

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



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May 19, 2006

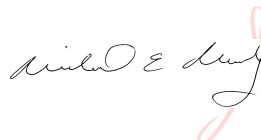
Ms. Mary Jo Kunkle
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
Lansing, MI 48911

Dear Ms. Kunkle:

RE: MPSC Case No. U-14649

Enclosed for filing in the above-captioned case please find the **Attorney General's Request for Rehearing**, together with a proof of service. This filing is being submitted electronically pursuant to the Commission's Paperless Electronic Filings Program.

Sincerely,

 Michael E. Moody
2006.05.19
14:32:48 -04'00'

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MEM:jas
Enc.
c: All Parties

PROOF OF SERVICE

MPSC Case No. U-14649

The undersigned certifies that a copy of the **Attorney General's Request for Rehearing**, was served upon the parties listed below by mailing the same to them at their respective addresses with first class postage fully prepaid thereon, on the 19th day of May, 2006.

**Janet
Schafer**

Digitally signed by Janet Schafer
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STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of	)	
SEMCO ENERGY GAS COMPANY for authority	)	
to implement a pilot gas cost assistance program in its	)	Case No. U-14649
MPSC Division, to recover costs related to the program	)	(e-file/paperless)
and related approvals.	)	
_____	)	

ATTORNEY GENERAL'S REQUEST FOR REHEARING

MICHAEL A. COX, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, by and through Michael Moody and John Liskey, Assistant Attorneys General, request that the Michigan Public Service Commission (Commission or MPSC) grant his request for rehearing as permitted pursuant to MPSC Rule 460.17403(1).

I. Facts and Procedural History

On January 9, 2006, Administrative Law Judge (ALJ) Mark Cummins issued his Proposal for Decision (PFD) granting Staff's motion for summary disposition (supported by the Attorney General's response motion), thus dismissing SEMCO Energy Gas Company's (SEMCO) application in its entirety. Exceptions to the PFD were due on February 21, 2006.

On February 13, 2006, SEMCO filed a request to withdraw its application in this case and dismiss the case without prejudice.

On February 14, 2006, the Attorney General filed a motion opposing this request on the grounds that the dismissal of this case should be with prejudice. In his motion, the Attorney General cited MCL 24.278(2) for the proposition that "[e]xcept as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order,

waiver, default or other method **agreed upon by the parties.**" (Emphasis added). The Attorney General declined SEMCO's request to withdraw and dismiss its application without prejudice. In addition, the Attorney General noted that pursuant to Rule 460.17341 and MCL 24.281, if a party does not file exceptions then the party waives any objections and the PFD becomes the final decision of the agency absent further review by the agency within the time provided by rule.

On February 17, 2006, SEMCO sought agreement of the parties to allow its request to voluntarily withdraw its complaint to be heard by the MPSC and extend the filing deadline for SEMCO to file its exceptions to the PFD until such time that the MPSC ruled on SEMCO's request. The Attorney General agreed with SEMCO's request.

On February 17, 2006, SEMCO filed a reply to the MPSC's and the Attorney General's motion opposing SEMCO's request to withdraw without prejudice.

On March 8, 2006, the Attorney General filed a response to SEMCO's reply motion. In this motion the Attorney General explained at pages 3-4:

In the instant case, SEMCO filed an application to incorporate some new provisions within its GCR clause. After the MPSC Staff filed a motion to dismiss the application, along with a supporting motion from the Attorney General, the ALJ granted the Staff's motion dismissing the application. Now, in order to avoid the adverse consequence of losing the motion to dismiss, SEMCO seeks to withdraw its application without prejudice so that it could potentially refile the application as if nothing ever happened. SEMCO cites to no MPSC decision supporting such a motion to withdraw under those facts. The reason there is no MPSC decision supporting such a motion is that the process before the MPSC would become a game. Parties could forum shop for different ALJ's and waste time and resources of the parties and the MPSC by filing applications and refiling applications when a party loses a motion to strike or loses a motion to dismiss.

SEMCO argues that the Attorney General has not claimed or even demonstrated how it will be prejudiced by withdraw of its application without prejudice. This is untrue. The Attorney General expended time and energy reviewing SEMCO's application and reviewing case law as to whether the application fell within the ambit of Act 304. The Attorney General also examined the impact of SEMCO's

application on the GCR process before decided to file its motion supporting Staff's motion to dismiss and attended the hearing on the motion. Now, SEMCO is seeking dismiss its application without prejudice, thus allowing SEMCO to potentially refile the application at a later date and require additional time and energy of the parties. In addition, to the prejudice to the Attorney General there is the prejudice to the process by allowing SEMCO to withdraw without prejudice after an adverse decision from the ALJ in the case. As explained above, if a party can simply withdraw its application without prejudice after it obtains an adverse ruling then it could create gaming of the MPSC's case schedule and a tremendous waste of time and resources for both parties and the MPSC.

Again, the Attorney General is not arguing that parties cannot settle cases or agree to a motion to withdraw, the Attorney General is arguing that one party cannot unilaterally decide to withdraw its application without prejudice after it receives an adverse decision from the ALJ in order to preserve the party's ability to refile at a later date. The Attorney General believes that he would be prejudiced if SEMCO is permitted to withdraw its application without prejudice since it allows SEMCO to refile that application at any time, and thus require additional time and energy of the Attorney General and create a potential gaming of the process before the MPSC.

