit Edison customers has been challenged in a separate legal case that is currently being heard in the state's appellate courts.

Center's brief, however, also suggests that if the court were to hear the case, the justices should use the dispute to clarify the constitutional limits on the powers of the MPSC. Such limits on the powers of unelected state agencies are fundamental to representative democracy.

EXECUTIVE SUMMARY

(1) On May 18, 2004, the Michigan Public Service Commission, an agency of state government, levied a 5 cent per-meter per-month "surcharge" on the electrical bills of all customers of Consumers Energy in order to finance subsidies for Michigan-based projects in wind power and other forms of "renewable energy." In imposing this charge — actually a tax — the MPSC exceeded its statutory authority under Michigan's "Customer Choice and Electricity Reliability Act" (Public Act 141). This conclusion is supported by accepted rules of statutory construction and by the MPSC itself:

- On May 16, 2002, the MPSC held that the CCERA did not permit the commission to force electricity customers to support renewable-energy production, writing that "the language adopted in Act 141 persuades the Commission that the Legislature did not intend to create a program that would require consumers to pay an additional surcharge to support it." The MPSC changed its view and claimed power to order a "surcharge" only after two renewable-energy firms later stated that they lacked money to finance their expansion plans. Given the MPSC's contradictory record, the courts should be skeptical of the MPSC's views in this dispute.

- The MPSC justifies its purported power to levy the "surcharge" in this case by citing a section of the CCERA that sometimes permits the commission to set electricity rates. The commission's reliance on this section fails for three reasons:

  ~ The CCERA's rate-setting section does not mention renewable energy or any "renewable energy source," even though lawmakers specifically defined the latter term in the act.

  ~ In contrast to the absence of language in the CCERA authorizing subsidies for renewable energy production, the act does establish a funding mechanism for an "educational program" to inform consumers about the availability of alternative electrical suppliers. It is implausible to suggest, as the MPSC does, that the Legislature would explicitly provide funding for such a relatively minor program, but only implicitly authorize a broad "surcharge" to provide subsidies for the production of renewable energy itself.

  ~ MPSC rates are charged for services rendered or for the recovery of "stranded costs." But the 5 cent per-meter per-month "surcharge" in this case is levied on customers who receive no service from

renewable-energy suppliers, and the "surcharge" does not pay for "stranded costs," since the costs subsidized in this case were not incurred before the CCERA became law. Indeed, according to guidelines enunciated by the Michigan Supreme Court in Bolt v. City of Lansing, this "surcharge" is a tax, not a rate or fee "exchanged for a service rendered or a benefit conferred. …"

- The MPSC further justifies its power to impose the "surcharge" in this case by pointing to a second section of the CCERA: the exhortation that the renewable-energy information program instituted by the legislation "also be designed to promote the use of existing renewable energy sources and encourage the development of new facilities." This claim fails for two reasons:

  ~ The section of the CCERA cited by the MPSC repeatedly refers to communication and education, clearly indicating that the CCERA's renewable-energy program is meant only to provide information to consumers, not to subsidize renewable-energy projects.

  ~ The specific passage that the MPSC cites appears only at the end of the relevant portion of the statute. It strains credulity to contend that the Legislature would casually append such an important power to the end of a statute that repeatedly talks about something else.

(2) The Michigan Court of Appeals has correctly overturned the MPSC's renewable-energy "surcharge." The Michigan Supreme Court should deny the commission leave to appeal that decision.

(3) If, however, the Supreme Court decides the MPSC might have grounds for appeal, the court must recognize that an MPSC power to levy such a "surcharge" probably represents an unconstitutional delegation of power from the Legislature to an executive agency. The jurisprudential standards for reviewing such delegations are contradictory, but a legislative grant of power to the MPSC would need to comply with key clauses of the Michigan Constitution: the seat of legislative power (Article 4, Section 1); separation of powers (Article 3, Section 2); due process (Article 1, Section 17); permissible language in the levying of taxes (Article 4, Section 32); nonsurrender of the taxation power (Article 9, Section 2); and permissible payments from the state treasury (Article 9, Section 17).

(4) If the Michigan Supreme Court were to grant the MPSC leave to appeal, this case would be ideal for determining the standards of judicial review for delegations of legislative power. Further, the dispute would allow the court to articulate a consistent standard of review for executive agency interpretations of ambiguous statutes. Ideally, this standard would grant agencies minimal leeway in the absence of explicit legislative language. Regardless, a consistent standard would reduce litigation and discourage judicial activism.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Constitutional Provisions

Miscellaneous

Administrative Cases

JURISDICTIONAL STATEMENT

Amicus curiae does not contest jurisdiction.

STATEMENT OF QUESTIONS INVOLVED

I. Does the Michigan Public Service Commission have authority to tax all customers of Consumers Energy to generate subsidies for renewable-energy production, given that the Legislature opted to create only an information campaign to educate the public about renewable energy?

- Amicus curiae's answer: No.
- The Michigan Public Service Commission's answer: Yes.
- The Attorney General's answer: No.
- The Court of Appeals' answer: No.

II. If the Legislature intended to authorize the Michigan Public Service Commission to tax all customers of Consumers Energy to generate subsidies for the production of renewable energy, would the Legislature's delegation of such a power be constitutional?

- Amicus curiae's answer: No.
- The Michigan Public Service Commission's answer: Unknown.
- The Attorney General's answer: Unknown.
- The Court of Appeals' answer: Unknown.

INTRODUCTION

The issue presented in this case is whether the Michigan Public Service Commission (MPSC) is empowered to levy a tax on all customers of Consumers Energy (Consumers).[1] The purpose of this tax is to subsidize the development of renewable-energy sources, so a general understanding of electricity generation and energy markets will help provide context in the instant case.

Electricity is measured commercially in "watt-hours,"[2] with kilowatt-hours (1,000 watt-hours) typically used to measure residential energy use, and megawatt-hours (1 million watt-hours) typically used to measure the electricity generated by power plants. In the United States in 2004, there were roughly 3,953 million megawatt-hours (MWh) of electricity generated.[3] This electricity originated from three main fuel sources: (1) fossil fuels (used by coal and gas plants); (2) nuclear power; and (3) renewable energy, such as wind power. Fossil fuels included coal (1,976 million MWh), petroleum (118 million MWh), and natural gas (700 million MWh). Nuclear plants generated 789 million

[1] The rationale for the use of the term "tax" will be discussed in Argument I. In brief, when a charge is imposed on everyone to raise revenue independent of the service rendered, it is a "tax." When someone pays an amount that reflects the value of a service rendered, the payment is a "fee."