On April 25, 2006, the MPSC issued its Opinion and Order in this case granting SEMCO's request to voluntarily withdraw its application without prejudice.

II. Argument

In its April 25, 2006 Opinion and Order, the MPSC cites to the unpublished Court of Appeals decision in *Lynaum v Coleman*, unpublished opinion *per curiam* of the Court of Appeals, decided September 25, 2001, Docket No. 221103, for the standard on granting dismissal with prejudice. (MPSC Order, April 25, 2006, pp 6-7). In fact, the MPSC quotes the *Lynaum* case as follows:

[I]n exercising [its] discretion [to grant or deny a voluntary dismissal] the trial judge is to weigh the competing interests of the parties along with any resultant inconvenience to the court from further delays. Normally, such a motion should be granted unless defendant will be legally prejudiced as a result.

(MPSC Order, April 25, 2006, pp 6-7).

The problem with this quote is that it is extremely misleading. The *Lynaum* Court was actually quoting a prior Court of Appeals decision and the entire quotation is as follows:

In exercising [its] discretion [to grant or deny a voluntary dismissal] the trial judge is to weigh the competing interests of the parties along with any resultant inconvenience to the court from further delays. Normally, such a motion should be granted unless defendant will be legally prejudiced as a result. **As the purpose of [MCR 2.504(2)] is to protect defendant [in this case Attorney General] from the abusive practice of dismissal after much time and effort has been put into a lawsuit, any dismissal should be on terms and on conditions which protect defendant [Attorney General]** [*Rosselott, supra* at 374, quoting *African Methodist Episcopal Church v Shoulders*, 38 Mich App 210, 212; 196 NW2d 16 (1972) (internal citations omitted).]

(*Lynaum, supra* at 5-6) (Emphasis and brackets added).

In addition, the *Lynaum* Court explains how to determine whether a defendant would be prejudiced by a voluntary dismissal as follows:

In determining whether a defendant would be prejudiced by a voluntary dismissal, the federal courts "consider such factors as the defendant's efforts and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and whether a motion for summary judgment has been filed by the defendant."

(*Lynaum, supra* at 5).

Moreover, the cases cited by *Lynaum* further support the proposition that the court must protect the defendant's [Attorney General] rights – not the plaintiff's [SEMCO] -- when deciding the plaintiff's motion to voluntarily withdraw – "If this lawsuit had been voluntarily dismissed without prejudice, defendants would have to spend additional time and money defending a new cause of action." *Rosselott v County of Muskegon*, 123 Mich App 361, 376; 333 NW2d 282 (1983) and "Defendants [Attorney General] have a right to an adjudication of this suit" *African Methodist Episcopal Church v Shoulders*, 38 Mich App 210, 212-213; 196 NW2d 16 (1972).

Here, the MPSC not only selectively quoted the *Lynaum* decision, but also it improperly applied the standard for determining whether a defendant would be prejudiced by a voluntary dismissal. The MPSC stated that the "Attorney General fail[ed] to proffer an argument that would meet the legal prejudice standard," yet both the *Lynaum* case and the *Rosselott* case both state that the Attorney General's effort and expense of litigating the case satisfies this prejudice standard. *Lynaum, supra* at 5-6; *Rosselott, supra* at 376. The fact that the MPSC also focused on SEMCO's unsupported "due process" rights, again, demonstrates that the MPSC improperly applied the standard for determining whether a defendant would be prejudiced by a voluntary dismissal. It is the Attorney General that has a "right to an adjudication of this suit" as explained by the *African Methodist Case. African Methodist, supra* at 212-213. In addition, the *Lynaum* Court explains that the court should look at whether there is "insufficient explanation for the need to take dismissal" on the part of the plaintiff, here SEMCO. *Lynaum, supra*. SEMCO has no explanation for requesting the voluntary withdraw without prejudice other than it wants to avoid the adverse effect the ALJ's grant of the motion to dismiss will have on SEMCO's ability to bring its application at a later date before the MPSC. Clearly, this is exactly the reason for not granting SEMCO's request to voluntarily withdraw without prejudice.

Furthermore, all the cases discussing the standard for determining whether a defendant would be prejudiced by a voluntary dismissal, deal with motions to withdraw before an adverse decision is issued against the plaintiff. The prejudice to the defendant [the Attorney General] of a plaintiff's [SEMCO's] motion to withdraw is even greater after an adverse decision against the plaintiff is issued, such as in this case. In fact, the *Lynaum* Court states that the court should examine "whether a motion for summary judgment has been filed by the defendant" when determining whether there is prejudice to the defendant since it would be highly prejudicial to

the defendant to grant plaintiff's motion to voluntarily withdraw without prejudice before the defendant obtains a decision on its motion for summary judgment. *Lynaum, supra*. Again, here, the Attorney General was successful in obtaining a motion to dismiss against SEMCO from the ALJ. Clearly, the Attorney General is highly prejudiced by granting SEMCO's request to voluntarily withdraw without prejudice after SEMCO received an adverse decision from the ALJ on its application.

Finally, the MPSC itself has asserted the same position of the Attorney General before the Michigan Court of Appeals and Michigan Supreme Court and won, and thus its decision in this case is completely contradictory to that position. *Adrian Energy Associates LLC v Michigan Public Service Commission*, January 11, 2006 Order, Docket No. 261718 (Attachment A) and *Adrian Energy Associates LLC v Michigan Public Service Commission*, February 27, 2006 Order, Docket No. 130314 (Attachment B). In *Adrian Energy Associates LLC*, Adrian Energy Associates, LLC and several other qualifying facilities (QFs) filed an appeal of the MPSC's decision in Case No. U-13917 and before the Court of Appeals ruled on the appeal sought to withdraw their appeal. The MPSC filed a brief at both the Court of Appeals and the Supreme Court arguing against the QFs motion to withdraw:

The appellees, the MPSC, the Attorney General and Consumers Energy Company expended considerable resources responding to the QF's 75-page brief that contained 44 attachments.

Despite this admission, the QFs argue at pages 10-11 that the Court of Appeals appears to have wrongly decided that the appellants were forum shopping.

The Court of Appeals properly exercised its discretion to decline to grant the Motion to Withdraw because the QFs' claim regarding the lawfulness of the Commission's order in MPSC Case No. U-13917 is likely to recur in the future.

(MPSC's February 10, 2006 "Appellee Michigan Public Service Commission's Brief in Opposition to Adrian Energy Associates, LLC, *et al's* Application for Leave to Appeal" (Attachment C)).

Although the MPSC relied upon arguments such as the expenditure of considerable resources, forum shopping, the likelihood of the claim to recur in the future, the MPSC disregarded these same arguments when raised by the Attorney General in this case.

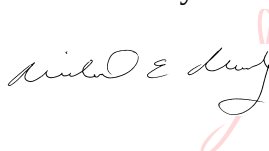
MPSC Rule 460.17403 provides that a rehearing should be granted where there are unintended consequences resulting from the compliance with the MPSC's decision. Here, the unintended consequence is the wrongly reasoned precedence that the MPSC's April 25, 2006 decision provides for future cases. The misquote of the Court of Appeals decision, the improper application of the standard provided in the Court of Appeals decision, and the fact that the MPSC, itself, has made these same arguments before the Court of Appeals and Supreme Court are all important factors that the MPSC should reconsider in this motion for rehearing. The MPSC should deny SEMCO's request to withdraw without prejudice and allow exceptions to the PFD or simply affirm the PFD.

III. Conclusion

The Attorney General respectfully requests that the MPSC grant the Attorney General's motion for rehearing and deny SEMCO's request to withdraw without prejudice allowing exceptions to the PFD or simply affirming the PFD.

Respectfully submitted,

Michael A. Cox
Attorney General

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2006.05.19 14:34:47 -04'00'

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May 19, 2006
U-14649 AG Req for Rehearing

Court of Appeals, State of Michigan

ORDER

Adrian Energy Assoc LLC v MPSC

Docket No. 261718

LC No. 00-013917

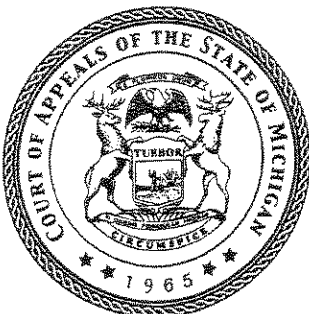
Stephen L. Borrello
Presiding Judge

Patrick M. Meter

Bill Schuette
Judges

The Court orders that the motion to file a reply to the answer is GRANTED.

The Court orders that the motion to withdraw the appeal pursuant to MCR 7.218(A), which is opposed by appellees, is DENIED.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JAN 11 2006

Date

Sandra Schultz Mengel
Chief Clerk

Order

Michigan Supreme Court
Lansing, Michigan

February 27, 2006

Clifford W. Taylor,
Chief Justice

130314
& (74)

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

ADRIAN ENERGY ASSOCIATES, L.L.C.,
CADILLAC RENEWABLE ENERGY
L.L.C., GENESEE POWER STATION
LIMITED PARTNERSHIP, GRAYLING
GENERATING STATION, L.P., HILLMAN
POWER COMPANY L.L.C., T.E.S.
FILER CITY STATION LIMITED
PARTNERSHIP, VIKING ENERGY OF
LINCOLN, INC., and VIKING ENERGY
OF MCBAIN, INC.,

Appellants,

SC: 130314
COA: 261718
MPSC Case No. 00-013917

v

MICHIGAN PUBLIC SERVICE COMMISSION,
CONSUMERS ENERGY COMPANY,
MIDLAND COGENERATION VENTURE, L.P.,
and ATTORNEY GENERAL,
Appellees.

On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal the January 11, 2006 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.



10221

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 27, 2006

Corbin R. Davis

Clerk

STATE OF MICHIGAN
IN THE SUPREME COURT

ADRIAN ENERGY ASSOCIATES LLC,
CADILLAC RENEWABLE ENERGY, LLC,
GENESEE POWER STATION LP, HILLMAN
POWER COMPANY, LLC, T.E.S. FILER CITY
STATION, LP, VIKING ENERGY OF
LINCOLN, INC., AND VIKING ENERGY OF
MCBAIN, INC.,

Supreme Court No. 130314

Court of Appeals No. 261718

MPSC Case No. U-13917

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
CONSUMERS ENERGY COMPANY, AND
ATTORNEY GENERAL MICHAEL A. COX,

Appellees.