[2] A watt-hour is an intuitive concept. Using light bulbs as an example, a 75-watt bulb that is on for four hours will use 300 watt-hours of energy.

[3] The source of the information for this paragraph is the U.S. government's Energy Information Administration. The electricity generation table for 1949 to 2004 is located at the following Web address: http://www.eia.doe.gov/emeu/aer/pdf/pages/sec8_8.pdf. Note that the figures in this federal government table are provided in billions of kilowatt-hours. This unit is mathematically equivalent to "millions of megawatt-hours," and the latter unit is used in this brief to provide an easier comparison to Michigan's figures and to other industry data.

MWh. Renewable power sources included hydroelectric (270 million MWh), wood (37.3 million MWh), waste (22.7 million MWh), geothermal (14.4 million MWh), solar (0.6 million MWh), and wind (14.2 million MWh).

The latest readily accessible figures for energy production in Michigan are from 2002.[4] In that year, about 118 million MWh of electricity were generated. The majority came from fossil fuels: coal (67 million MWh), petroleum (1.1 million MWh), natural gas (16 million MWh), and other gases (0.01 million MWh). Nuclear plants generated 31 million MWh. Figures for renewable-energy power are readily available in only two categories: hydroelectric (0.6 million MWh), and "other" (2.5 million MWh).

Energy Generation by Source for the United States (2004) and Michigan (2002) in Millions of Megawatt-Hours

Energy Source	United States (2004)	Michigan (2002)
ALL SOURCES	3,953	118
FOSSIL FUELS		
Coal	1,976	67
Petroleum	118	1.1
Natural gas	700	16
Other gases		0.01
NUCLEAR POWER	789	31
RENEWABLE-ENERGY SOURCES		
Hydroelectric	270	0.6
Wood	37.3	(Other renewable) 2.5
Waste	22.7	
Geothermal	14.4	
Solar	0.6	
Wind	14.2	

According to the Michigan Department of Labor & Economic Growth, there are currently only three wind turbines in Michigan.[5] The oldest one, which was installed in

[4] The source of the information for this paragraph is the U.S. government's Energy Information Administration. The Michigan profile for 2002 is located at the following Web address: http://www.eia.doe.gov/cneaf/electricity/st_profiles/michigan.pdf.

[5] This wind-turbine information is located at the following

1996, can generate 600 kilowatts and is owned by Traverse City Power and Light. The other two, which were installed in 2001, can generate 900 kilowatts apiece. These latter two wind turbines are owned by Mackinaw Power, LLC, which is one of the two entities that filed the application petitioning the MPSC to create the tax in the instant case. The other entity that filed was North American Wind Energy, LLC, which to date has not constructed a single wind turbine in Michigan.

Two companies dominate the Michigan electricity market, Detroit Edison, which provided around 48 million MWh in 2002, and Consumers Energy, which provided about 36 million MWh in 2002. (Consumers is the company involved in this litigation.) The next highest supplier was Indiana Michigan Power Co., which provided around 3 million MWh.

As the figures above indicate, the vast majority of power produced in the United States and Michigan comes from fossil fuel and nuclear plants. Coal and natural gas are relatively cheap commodities, and the plants that burn them are generally efficient. But fossil fuel plants do emit carbon dioxide and sulfur dioxide. Nuclear power plants do not produce these emissions and therefore are considered more efficient than fossil fuel plants. Still, they generate nuclear waste, which can be harmful if not properly disposed of.

Some people believe that renewable-energy sources can reduce demand for fossil fuels and nuclear energy. But renewable sources are far more costly and in some cases do not provide the dependability of fossil fuels and nuclear energy. For example, wind and solar power are weather-dependent, while coal, oil, natural gas, and nuclear power can produce energy on demand.

Since electricity cannot be stored, the unpredictability of some renewable-energy sources makes them less attractive

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Web address: http://www.michigan.gov/documents/CIS_EO_Wind_Chart_140011_7.pdf.

in the marketplace. The market for electricity is required to make available not just the amount of power actuarially forecast for that time and day, but also a government-regulated overage to meet unanticipated demand surges. The market thus places a premium on reliability.

The MPSC has deemed that the production of more renewable energy would benefit Michigan. In the commission's May 18, 2004 Order in *In re Mackinaw Power, LLC*, MPSC Case No. U-13843, the MPSC stated:

> [T]he Commission is persuaded that the time is right for the Commission to take another step in the direction of promoting renewable resources. . . . [G]reen power programs are favored by the public and have flourished in other jurisdictions. Green power has far less of the expensive and health hazardous externalities frequently associated with fossil fuel power production.

Id. at 12.[6] Unfortunately, in this order, the MPSC took a statute that merely created a renewable-energy information program and stretched it into a purported justification for the commission's taxing all of Consumers' customers to subsidize renewable-energy facilities. This was a violation of Michigan law and the Michigan Constitution.

[6] MPSC case orders are available online at http://www.dleg.state.mi.us/mpsc/orders/electric/. Unfortunately, the database is unwieldy, since users cannot search for an order by case number. Instead, they must locate a particular order by identifying the month, date, and year it was issued.

STATEMENT OF FACTS

The Customer Choice and Electricity Reliability Act (CCERA), 2000 PA 141, became effective June 5, 2000. The Legislature stated that the purpose of the act was the following:

> (a) To ensure that all retail customers in this state of electric power have a choice of electric suppliers.
>
> (b) To allow and encourage the Michigan public service commission to foster competition in this state in the provision of electric supply and maintain regulation of electric supply for customers who continue to choose supply from incumbent[7] electric utilities.
>
> (c) To encourage the development and construction of merchant plants which will diversify the ownership of electric generation in this state.
>
> (d) To ensure that all persons in this state are afforded safe, reliable electric power at a reasonable rate.
>
> (e) To improve the opportunities for economic development in this state and to promote financially healthy and competitive utilities in this state.

MCL 460.10(2).[8]

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[7] "Incumbent utilities" are those electricity providers that operated under the monopoly-franchise system that existed prior to the enactment of Public Act 141.

[8] For reasons that are not clear, the "purpose" language included in the legislation "does not apply after December 31, 2003." MCL 460.10(3). This date does not, however, affect the remaining provisions of the act.

One provision of the CCERA allowed the MPSC to create an informational program to educate customers about the benefits of using renewable energy:

> The commission shall establish the Michigan renewables energy program. The program shall be designed to inform customers in this state of the availability and value of using renewable energy generation and the potential of reduced pollution. The program shall also be designed to promote the use of existing renewable energy sources and encourage the development of new facilities.

MCL 460.10r(6). Another provision states, "The commission 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).

On July 25, 2001, in *In re Consumers Energy Co,* MPSC Case No. U-13029, the MPSC approved Consumers' request for "authority to establish a voluntary program to encourage the use of renewable resources." *Id.* at 1. This was a three-year program that allowed individual Consumers' customers to purchase 100 percent, 50 percent, or 10 percent of their power from a renewable provider. The surcharge was 3.2 cents per kilowatt-hour for purchasers who chose 100 percent; 1.6 cents per kilowatt-hour for purchasers who chose 50 percent; and 0.32 cents per kilowatt-hour for purchasers who chose 10 percent.

While Consumers' voluntary program was underway, the commission began developing a separate industry-wide renewable-energy program. On May 16, 2002, in *In re Michigan Renewables Energy Program,* MPSC Case No. U-12915, the MPSC entered an order that established the "Michigan Renewable Energy Program" (MREP). In this order, **contrary to the MPSC's argument in the instant case**, the commission acknowledged that the CCERA did not

provide a funding mechanism for the MREP. The commission stated: "One of the limiting issues surrounding the creation of a renewable-energy program is identifying funding for its activities. As noted earlier, the statute that directs the Commission to establish the program does not provide a mechanism for creating a revenue stream to fund projects." *Id.* at 8-9. The MPSC also rejected the argument that it could impose a "surcharge"[9] on all of a utility's customers: "the language adopted in Act 141 persuades the Commission that the Legislature did not intend to create a program that would require consumers to pay an additional surcharge to support it." *Id.* at 10. The MPSC also discussed where it was likely to obtain funding:

> Funding sources for renewable energy projects may be found through other agencies with which the MREP will coordinate its efforts. Among some of the possibilities for funds mentioned by the commenters are the United States Department of Energy, the CIS Energy Office, and the Michigan Economic Development Corporation. Perhaps additional grant sources may be found as well.

Id.

In addition to admitting that the CCERA did not provide a funding mechanism for the MREP, the MPSC expressed an unwillingness to force the incumbent utilities (such as Consumers and Detroit Edison) to purchase a quota of renewable energy. Instead, the commission expressed a preference to let the market dictate purchases of renewable energy:

> [T]he Commission finds that it should permit the market to drive the demand for power from renewable energy sources. The intent of the

[9] "Surcharge" is the MPSC's language for this levy. As discussed in other portions of this brief, this "surcharge" is actually a tax.

> public education component of this program is to encourage customers to request power from renewable energy sources. Disclosure requirements . . . will inform customers about the available power portfolios [i.e., the mix of fossil fuels, nuclear power, and renewable energy available], and green tariffs [premiums paid voluntarily by customers] can be a legitimate marketing tool for utilities. The current price for power from renewable energy sources is, on average, higher than that from traditional generation sources. However, alternative electric providers may be encouraged to purchase and market renewable energy in a competitive market if customers find the benefits outweigh the additional costs.
>
> . . .
>
> The Commission finds that green tariffs are an appropriate method of providing customers with the ability to purchase energy produced by renewable energy sources. At this juncture, the Commission is persuaded that green tariffs or renewable energy programs should be undertaken on a voluntary basis, as the market dictates. Several commenters state that customers have demonstrated that they are willing to pay additional amounts to obtain power from renewable energy sources. As the open access provisions of Act 141 are implemented and the market of alternate service providers expands, the demands of the market may be expected to reflect these trends. And, as demand grows, so will the market opportunities for renewable energy producers.

Id. at 11-12, 14.

On July 22, 2003, in *In re Mackinaw Power, LLC*, MPSC Case No. U-13843, Mackinaw Power, LLC and North American Wind Energy filed an application with the MPSC to amend Consumers' voluntary renewable-energy program. The applicants candidly admitted that from their perspective too few electricity customers were willing to pay the voluntary surcharge for green power,[10] which prevented the applicants from obtaining financing to expand or create new renewable-energy facilities:

> Without financiable [sic] EPAs[11], substantial new Green Power assets cannot be financed to complement existing generation portfolios. The initial Green Power Pilot Project . . . was financed without debt. The developer [Mackinaw Power] took 100% of the financial risks. Larger wind power projects with scope and scale sufficient to diversify the generation resource portfolios require leveraged financing. The financial institutions will not provide sufficient debt because the EPAs do not have long-term, firm pricing approved by the MPSC.

MPSC Case No. U-13843 Application at 3 (footnote and emphasis added).

Thus, the applicants asked the MPSC for permission to change the existing EPAs. Under those EPAs, the volume of renewable power purchased by Consumers on behalf of its customers could fluctuate. The price that Consumers paid for this renewable power was equal to the "avoided cost"[12]

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[10] According to Mackinaw Power, LLC and North American Wind Energy, the voluntary surcharge worked out to about a 40 percent or 50 percent premium over the standard rates.

[11] An EPA is an Energy Purchase Agreement — in this case, a contract between Consumers and the renewable-energy providers regarding the sale and purchase of electricity.

[12] The term "avoided cost" derives from federal law. In 1978,

(roughly the amount that Consumers saved by not generating the electricity itself) plus the voluntary surcharge paid by customers who chose to buy green power.[13] The applicants sought to replace this financial arrangement with a 20-year agreement that obligated Consumers to purchase a guaranteed volume of renewable energy from them at a guaranteed price. Specifically, the applicants sought an initial price of 5.8 cents per kilowatt-hour, with the price escalating 1 percent annually.

Thus, the applicants requested long-term, guaranteed contracts so that they could use the resulting revenue to obtain private financing for the construction of new generating capacity. The applicants also set forth public policy arguments in favor of renewable energy:

> Large renewable energy projects will deliver economic benefits to Michigan through new construction, maintenance and manufacturing jobs, increased tax revenues and annual payments to rural landowners who lease their land for the projects. New renewable projects provide energy security and self-sufficiency.
>
> . . .
>
> When wind power is developed by Michigan-based companies, this increases the probability of

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Congress enacted the Public Utility Regulatory Pricing Act (PURPA). Under PURPA, utilities are required to buy power from "qualifying facilities" that use alternative fuel sources. *Ass'n of Businesses Advocating Tariff Equity v Michigan Public Service Comm*, 216 Mich App 8, 11; 548 NW2d 649 (1996). The utility must pay the qualified facility the "avoided cost," which is defined as "the cost to a utility of energy or capacity, or both, which the utility would have generated for itself or purchased from another facility but for the purchase from the QF [qualified facility]." *Id.*

[13] The EPAs did permit Consumers to retain a small portion of this surcharge to cover overhead costs.