Received

FEB 13 2006

Dept. of Attorney General
Tobacco & Special Litigation Division

**APPELLEE MICHIGAN PUBLIC SERVICE COMMISSION'S
BRIEF IN OPPOSITION TO ADRIAN ENERGY ASSOCIATES, LLC, *ET AL*'S
APPLICATION FOR LEAVE TO APPEAL**

MICHIGAN PUBLIC SERVICE COMMISSION

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Dated: February 10, 2006

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II. The Court of Appeals properly exercised its discretion in denying the QFs' Motion to Withdraw because the appeal had already been briefed, the QFs sought to dismiss the appeal in order to refile their failed federal action appealing the same Commission order, and the issue raised on appeal is likely to be raised by the QFs in future MPSC proceedings.	6
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Counter-Statement of Questions Presented

- I. In an appeal before decision by the Court of Appeals, MCR 7.302(B) provides that an Application for Leave to Appeal must show either that a delay in final adjudication is likely to cause substantial harm, or that the appeal is from a ruling regarding the validity of any State law or governmental action. Where briefing in the Court of Appeals case has been fully completed and awaits oral argument and thus no substantial harm is alleged or shown, and where the application is from a Court of Appeals order denying the Appellants' Motion to Withdraw their appeal, have the QFs failed to sustain their burden of showing meritorious grounds for granting their Application for Leave to Appeal?

The Michigan Public Service Commission answers, "Yes."

Consumers Energy Company answers, "Yes."

Adrian Energy Associates, LLC, *et al.*, answer, "No."

- II. Pursuant to MCR 7.218, the Court of Appeals denied Adrian Energy Associates, LLC, *et al.*'s, opposed Motion to Withdraw their appeal. Adrian Energy Associates, LLC, *et al.*, sought to withdraw their appeal after all briefing was completed in order to refile their previously dismissed federal court appeal of the same Commission order. Where Adrian Energy Associates, LLC, *et al.*, are likely to continue to raise the same issue in future MPSC proceedings, did the Court of Appeals abuse its discretion under these circumstances in declining to grant the Motion to Withdraw the appeal?

The Michigan Public Service Commission answers "No."

Consumers Energy Company answers "No."

Adrian Energy Associates, LLC, *et al.*, answers "Yes."

Counter-Statement of Concise Statement of Material Proceedings and Facts

Appellants Adrian Energy Associates, LLC; Cadillac Renewable Energy, LLC; Genesee Power Station LP; Hillman Power Company, LLC; T.E.S. Filer City Station, LP; Viking Energy of Lincoln, Inc.; and Viking Energy of McBain, Inc. (hereinafter referred to as "qualifying facilities" or "QFs") are companies¹ that sell power to Consumers Energy Company under power purchase contracts whose rates are approved by the Michigan Public Service Commission. In their appeal at the Michigan Court of Appeals in Docket No. 261718, these companies challenge the lawfulness of a MPSC order,² that interpreted their power purchase contracts in a manner they considered to be unlawful.

On the same day that these power companies filed an appeal of the February 28, 2005, Opinion and Order in Case No. U-13917 with the Court of Appeals, they filed an appeal of the same order with the Federal Energy Regulatory Commission ("FERC") in Docket No. EL05-85 and with the United States District Court, Western Division, in Case No. 5:05-CV-60. On June 1, 2005, FERC issued a Notice of Intent Not To Act declining to initiate an enforcement action under section 210(h)(2)(A) of PURPA.³ Subsequently, the MPSC asked the FERC to

¹ Appellants are all qualifying facilities as that term is defined in the Public Utility Regulatory Policies Act ("PURPA") that Congress enacted as part of a package of five pieces of legislation, known collectively as the National Energy Act, designed to combat the nationwide energy crisis in the early 1970s and the severe shortage of natural gas in 1977. Section 210 of the PURPA, 16 USC 824a-3, was designed to ameliorate the energy crisis by encouraging the development of alternative power sources in the form of cogeneration and small power production facilities. Subsections 17-22 of § 201 of the PURPA, 16 USC 796(17)-22, define a "cogeneration facility" as one that produces both electric energy and some other form of useful energy, such as steam or heat. The same section defines "small power production facility" as one that has a production capacity of no more than eighty megawatts (MW) and uses as a primary energy source biomass, waste, geothermal resources, or renewable resources such as wind, water, or solar energy.

² Opinion and Order, MPSC Case No. U-13917, February 28, 2005; attached as Attachment A.

³ *Adrian Energy Associates, LLC, et al. v MPSC*, Federal Energy Regulatory Commission, Docket No. EL05-85-000, Notice of Intent Not to Act, June 1, 2005; attached as Attachment B.

clarify that FERC did not intend to offer a substantive opinion on the question of whether the qualifying facilities properly framed a complaint with respect to the MPSC's implementation of PURPA, and FERC granted the request.⁴

On October 12, 2005, the United States District Court also dismissed without prejudice the appeal of the MPSC's Opinion and Order in Case No. U-13917 issued February 28, 2005.⁵ The District Court's analysis centered on whether it should exercise discretionary jurisdiction pursuant to the terms of the Declaratory Judgment Act, 28 USC 201(a). In assessing the propriety of exercising discretionary jurisdiction, the District Court indicated that the propriety of exercising jurisdiction depends "upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power."⁶ The District Court analyzed and applied the five criteria applicable to a determination of whether it should exercise jurisdiction, and found that exercise of federal jurisdiction was disfavored. The District Court analyzed these criteria as follows⁷:

LEGAL ANALYSIS

To analyze the propriety of the exercise of jurisdiction over this suit, this Court will use the same five-factor test employed by the Sixth Circuit Court of Appeals in *AmSouth*. These factors are:

- (1) whether the judgment would settle the controversy;

⁴ *Adrian Energy Associates, LLC, et al. v MPSC*, FERC Docket No. EL05-85-001, Order on Request for Reconsideration, July 26, 2005; attached as Attachment C.