> economic development through manufacturing wind turbines, blades and towers in Michigan. Manufacturers are holding multiple conferences to promote this activity, but without projects in Michigan, this activity will be futile.
>
> With long-term, firm-priced EPAs, the new wind power projects will be financed. And, long-term, firm priced EPAs for new, zero-emissions wind power projects reduce the risk of volatile pricing and eliminate emissions risks. Like a Treasury Bill boosts financial portfolio performance, new renewable power boosts generation portfolio performance by eliminating volatile pricing and emission risks. The solution will diversify the generation portfolio and leverage investments in Clean Air Act Compliance. Total benefits to Michigan include increased energy security, public health, farmland protection, environmental values and economic development through manufacturing.

MPSC Case No. U-13843 Application at 4.

On May 18, 2004, in MPSC Case No. U-13843, the MPSC issued an order meant to facilitate the construction of new renewable-energy plants. The commission held that it had the power to order that each of Consumers' customers be charged 5 cents per meter every month to finance the renewable-energy program:

> The Commission finds that Consumers should be authorized to implement a renewable resource program funding mechanism to recover green power program costs not covered by contributions of customers who agree to pay a premium for green power. . . . A five-cent per meter per month customer charge will ensure that the amount that any customer pays will

> be minimal. It also ensures that the bulk of the cost of the program will fall on residential customers, who traditionally seem more supportive of green power.

MPSC Case No. U-13843, May 18, 2004 Order at 20.

The commission also approved the use of long-term contracts, stating that "the new green power program should be structured to encourage financial institutions to finance new facilities. Toward that end, the Commission approves the use of long-term contracts between Consumers and its suppliers. Specifically, the Commission finds that contract terms of up to 20 years would be appropriate." *Id.* at 17-18.[14]

Because such long-term contracts could expose Consumers to financial risk, the commission ordered that the 5 cent per-meter per-month tax be levied and disbursed to Consumers to offset any losses that the company sustained:

> Revenues collected from the monthly five-cent charge will be placed into a renewable resource program fund. The fund will be used to compensate Consumers for costs that are not recovered from customers who voluntarily choose the green power program. . . . Consumers should enter into renewable contracts commensurate with the anticipated amount of the fund.[2] . . .
>
> . . . In 2006, when rate caps on residential customers disappear, the funding mechanism is expected to generate . . . $1,000,000 per year.

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[2] The funds will accrue interest at Consumers' average short-term interest rate. In the event that

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[14] The commission did, however, refuse to give Mackinaw Power or North American Wind Energy the exclusive right to provide renewable energy to Consumers under the new plan.

> the fund develops a significant unused balance, the Commission may direct other appropriate uses for the fund, such as advertising to promote renewable energy.

Id. at 20-21. Thus, the risk of financial loss in the renewable-energy contracts was passed from Consumers to Consumers' customers.[15]

On January 25, 2005, in MPSC Case No. U-13843, the MPSC ordered Consumers to create a process for soliciting bids from potential renewable-energy providers in the program the commission had established in the May 18, 2004 Order. On April 28, 2005, in *In re Consumers Energy Co,* MPSC Case No. U-14471, the commission also approved a continuation of Consumers' original program, in which the company's customers could voluntarily pay a surcharge in order to receive some or all of their power from renewable-energy sources.

The Michigan Attorney General appealed the MPSC's Orders of May 18, 2004 (MPSC Case No. U-13843), January 25, 2005 (MPSC Case No. U-13843), and April 28, 2005, (MPSC Case No. U-14471). These appeals were consolidated by the Michigan Court of Appeals.

On November 22, 2005, in a published decision, the Court of Appeals affirmed in part and reversed in part.[16] In the sole ruling that is pertinent here, the Court of Appeals held that the MPSC lacked the statutory authority to impose the 5 cent per-meter per-month tax:

> We hold that the PSC lacked the statutory authority to authorize CEC to impose an

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[15] The MPSC has also established a similar 5 cent per-meter per-month tax for all of Detroit Edison's customers. The case involving that tax is currently working its way through the state's appellate courts. *Attorney General v Michigan Public Service Comm*, Court of Appeals Case No. 259845.

[16] The order has been approved for publication, but was not in either Mich App or NW2d at the time this brief was submitted.

additional charge of $0.05 per meter per month on all customers, including customers who had not agreed to pay a premium to receive green power, to finance the development of renewable resource power programs. The PSC established a renewable energy program, as required by MCL 460.10r(6). The PSC's authority to set rates that facilitate the development of new energy technologies is set out in MCL 460.10b(1); however, that authority does not include the power to make management decisions on behalf of a utility. *Union Carbide Corp v Public Service Comm*, 431 Mich 135, 148; 428 NW2d 322 (1988). The PSC's ability to consider a wide variety of factors when setting rates is well established, *Detroit Edison Co v Public Service Comm*, 221 Mich.App. 370, 375, 562 NW2d 224 (1997), but is not unlimited. MCL 460.10b(1) and MCL 460.10r(6) were enacted as part of the CCERA, and became effective on June 5, 2000. The PSC's interpretation of new legislation is not entitled to the same degree of deference as is its interpretation of longstanding legislation. [*In re Procedure & Format for Filing Tariffs Under the Michigan Telecommunications Act*, 201 Mich App 533, 538-539; 534 NW2d 194 (1995)]. Under any circumstances, though, a doubtful statutory power does not exist. [*Attorney General v Public Service Comm*, 231 Mich App 76, 78; 585 NW2d 310 (1998)]. The Legislature clearly intended consumer participation in green power programs to be voluntary. Neither 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 from the program. The PSC exceeded its authority in concluding to the contrary.

> Requiring all customers to pay a monthly charge to build a fund to compensate CEC for costs associated with the development of renewable resource energy programs might well have positive economic and public policy implications; however, we must not consider such implications when determining if the PSC acted within its statutory authority. *Consumers Power Co v Public Service Comm*, 460 Mich 148, 156, 596 NW2d 126 (1999).