⁵ Opinion, *Adrian Energy Associates, LLC, et al., v Michigan Public Service Commission, et al., and Consumers Energy Company*, Case No. 5:05-CV-60, October 12, 2005; attached as Attachment D. Adrian Energy has appealed this order in *Adrian Energy, LLC, et al. v MPSC; J. Peter Lark, Robert B. Nelson and Laura Chappelle, MPSC Commissioners; and Consumers Energy Company*, U.S. Court of Appeals, Sixth Circuit, Case No. 06-1015.

⁶ Opinion, *Adrian Energy Associates, LLC, et al., v Michigan Public Service Commission, et al., and Consumers Energy Company*, Case No. 5:05-CV-60, October 12, 2005, page 6.

⁷ Opinion, *Adrian Energy Associates, LLC, et al., v Michigan Public Service Commission, et al., and Consumers Energy Company*, Case No. 5:05-CV-60, October 12, 2005, pages 6-9.

- (2) whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations at issue;
- (3) whether the declaratory remedy is being used merely for the purpose of 'procedural fencing' or 'to provide an arena for a race for res judicata';
- (4) whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction; and
- (5) whether there is an alternative remedy that is better or more effective.

AmSouth, 386 F.3d at 785 (citing *Scottsdale Ins. Co.*, 211 F.3d at 968).

As to the first factor, the resolution of the federal legal questions posed in this suit would not solve the controversy. The MPSC and the Michigan Court of Appeals would still be required to resolve the pending state suit, which involves legal issues vitally related to both energy supply and energy rates. As such, this factor disfavors the exercise of jurisdiction.

As to the second factor, on the face of it, a declaration of federal law might enlighten the MPSC about federal law and, thereby, clarify the relations between the parties. While this is a possibility, the Court believes that it is a remote one. The MPSC, if anything, is more aware of federal legislation affecting energy supply than this Court and duly considers federal law in making its state regulatory decisions. The MPSC is also under a state statutory obligation, Mich. Comp. Laws § 460.6j(6), to rule on the reasonableness and propriety of the energy purchased by Consumers (including the rates of those purchases), as part of "Power Supply Cost Recovery" review. To involve this Court before a final MPSC determination is made would only serve to derail a natural and proper state venue, which might moot any federal issue. See *AmSouth*, 386 F.3d at 787.

"Procedural fencing" is the pejorative term given to the practice of filing a federal law suit asserting a federal defense as a means of eluding a state forum. See *AmSouth*, 386 F.3d at 788. In the instant case, for example, Count I of the First Amended Complaint was also asserted as a defense before the Michigan Court of Appeals. While Plaintiffs do not regard that title as apt since they characterize the state suit as limited to state issues, the Court does believe that the term applies because the MPSC, in conducting its own review, must inherently consider the propriety of its orders under federal law, including PURPA. In light of such, this suit appears to be an illicit attempt to get federal review of issues which are in the process of review before the state courts. Thus, this factor disfavors the exercise of jurisdiction.

Under state law, electric rate and supply determinations (including determinations about Power Supply Cost Recovery review) are made solely by the MPSC, under Mich. Comp. Laws § 460.6j(6), and are reviewed on appeal by the Michigan Court of Appeals, under Mich. Comp. Laws § 462.26.⁵ Federal law does not contemplate federal review of such determinations, except in aberrant cases where federal law has been ignored or violated. Comity for state government requires respect for the MPSC, its assigned powers and its administrative expertise. The exercise of jurisdiction over this suit is likely to be disruptive of the balance between federal and state institutions, especially since it

is typically the MPSC which exercises authority over these very issues. The interests of comity are also especially strong whereas the state's own system of review expresses confidence in the administrative expertise of the MPSC. See *Bldg. Owners & Managers Ass'n of Metro. Detroit v. Pub. Serv. Comm'n*, 346 N.W.2d 581, 587 (Mich. Ct. App. 1984); *Attorney Gen. v. Mich. Pub. Serv. Comm'n*, 602 N.W.2d 225, 229-30 (Mich. Ct. App. 1999). Therefore, this factor strongly disfavors the exercise of jurisdiction.

Alternative remedies disfavor the exercise of declaratory relief to the extent they are effective. In the instant case, a suit against the MPSC would seem the natural and more effective remedy since it would offer broader statutory and equitable remedy and review (*i.e.*, it would consider not only the propriety of the rates under PURPA, but also under state statutes governing the administrative review of such rates). Such a suit could include the consideration of Plaintiffs' federal defenses/claims under PURPA, since such statute does not prevent the state courts from enforcing PURPA obligations. See generally *Smith v. Dep't of Public Health*, 410 N.W.2d 749, 800 (Mich. 1987) (stating that Michigan courts "are duty-bound to enforce the provisions of the United States Constitution as well as valid federal laws" and routinely do so); see also, *e.g.*, *Midland Cogeneration Venture Ltd. P'ship v. Mich. Public Serv. Comm'n*, 1999 WL 33444299, *2 (Mich. Ct. App. May 21, 1999) (determining alleged PURPA violation). Accordingly, all five factors favor the dismissal of this action.

⁴ Plaintiffs' legal analysis has relied on the decision in *United States v. Kentucky*, 252 F.3d 816 (6th Cir. 2001), which is clearly distinguishable. In that case, federal review was mandated because the federal law completely preempted state law. Such is not the case here since the MPSC routinely enforces PURPA and FPA, which acts are consistent with state law regulatory requirements and a state law approach to regulation. The case of *Intellapex, PLLC v Intel Corp.*, 2005 WL 2077371 (W.D. Mich. 2005), is also distinguishable because it did not present an instance of federal/state friction by the federal adjudication of federal trademark claims, which claims are routinely adjudicated by federal courts.

⁵ The burden of proof at the Michigan Court of Appeals is a difficult one under Mich. Comp. Laws § 462.26(8), see *In re MCI Telecomm. Compl.*, 596 N.W.2d 164, 181 (Mich. 1999), which explains why some litigants might seek a forum elsewhere.

Subsequent to the issuance of the District Court's dismissal, the QFs on December 16, 2005, filed a Motion to Withdraw their appeal at the Michigan Court of Appeals, Docket No. 261718 on December 27, 2005. On January 11, 2006, the Court of Appeals denied the Motion to Withdraw.

Argument

- I. The QFs have failed to establish meritorious grounds for appeal to this Court prior to a decision by the Court of Appeals because all briefing has been completed, and thus no substantial harm will occur if the QFs are required to wait for a decision by the Court of Appeals before filing an Application for Leave to Appeal, and because the ruling denying the QFs' Motion to Withdraw their appeal does not involve a ruling that any State law or governmental action is invalid.

The QFs' Application for Leave to Appeal prior to a decision of the Court of Appeals should be denied because it fails to set forth sufficient grounds as set forth in MCR 7.302(B). That rule provides⁸:

(B) Grounds. The application must show that

* * *

(4) in an appeal before decision by the Court of Appeals,

(a) delay in final adjudication is likely to cause substantial harm, or

(b) the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan Statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid;

No substantial harm is likely to be caused by a denial of the Application for Leave to Appeal. All briefing in the Court of Appeals' case has been completed, and the case awaits oral argument that the QFs may waive if they choose.⁹ The QFs have failed to demonstrate any harm occasioned by simply awaiting the decision of the Court of Appeals before filing an Application for Leave to Appeal to seek to appeal the Court of Appeals' final decision.

The QFs have also not satisfied the only other ground for seeking leave to appeal an order of the Court of Appeals before that court has reached a decision. The ruling denying the QF motion is not one where the Court of Appeals held a State law or action to be invalid, but is one

⁸ MCR 7.302(B).

⁹ MCR 7.214.

declining to allow the Appellants to dismiss their appeal. Therefore, the QFs have failed to satisfy either ground required in order for this Court to grant their Application for Leave to Appeal the Court of Appeals' interlocutory order.

II. The Court of Appeals properly exercised its discretion in denying the QFs' Motion to Withdraw because the appeal had already been briefed, the QFs sought to dismiss the appeal in order to refile their failed federal action appealing the same Commission order, and the issue raised on appeal is likely to be raised by the QFs in future MPSC proceedings.

A. The Court of Appeals has discretion to grant or deny a Motion to Withdraw an appeal.

MCR 7.218 sets forth the requirements for a party who wishes to voluntarily dismiss its appeal. As the QFs' brief at page 6 acknowledges, MCR 7.218 supercedes any common-law right to voluntarily dismiss an appeal or dismiss a lawsuit. This Court Rule provides¹⁰:

(A) Dismissal by Appellant. In all cases where the appellant or plaintiff in an original action under MCR 7.206 files an unopposed motion to withdraw the appeal, the clerk will enter an order of dismissal.

(B) Stipulation to Dismiss. The parties to a case in the Court of Appeals may file with the clerk a signed stipulation agreeing to dismissal of an appeal or an action brought under MCR 7.206. On payment of all fees, the clerk will enter an order dismissing the appeal or the action under MCR 7.206, except that class actions or cases submitted on a session calendar may not be dismissed except by order of the Court of Appeals.

This rule provides that an unopposed motion to withdraw an appeal will be dismissed by the clerk, or that a stipulation of the parties may be filed and a dismissal of an appeal entered by the clerk when all fees are paid. The rule also notes that a stipulation to withdraw an appeal may not be filed if the case has been submitted on a session calendar. Consequently, if no stipulation or unopposed motion is filed, or if the case has been submitted on the session calendar, the Court must consider whether to grant or deny the motion to withdraw.

¹⁰ MCR 7.218.

The notion that the Court of Appeals has discretion to deny a motion to dismiss an appeal is further supported by an examination of the court rules governing appeals at the Court of Appeals. These rules provide that appeals are processed at the Court of Appeals in various stages. MCR 7.213 sets forth provisions relating to calendar cases at the Michigan Court of Appeals. Subsection A of the rule provides that at any time before submission of a case, the Court of Appeals may direct attorneys for the parties to the appeal to participate in settlement discussions. Subsection B provides¹¹:

(B) Notice of Calendar Cases. After the briefs of both parties have been filed, or after the expiration of the time for filing the appellee's brief, the clerk shall notify the parties that the case will be submitted as a "calendar case" at the next available session of the court.