Slip opinion at 5 (citation omitted and emphasis added).

The MPSC has filed the instant application. The Attorney General responded, and the MPSC has already filed its reply.

ARGUMENT

I. The MPSC does not have the power to tax all customers of Consumers Energy to generate subsidies for renewable-energy production, since the Legislature authorized the creation only of an information campaign to promote the use of renewable energy.

A. Standard of Review

Generally, an MPSC determination regarding the scope of its authority is a question of law that is reviewed de novo. *Consumers Power Co v Michigan Public Service Comm*, 460 Mich 148, 157; 596 NW2d 126 (1999).

B. Merits

The MPSC argues that MCL 460.10b(1) and MCL 460.10r(6) give it the authority to impose the 5 cent per-meter per-month tax to subsidize renewable-energy production. Further, the MPSC argues that this decision should be deferred to by the courts.

When a statute is clear, the courts will enforce it as written and will not defer to an agency's interpretation of the statute. *Consumers Power Co*, 460 Mich 148, 157 n 7. When a statute is ambiguous, there are contradictory standards of review for an MPSC interpretation of that statute. Some rulings suggest that the MPSC cannot exercise a power unless that power has been granted clearly in legislation, while other rulings suggest that the courts should be deferential to MPSC interpretations, even if those interpretations grant the commission additional power.[17]

[17] This contradiction has probably arisen because of constitutional concerns that will be discussed more fully in Argument II. With agencies, the courts have recognized two somewhat inconsistent concepts: (1) courts prefer to defer to agency expertise, particularly in technical matters; and (2) courts are wary of allowing agencies to act in the Legislature's stead, since agencies are largely insulated from democratic influences. This second issue becomes particularly acute when the delegation language contains few standards and effectively

Courts have held that the MPSC cannot exercise a power that is not explicitly conferred in a statute. In *Consumers Power Co*, this Court stated that it "strictly construes the statutes that confer power on the PSC." *Id.* at 155. A rule of construction specific to statutes involving boards and commissions is that ambiguous language cannot be used to confer power. *Id.* ("The power and authority to be exercised by boards and commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist." (quoting *Union Carbide Corp v Michigan Public Service Comm*, 431 Mich 135, 151; 428 NW2d 322 (1988))); *Michigan Electric Cooperative Ass'n v Michigan Public Service Comm*, 267 Mich App 608, 616; 705 NW2d 709 (2005) ("The PSC possesses only that authority granted it by the Legislature. Authority must be granted by clear and unmistakable language. A doubtful power does not exist.").

Other authorities indicate that deference should be given to agency interpretations of ambiguous statutes. The pertinent portion of MCL 462.25 states, "All rates, fares, charges, classification and joint rates fixed by the commission and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie, lawful and reasonable until finally found otherwise." MCL 462.26(8) states, "In all appeals under this section the burden of proof shall be upon the appellant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable." Regarding "unlawfulness," this Court stated, "To declare an order of the commission unlawful there must be a showing that the commission failed to follow some mandatory provision of the statute or was guilty of

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leaves the agency a wide scope of authority.

These inconsistent standards and the policy implications behind them were discussed in Justice Brickley's dissent in *Consumers Power Co*, and they are also reviewed in Argument II. Justice Brickley advocated adoption of the classical federal model, in which an agency's construction of ambiguous statutes receives deference from the courts. As stated below, amicus curiae does not agree.

an abuse of discretion in the exercise of its judgment." *In re MCI Telecommunications Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). Regarding "unreasonableness," this Court stated, "The hurdle of unreasonableness is equally high. Within the confines of its jurisdiction, there is a broad range or 'zone' of reasonableness within which the PSC may operate." *Id*. In *Consumers Power Co*, this Court stated, "While the PSC has only those powers conferred on it by the Legislature, the interpretation given to statutes by the agency charged with applying them is entitled to great deference." 460 Mich at 154.

Nevertheless, even where the courts have granted deference to agency interpretations of ambiguous statutes, some courts have qualified the amount of deference they will give. The Court of Appeals has stated, "A reviewing court must give due deference to the administrative expertise of the PSC and may not substitute its judgment for that of the agency. However, this does not mean that courts may abandon or delegate their responsibility to interpret statutory language and legislative intent." *Attorney General v Michigan Public Service Comm*, 244 Mich App 401, 406; 625 NW2d 786 (2001) (citation omitted). Further, a court does not "afford the same measure of deference to an agency's initial interpretation of new legislation as [it does] to a longstanding interpretation." *Michigan Electric Cooperative Ass'n*, 267 Mich App at 616.

These contradictory standards for reviewing the MPSC's interpretation of an ambiguous statute are problematic. Such varying standards could tempt judges to apply whatever rule would justify a conclusion they personally favor. In contrast, the ideal approach was stated by this Court in *Consumers Power Co*: "In construing the statutes empowering the PSC, this Court does not weigh the economic and public policy factors that underlie the action taken by the PSC." 460 Mich at 156. More importantly, such conflicting standards breed litigation. They encourage the MPSC to construe its powers broadly, but also encourage challenges to any MPSC action.

This leads to the courts' becoming involved in a wide range of agency matters, and without a unitary standard, a consistent jurisprudence is unlikely to emerge.

Thus, a single unifying standard for the review of ambiguous statutes is needed. For reasons that will be touched upon in Argument II, the best standard would be one that limits the MPSC to powers clearly given by the Legislature. Regardless, this Court should settle on a single standard if presented the opportunity.

Turning to the specific issue at hand, the Legislature clearly did not intend to empower the MPSC to tax all of Consumers' customers in order to facilitate financing of renewable-energy projects. As a primary matter, the MPSC has already admitted that the Legislature clearly did not provide a mechanism to finance the MREP: In MPSC Case No. U-12915, the MPSC stated "the language adopted in Act 141 persuades the Commission that the Legislature did not intend to create a program that would require consumers to pay an additional surcharge to support it." The MPSC should not be allowed to change its position to its own advantage now.

Further, the MPSC's earlier conclusion about the MREP would undermine any argument for granting the MPSC deference if this Court were to conclude that the CCERA is ambiguous. After all, a court does not "afford the same measure of deference to an agency's initial interpretation of new legislation as [it does] to a longstanding interpretation." 267 Mich App at 616. It is therefore reasonable to conclude that if a court were to grant any deference in the case of ambiguous statutes, that court would afford no deference to an agency's interpretation of a new statute when that interpretation directly contradicts the agency's earlier interpretation of the statute.

This statute is not ambiguous, however. The "CC" in the CCERA stands for "Customer Choice." The section of Act 141 stating its purpose, *supra* at p. 7, makes clear that customer choice and market forces were the overriding rationales

behind the reform. The MPSC's vision of the "renewables energy program" directly contravenes these rationales. In Consumers' voluntary renewable-energy program, the market signaled that new renewable-energy facilities were not viable for Mackinaw Power and North American Wind, since banks were unwilling to finance these companies' projects. In imposing a compulsory tax, the MPSC seeks to override the very market signals that the Legislature intended to elevate. Moreover, by assuring the renewable-energy firms a 20-year stream of revenue independent of their performance, the MPSC's arrangement would shield providers of renewable energy from the competitive forces that impose economic discipline and efficiency. In fact, the consumers have no "choice" about whether to participate in funding these renewable-energy projects; participation is mandatory for every one of Consumers' customers.[18]

MCL 460.10b(1), a rate-setting section of the CCERA that the MPSC relies on in its arguments here, does not mention "renewable energy." Rather, the section merely discusses "new generation, transmission, and distribution technologies." This phrase need not include renewable energy, since "new generation, transmission, and distribution technologies" can simply entail traditional utilities' becoming more competitive through new technologies that increase the companies' efficiency and that mitigate the environmental impacts of fossil and nuclear fuels.

Furthermore, in MCL 460.10g(f), the Legislature specifically defined the term "renewable energy source" ("energy generated by solar, wind, geothermal, biomass, including waste-to-energy and landfill gas, or hydroelectric"). Yet the term "renewable energy source" was not used in MCL 460.10b(1), indicating that the Legislature did not intend to include it there.

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[18] It is also worth recalling here that all of the customers of Detroit Edison, the other major energy supplier in Michigan, face a similar tax.

The Legislature knew precisely how to create a funding mechanism, since it did so in MCL 460.10r(2), where it ordered the MPSC to establish a funding mechanism for an "educational program" to inform electric customers about the availability of alternative electrical suppliers. It seems odd to suggest that the Legislature would explicitly discuss the funding of such a relatively minor program, but only implicitly authorize a tax to provide subsidies for the production of renewable energy itself. The far better explanation is that the Legislature did not intend to create subsidies for renewable-energy production — and that the Legislature certainly did not empower the MPSC to levy a tax for that purpose.

The structure of MCL 460.10r indicates that the "renewable energy program" was created only to provide information to consumers, not to subsidize renewable-energy projects. MCL 460.10r(1) requires the MPSC to establish standards for communications from electricity providers to consumers. MCL 460.10r(2) mandates that the MPSC create a funding mechanism for an educational program. MCL 460.10r(3) requires electricity providers to inform each customer about the environmental characteristics of the customer's energy provider, including what fuels are used (for example, fossil, nuclear, or renewable), the average emissions of sulfur dioxide and carbon dioxide emitted per megawatt-hour, and the average amount of nuclear waste per megawatt-hour. Obviously, MCL 460.10r(3) was enacted so that electricity customers could be informed about the environmental consequences of their choice of electricity provider. Both MCL 460.10r(4) and MCL 460.10r(5) discuss informational reporting requirements.

As noted above, MCL 460.10r(6) states:

> The commission shall establish the Michigan renewables energy program. The program shall be designed to inform customers in this state of the availability and value of using renewable energy generation and the

> potential of reduced pollution. The program shall also be designed to promote the use of existing renewable energy sources and encourage the development of new facilities.

The MPSC contends that this provision was meant to create a fund that would subsidize renewable-energy production. But the remainder of MCL 460.10r discusses only providing electricity customers with information, clearly indicating that in MCL 460.10r(6), the Legislature was referring to a program only to inform electricity customers about the potential benefits of renewable-source electricity. Such a program would "promote the use of existing renewable-energy sources and encourage the development of new facilities," since customers would now be aware of the environmental consequences of the use of fossil or nuclear fuels and might want to explore a renewable-energy alternative. The MPSC's suggestion that MCL 460.10r(6) actually empowers the commission to levy a tax to subsidize renewable-energy production is an implausible construction of the legislative language, especially given that this subsection occurs at the end of MCL 460.10r. It strains credulity to contend that the Legislature would casually append such an important power to the end of a statute that repeatedly talks about something else.

The MPSC tries to distinguish the instant case from this Court's decisions in *Consumers Powers Co* and *Union Carbide Corp* by contending that this case is a pure rate case, while those cases were not. This distinction is unavailing, since the 5 cent per-meter per-month charge is in actuality a tax, not a fee.

Union Carbide involved the MPSC's attempt to order Consumers to fire up and shut down its plants in a particular order. In that case, the MPSC essentially wanted to make sure that Consumers' least efficient plant was operated as little as possible, and the commission ordered Consumers to make certain that this occurred. This Court held that while

the MSPC had the power to regulate rates, it did not have the power to "make management decisions." 431 Mich at 149. In dicta, this Court stated that the MPSC "acted properly in preventing Consumers from passing on to ratepayers any additional fuel expense" from the inefficient operation of its plants (although this issue was not appealed to this Court). *Id.* Nevertheless, this Court held that the MPSC's effort to protect consumers through the exercise of the commission's rate-making power did not enable the MPSC to order Consumers to operate in a particular manner.

In *Consumers Power Co*, the MPSC attempted to order Detroit Edison and Consumers to engage in "retail wheeling," in which a consumer buys electricity from a third-party provider and receives the electricity through Detroit Edison's or Consumers' power lines for a fee.[19] This Court held that the MPSC's rate-making power did not include the authority to take such action:

> The PSC initially characterizes its retail wheeling program as ratemaking. . . . The challenged portion of the order does not, however, involve ratemaking. Although retail wheeling has a ratemaking component, i.e., the establishment of the rate a third-party provider must pay to transmit power through a local utility's system, appellants do not challenge that aspect of the experimental program. Instead, appellants contend that the PSC cannot order local utilities to transmit electricity from a third-party provider's system through its own system to an end-user. This aspect of retail wheeling is simply not ratemaking.