This rule indicates that an appeal at the Court of Appeals will progress to the decision stage, being submitted as a calendar case, at the next available session of the court, after all briefing is completed. MCR 7.218(B) states that once an appeal has been submitted on a session calendar it may not be dismissed except by order of the Court of Appeals. In other words, once the briefing is completed, and the case has been submitted for oral argument and decision, the Court, via a three-judge panel, will exercise its discretion to decide whether to allow the appeal to be withdrawn.

B. The Court of Appeals properly exercised its discretion in declining to grant the Motion to Withdraw where the appeal had already been fully briefed.

In the appeal that is the subject of the Application for Leave to Appeal here, all briefing has been completed, although notice that the case has been submitted as a calendar case has not yet issued.¹² The appellees, the MPSC, the Attorney General and Consumers Energy Company

¹¹ MCR 7.213(B).

¹² MCR 7.213(B). It is possible that the notice that the case has been submitted as a calendar case has not yet been issued is because the appeal in Docket No. 261718 was consolidated with

expended considerable resources responding to the QFs' 75-page brief that contained 44 attachments. Nothing more remains for the QFs to do other than present oral argument, and they may waive argument if they choose to do so.¹³ Given the resources expended by the parties and the Court, the Court of Appeals acted reasonably in declining to grant the motion.

C. The Court of Appeals properly exercised its discretion in declining to grant the Motion to Withdraw when the QFs sought to dismiss the appeal in order to refile their failed federal action appealing the same Commission order.

The QFs admit in their brief on page 3 that they responded to the federal District Court's dismissal of their appeal of the MPSC's order in Case No. U-13917 by filing a Motion to Withdraw their appeal in Court of Appeals Docket No. 261718. Despite this admission, the QFs argue at pages 10-11 that the Court of Appeals appears to have wrongly decided that the appellants were forum shopping.

The QFs argue that they were required to file an action in federal court to challenge the lawfulness of the Commission's order in MPSC Case No. U-13917 as the case involved implementation of PURPA. The Commission specifically disputed that this case involves implementation of PURPA as that process was accomplished over a decade ago when the rates for the power that the qualifying facilities will be paid by Consumers Energy Company were approved. The QFs' only issue on appeal concerns interpretation of the previously-approved energy rates that provided that the qualifying facilities would be paid the cost of the coal burned by Consumers Energy Company.¹⁴ Federal district courts, to which recourse may be taken under

Court of Appeals Docket No. 261747 and 264860. These two other appeals have appealed the same MPSC order, but on other issues. The briefing in Docket No. 264860 has not yet been completed.

¹³ MCR 7.214.

¹⁴ The QFs' description of their actions at page 10 of its Application makes it appear that it filed its action at the District Court only after the Federal Energy Regulatory Commission declined to hear its appeal of the order in MPSC Case No. U-13917. Actually, they filed an appeal of that

PURPA Section 210(h)(2)(B) when the FERC refuses to bring an enforcement action, have refused to entertain enforcement actions addressing case-specific state application of state-based PURPA rates.¹⁵ The court in the *MIT* case dismissed a qualifying facility's complaint, "mindful of the dichotomy between implementation claims and 'as-applied: claims'" under Section 210(h) of PURPA. As the court explained¹⁶:

An implementation claim ... involves a contention that the state agency has failed to implement a lawful implementation plan under § 210(f) of PURPA. An as-applied claim, in contrast, involves a contention that the agency's implementation plan is unlawful, as it applies to or affects an individual petitioner.

A review of the District Court's decision in *Adrian Energy Associates, LLC, et al. v MPSC, et al.* reveals that the Court dismissed the QFs' appeal of the MPSC's order in Case No. U-13917 because it recognized the State appellate forum as capable of competently adjudicating all of the QFs' claims of unlawfulness of the Commission's order in MPSC Case No. U-13917. The Court found the following with respect to question of whether it was proper for it to exercise jurisdiction¹⁷:

"Procedural fencing" is the pejorative term given to the practice of filing a federal law suit asserting a federal defense as a means of eluding a state forum. See *AmSouth*, 386 F.3d at 788. In the instant case, for example, Count I of the First Amended Complaint was also asserted as a defense before the Michigan Court of Appeals. While Plaintiffs do not regard that title as apt since they characterize the state suit as limited to state issues, the Court does believe that the term applies because the MPSC, in conducting its own review, must inherently consider the propriety of its orders under federal law, including PURPA. In light of such, this suit appears to be an illicit attempt to get federal review of issues

order at the District Court, FERC, and the Court of Appeals on the same day.

¹⁵ See, e.g., *Greensboro Lumber Co v Georgia Power*, 646 F Supp 1345, 1374 (ND Ga, 1986); *Massachusetts Institute of Technology v Massachusetts Dep't of Public Utilities*, 941 F Supp 233 (D Mass, 1996) ("*MIT*").

¹⁶ *MIT v Massachusetts Department of Public Utilities*, 941 F Supp at 237.

¹⁷ Opinion, *Adrian Energy Associates, LLC, et al., v Michigan Public Service Commission, et al., and Consumers Energy Company*, Case No. 5:05-CV-60, October 12, 2005, page 8.

which are in the process of review before the state courts. Thus, this factor disfavors the exercise of jurisdiction.

Furthermore, the QFs' claim that the federal court has exclusive jurisdiction over one of their federal claims (Application for Leave to Appeal, pages 10-11) is belied by the fact that they initially chose a State forum, a State circuit court, to litigate their claims that Consumers Energy Company was paying them an incorrect price for its power.¹⁸ The QFs again sought a State forum, the Michigan Court of Appeals, to review the lawfulness of the MPSC's decision (and on the same day sought review of that decision at the Federal Energy Regulatory Commission and the federal District Court). It is only when the federal District Court declined to exercise jurisdiction because it recognized the appropriateness of the State Court of Appeals reviewing the MPSC's decision that the QFs chose to seek to abandon their state appellate remedy. The Court of Appeals reasonably exercised its jurisdiction to decline to allow the withdrawal of the appeal under these circumstances.

D. The Court of Appeals properly exercised its discretion in declining to grant the Motion to Withdraw because the issue raised in the appeal is likely to be raised by the QFs in future MPSC proceedings.

The Court of Appeals properly exercised its discretion to decline to grant the Motion to Withdraw because the QFs' claim regarding the lawfulness of the Commission's order in MPSC Case No. U-13917 is likely to recur in the future. The QFs claim that the Commission acted unlawfully when it concluded that the price payable to the qualifying facilities for energy

¹⁸ That court transferred that action to the MPSC based on the doctrine of primary jurisdiction. *Adrian Energy Associates, et al v Consumers Energy Co*, Ingham County Circuit Court, Docket No. 03-1799-CZ, Order Granting Deferral to the Primary Jurisdiction of the Michigan Public Service Commission; attached as Attachment D. On appeal by Adrian Energy, the Court of Appeals affirmed the transfer of the case to the Michigan Public Service Commission although it did find that the Circuit Court should have stayed proceedings pending the resolution of the Commission action. *Adrian Energy, LLC, et al. v Consumers Energy Company*, Court of Appeals No. 255319, November 3, 2005, unpublished *per curiam* opinion; attached as Attachment E.

payments by Consumers Energy Company is calculated using the cost of the coal burned at Consumers Energy Company's plants. This issue was litigated in the context of an Act 304 power supply cost recovery ("PSCR") plan case wherein the MPSC considered the utility's plans to acquire power for its customers and the source and cost of that supply.¹⁹ These cases are conducted each calendar year. Since the QFs claimed that Consumers Energy Company had incorrectly calculated the cost of the power that Consumers buys from the qualifying facilities, the QFs asked that the Commission find that they, not Consumers, had properly calculated the price payable to them. Because the price payable for power is an issue in each PSCR plan case, and since the QFs' contracts for sale of power to Consumers are ongoing, this issue will recur each year.

The Michigan Court of Appeals similarly declined to allow an appellant to withdraw its appeal in the case of *Midland Cogeneration Venture v PSC*.²⁰ The Court stated²¹:

At oral argument, MCV indicated that its appeal is limited to conditions 2 and 3, given the PSC's clarification on remand that the obligation to ensure access to books and records under condition 1 is directed at Consumers, not MCV. Consumers announced its intention to withdraw from its appeal its challenge to any and all of the conditions. The PSC opposed the withdrawal, noting that the issue of the PSC's authority to order discovery regarding Consumers' holding company and affiliates is a recurring one. We agree with the PSC that the propriety of all seven conditions should be reviewed at this time.

Although the Court declined to allow the withdrawal of the appeal at a later stage of the proceedings, at oral argument, than is the case here, the Court's rationale was that the issue of the MPSC's authority was a recurring one. Similarly here, the issue of the proper calculation of the

¹⁹ 1982 PA 304; MCL 460.6j *et seq.*

²⁰ *Midland Cogeneration Venture v PSC*, 199 Mich App 286; 501 NW2d 573 (1993).

²¹ *Midland Cogeneration Venture v PSC*, 199 Mich App at 295.

price payable to the qualifying facilities may recur in every PSCR case in the future. Therefore, the Court of Appeals acted properly in declining to dismiss the appeal.

Conclusion and Relief

In conclusion, the Michigan Public Service Commission urges this Court to deny Appellants Adrian Energy Associates, LLC, *et al.*'s Application for Leave to Appeal the Michigan Court of Appeals' interlocutory order denying their Motion to Withdraw their appeal. This Court should not grant the Application when the Appellants will suffer no substantial harm from continuation of the appeal when all briefing has been completed. Further, the Appellants have failed to show that the Court of Appeals exercised its discretion unreasonably when all briefing was completed and when Appellants filed the Motion in order to refile their federal action that was dismissed because their state appeal was pending. Finally, the Court of Appeals acted reasonably in denying the Motion to Withdraw when the Appellants are likely to raise this

issue again on appeal of subsequent PSCR plan cases, and the Court of Appeals may have to face the same issues again. For all of these reasons, the Commission urges this Court to deny the Application for Leave to Appeal.

Respectfully submitted,

MICHIGAN PUBLIC SERVICE COMMISSION

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A handwritten signature in cursive script, reading "Patricia S. Barone".

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