460 Mich at 157-58. This Court ignored the public policy

[19] This is basically the concept of "unbundled energy." When energy is "bundled," one entity both supplies and delivers the energy. When energy is "unbundled," as in retail wheeling, one entity supplies the energy and another delivers it.

rationale for retail wheeling, and this Court held that as a matter of statutory interpretation, the MPSC clearly did not have the power to enact such a program.

As in *Union Carbide* and *Consumers Power Co*, the MPSC claims that this case is within its traditional rate-making powers. This is untrue. Although the MPSC will likely contend that the 5 cent per-meter per-month surcharge is a "rate" or "fee," it is not. It is a tax.

In *Bolt v City of Lansing*, 459 Mich 152, 161; 587 NW2d 264 (1999), this Court stated, "Generally, a 'fee' is 'exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit.' A 'tax,' on the other hand, is designed to raise revenue." *Id.* (citations omitted). Here, Consumers' customers are being charged for a service they did not choose to receive, and the MPSC admits that its goal is to raise revenue. Therefore, the 5 cent per-meter per-month charge is a tax.

This tax is clearly not within the MPSC's traditional rate-making power. In fact, the MPSC's argument errs at its inception, since it employs the term "rate." This term is a misnomer. MPSC rates are charged for services rendered or for the recovery of "stranded costs." MCL 460.10a(1). As just noted, what the MPSC refers to as a "rate" is not a payment for services, since many customers do not receive the services. Nor is this "rate" for the payment of "stranded costs" — i.e., costs that arose before Act 141 became law and before the utilities faced competition. The MPSC does not have the power to order all of Consumers' customers to subsidize the development costs of renewable-energy companies that wish to enter the more competitive market that emerged after Act 141 became law.

It is therefore clear that the MPSC did not have the statutory authority to enact the 5 cent per-meter per-month tax on Consumers' customers to help finance renewable-energy production. This Court should deny leave to appeal.

II. If the Legislature indeed intended to give the Michigan Public Service Commission the power to tax all of Consumers' customers in order to subsidize production of renewable energy, such a delegation would be unconstitutional.

A. Standard of Review

The constitutionality of a legislative act is a question of law that is reviewed de novo. *DeRose v DeRose*, 469 Mich 320, 326; 666 NW2d 636 (2003).

B. Merits

As discussed above, there is tension in the case law regarding the standard of review for MPSC actions. This is likely due to the competing policy concerns about, on the one hand, allowing the courts to micromanage legislative and agency decisions, and on the other hand, allowing unelected agencies to make policy decisions insulated from democratic controls. One school of thought holds that the courts should defer to agency action as long as the Legislature provides intelligible principles for the agency to follow. But a second school of thought holds that when these so-called "intelligible principles" are vague, new due-process and separation-of-powers issues arise. Under this view, agencies should not be exercising what are in effect legislative prerogatives to fill statutory gaps left by vague or ambiguous legislative language. Legislatures are not in fact constitutionally permitted to delegate their fundamental legislative powers.

The nondelegation doctrine was discussed at length in *Taylor v Smithkline Beecham Corp*, 468 Mich 1; 658 NW2d 127 (2003), where this Court wrote:

> A simple statement of this doctrine is found in *Field v Clark*, 143 US 649, 692; 12 S Ct 495; 36 L Ed 294 (1892), in which the United States Supreme Court explained that "the integrity and maintenance of the system of government ordained by the Constitution" precludes

> Congress from delegating its legislative power to either the executive branch or the judicial branch. This concept has its roots in the separation of powers principle underlying our tripartite system of government. Yet, the United States Supreme Court, as well as this Court, has also recognized "that the separation of powers principle, and the nondelegation doctrine in particular, do not prevent Congress [or our Legislature] from obtaining the assistance of the coordinate Branches." *Mistretta v United States*, 488 US 361, 371; 109 S Ct 647; 102 L Ed2d 714 (1989).

Id. at 8 (footnotes omitted). The Michigan Supreme Court explained that there are two general types of nondelegation claims. One type was the claim at issue in *Taylor*, where the Legislature premised government action on findings by an independent body (in that case, the U.S. Food and Drug Administration). *Id.* at 10.[20] The second type of nondelegation claim occurs when a delegation of legislative power has been made to a state agency or department. Assuming this Court determined that the CCERA could allow the MPSC to create the 5 cent per-meter per-month customer tax, the second type of delegation would be at issue here.

Federal law is more developed than Michigan law regarding the question of nondelegation to executive agencies, and this federal jurisprudence highlights pitfalls that Michigan should avoid. The latest United States Supreme Court decision that discussed the nondelegation doctrine was *Whitman v Am Trucking Ass'n, Inc*, 531 US 457, 472; 121 SCt 903 (2001). There, the Supreme Court

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[20] In *Taylor,* the plaintiffs claimed that MCL 600.2946(5), which prohibits product liability lawsuits where the U.S. Food and Drug Administration (FDA) has approved the drug, impermissibly delegated legislative authority to the FDA. The Michigan Supreme Court rejected this claim.

held that Congress cannot delegate legislative powers to executive agencies, but can constitutionally delegate rule-making authority to an executive agency if Congress sets forth an "intelligible principle" to which that agency must conform. *Id.* In the federal model, the provision of an "intelligible principle" theoretically strips rule-making of its legislative characteristics.

Yet under the intelligible-principle test, the Supreme Court has not overturned a federal statute since 1935. This result suggests that the "intelligible-principle" test is toothless.

In *Whitman*, there were two judicial opinions relevant to the instant case. In one, Justices Stevens and Souter acknowledged that there really is no clear difference between legislating and rule-making, because even where intelligible principles are provided, rule-making is often the functional equivalent of legislative power. 531 US at 488-489 (Stevens, J., concurring). Despite this conclusion, the two justices would allow most delegations.

Justice Thomas, on the other hand, expressed doubt about the propriety of the intelligible-principle doctrine:

> "I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.' "

Id. at 487 (Thomas, J., concurring). Justice Thomas expressed a willingness "to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers." *Id.*

In the federal scheme, the courts generally defer to an administrative agency's interpretation whenever a delegation statute is ambiguous. *Chevron USA, Inc v*

Natural Resources Defense Council, Inc, 467 US 837; 104 SCt 2778; 81 LEd2d 694 (1984*).* Under the traditional *Chevron* analysis, when construing an agency regulation, the courts must consider two issues: (1) whether Congress' intent was clear, since Congress' clear intent must be given effect; and (2) whether, in cases where Congress' intent was not clear, the agency's interpretation is based on a permissible construction of the statute. 467 US at 842-43. The courts will defer to the agency's determination whenever an agency must fill a statutory gap. *Id.* at 843-44.

This Court recently summarized *Chevron* deference:

> The concept of *Chevron* deference . . . is a doctrine that is in the nature of a *standard of review*, applied by the judiciary in reviewing an agency's reasonable construction of an ambiguous statute, which recognizes that any necessary policy determinations in interpreting a federal statute are more properly left to the agency responsible for administering the particular statute.

Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Development Bd, 472 Mich 479, 492 n 23; 697 NW2d 871 (2005).

While federal courts generally defer to agency decisions when a statute is ambiguous, the United States Supreme Court recently announced an exception to this practice when an agency's rule nears a boundary of Congress' power (i.e., the boundary of a legislative power). *Solid Waste Agency of N Cook County v United States Army Corps of Eng'rs*, 531 US 159; 121 S Ct 675; 148 LEd2d 576 (2001) (*SWANCC*). The Supreme Court stated:

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. See *Edward J DeBartolo Corp v Florida Gulf Coast Building*

> *& Constr. Trades Council*, 485 US 568, 575, 99 LEd2d 645, 108 SCt 1392 (1988). This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. See *ibid*. . . . Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo*, 485 US at 575.

531 US at 172-73.

Michigan law concerning judicial review of agency action is not as well-settled. In *DPG York, LLC v State*, 474 Mich 987; 707 NW2d 596 (2005), vacated __Mich__; 708 NW2d 375 (2006), this Court ordered the Michigan Court of Appeals to analyze a nondelegation issue involving a state agency under *Westervelt v Natural Resources Comm*, 402 Mich 412; 263 NW2d 564 (1978). *Westervelt* was a 3-3 opinion. In *Westervelt*, all six participating justices held that the delegation was not improper. The three-justice lead opinion stated that the delegation challenge has both a separation-of-powers component and a due-process component, while the remaining three justices indicated that the sole test was the "standards test" — i.e., only the separation-of-powers component. This Court has not authoritatively resolved the *Westervelt* split.

Since the *Westervelt* concurring opinion is basically the pre-*SWANCC* federal intelligible-principle model, there are at least three constitutional models that could apply in the instant case: (1) the *Westervelt* lead-opinion model; (2) the pre-*SWANCC*-federal model; or (3) the post-*SWANCC*-federal model. Alternatively, this Court might find some other test to be controlling.

If this Court were to follow the post-*SWANCC* federal model, the MPSC's actions would implicate a number of constitutional legislative powers. Const 1963, art 4, § 1 declares, "The legislative power of the State of Michigan is vested in a senate and a house of representatives." Const 1963, art 3, § 2 states, "The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 1, § 17 states in part, "No person shall be . . . deprived of life, liberty or property, without due process of law." Const 1963, art 4, § 32 states, "Every law which imposes, continues or revives a tax shall distinctly state the tax." Const 1963, art 9, § 2 states, "the power of taxation shall never be surrendered, suspended or contracted away." Const 1963, art 9, § 17 mandates, "No money shall be paid out of the state treasury except in pursuance of appropriations made by law."

Applying some of these constitutional commands, this Court has clearly held that policy determinations are fundamentally a legislative function. In *Blank v Dep't of Corrections*, 462 Mich 103; 611 NW2d 530 (2000), this Court discussed the constitutionality of the Joint Committee on Administrative Rules (JCAR), a legislative committee. JCAR was created to ensure that the Legislature approved of all rules being promulgated by the agencies. Unless approved by JCAR or the Legislature itself, the rules in question could not be implemented. The lead opinion in *Blank*, which was authored by Justice Kelly and signed by Justices Corrigan and Young, described the question presented:

> The Legislature's statutory delegation of authority to executive branch agencies to adopt rules and regulations consistent with the purpose of the statute does not violate the separation of powers provision. The issue here is whether the Legislature, upon delegating such authority, may retain the right to

> approve or disapprove rules proposed by executive branch agencies [without enacting new legislation].

Id. at 113. The lead opinion stated that where JCAR does not approve a rule, it is making a policy determination, and "Policy determinations are fundamentally a legislative function." *Id.* at 116. Thus, the lead opinion, while finding JCAR to be constitutionally impermissible, did not question the initial delegation of rule-making authority to an executive agency.

Justice Weaver, in contrast, joined the lead opinion, but chose to "leave to another case the question of the constitutionality of the delegation of rulemaking authority to agencies." *Id.* at 130 (Weaver, J. concurring). Thus, one justice — Justice Weaver — has explicitly acknowledged the possibility that almost all agency rule-making is constitutionally suspect. Moreover, four justices have agreed to the proposition that policy determinations are fundamentally a legislative function.

As noted above, *supra* at p. 12, when the renewable-energy suppliers sought relief from the MPSC, they made fundamental policy arguments to the MPSC, stressing the economic and environmental benefits of wind power. In turn, the MPSC discussed policy arguments in favor of renewable-energy programs when it ordered the tax. Such arguments are properly the domain of the Legislature, not an administrative agency.

As noted earlier, the 5 cent per-meter per-month charge is in fact a tax. Further, the money that the MPSC proposes to pay Consumers from the renewable-energy fund can be seen as an appropriation "paid out of the state treasury."

Therefore, if this Court were to find that the CCERA is ambiguous and might allow the MPSC to enact its 5 cent per-meter per-month tax, serious constitutional issues would arise. Amicus curiae believes that this Court should deny

leave to appeal and affirm the Court of Appeals decision. If, however, this Court were to grant leave to appeal, this case is ideal for determining the standards of judicial review of delegations of legislative power. Thus, in that case, this Court should request briefing on both the proper standard of review and the constitutional issues surrounding the purported delegation at issue here.

RELIEF REQUESTED

This Court should deny leave to appeal. But if this Court does grant leave to appeal, it should request briefing on the standard of review for agency interpretations of ambiguous statutes and whether the Legislature's purported delegation violates the Michigan Constitution.

DATED: March 27, 2006

Respectfully submitted,

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Prior to his work with the Michigan Supreme Court, Wright spent four years as an assistant attorney general for the State of Michigan, where he gained significant litigation and appellate advocacy experience. He joined the state Attorney General's Office after one year as a policy adviser in the Senate Majority Policy Office of the Michigan Senate. Wright also spent two years as a law clerk to the Hon. H. Russell Holland, a U.S. district judge in Alaska.

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