A MACKINAC CENTER REPORT

In re Complaint of Rovas Against SBC Michigan

An Amicus Curiae Brief to the Michigan Supreme Court

Patrick J. Wright

A Mackinac Center "friend of the court" filing to the Michigan Supreme Court in a case involving a regulatory agency's power to interpret state law

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ABOUT THIS DOCUMENT:
A BRIEF OF AMICUS CURIAE

On February 27, 2008, the Mackinac Center for Public Policy filed a brief of amicus curiae* with the Michigan Supreme Court in *In re Complaint of Rovas Against SBC Michigan*. Superficially, this case is about a mundane issue: whether it was proper for SBC to charge $71 for a service call. But the case may prove to be extremely important because the Court will likely clarify how closely courts should review the actions of Michigan's administrative agencies. This in turn will determine how much power such agencies can wield. In its amicus brief, the Mackinac Center sought a standard that would curb agency power by allowing rigorous judicial review of agencies' legal determinations.

The case arose when a household served by SBC experienced 10 days of phone trouble. On a service visit, the SBC technician could not find a problem with the outside line, so he concluded that the problem was with the line inside their house. Because the phone company has no duty to maintain the line inside the house, SBC charged the customers $71 for the service call. (There would have been no charge if the problem had been with the outside line). In fact, the technician had erred, and the problem was with the outside line.

The customers filed a complaint with the Michigan Public Service Commission (MPSC). They charged in part that SBC's misdiagnosis violated MCL 484.2502(1)(a), which prohibits the company from making "false, misleading, or deceptive" statements. After reviewing the case, the Administrative Law Judge recommended a finding that a misdiagnosis is not a "false" statement. The MPSC, however, concluded that what had occurred was more than a simple misdiagnosis and that SBC's actions constituted a "false" statement. The agency fined the company $15,000.

SBC contested this ruling in the Michigan Court of Appeals. The court subsequently noted two possible meanings of "false" in MCL 484.2502(1)(a): (1) wrong with the intent

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

to mislead; and (2) wrong without the intent to mislead. The court found that the technician did not intend to mislead — he merely made a mistake. The court stated that if it were analyzing the issue anew, it would have interpreted the statute as employing the first definition of "false" and held that SBC did not violate the law. The MPSC, however, had chosen the second definition and consequently held that SBC violated the statute. The court affirmed the MPSC's ruling, claiming that courts are obligated to defer to the agency's interpretation of the statute.

The Michigan Supreme Court granted review, asking the parties and interested amici to address several questions, including "what legal framework appellate courts should apply to determine the degree of deference due an administrative agency in its interpretation of a statute within its purview." The Mackinac Center's brief focused entirely on this question.

The Michigan Supreme Court decided the case in July 2008. The justices held that the rulings of state agencies should not receive deference from the courts and that the Michigan judiciary hence plays an integral role in reviewing the legality of agency actions. The ruling places a direct check on the power of state agencies to interpret and to act upon laws passed by the Michigan Legislature.

The decision is a landmark in Michigan jurisprudence, particularly since it diverges from federal jurisprudence, which grants almost unlimited power to federal agencies in implementing laws passed by Congress. The court's ruling was substantially in agreement with the arguments presented in this brief.

EXECUTIVE SUMMARY

The standard that courts use to review administrative agencies' actions is critical to limiting the power of unelected administrative officials. The Mackinac Center's brief urges the Michigan Supreme Court to reject the federal model of judicial deference to administrative agencies and instead adopt a less deferential standard that is more consistent with Michigan's state law and history.

Federal courts generally allow agencies to create rules in two ways: (1) through formal adjudication of specific disputes, as in the current disagreement between SBC and the household in question; and (2) through the "notice-and-comment" rulemaking process of the Administrative Procedures Act. Historically, courts were sometimes reluctant to defer to rules created through adjudication, finding those rules less well-considered than those created in the rulemaking process. Since the seminal case of *Chevron USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837 (1984), however, federal courts have accorded a high degree of deference ("Chevron deference") to both kinds of rules.

Significant differences between federal and Michigan administrative law and history require Michigan courts to adopt a much less deferential standard of judicial review. Chevron deference is partly a product of the intelligible-principle doctrine, in which Congress is given wide discretion to delegate important policy questions to administrative agencies. In *Chevron*, the United States Supreme Court justified its deference to agency rules in part by noting that federal agencies are subject to greater democratic control than federal courts are, making agencies more accountable arbiters of important policy determinations.

Michigan courts, in contrast, do not follow the intelligible-principle doctrine. Properly construed, Michigan law prohibits legislative delegation to administrative

agencies. Before the legislature may delegate an issue to an agency, meaningful standards and effective safeguards must be established to prevent arbitrary agency action. More importantly, policy determinations are considered purely legislative and cannot be delegated. Since policy determinations stay in the legislature, statutes that are ambiguous about the legislature's central intent would never be interpreted by agencies and would be struck down by the judiciary for unconstitutionally delegating legislative power (statutory ambiguities unrelated to central policy would be interpreted by the courts acting in their traditional role, not by agencies). Consequently, the federal justification for *Chevron* deference does not apply in Michigan.

In addition, the Michigan Constitution and the debates surrounding its ratification further indicate that no deference should be granted to agency interpretations of ambiguous statutes. Michigan's constitution contains both an explicit separation-of-powers clause and a separate provision allowing judicial review of agency actions to determine whether they are "authorized by law." The constitutional convention debates clearly indicate that the delegates were wary of agency power and attempted to limit rather than expand it.

The Mackinac Center's brief urges the Michigan Supreme Court to hold that the judiciary need not defer to administrative agencies' interpretations of ambiguous statutes. Alternatively, because Michigan courts (unlike federal courts) have not determined that agency rules created through formal adjudication are equivalent to rules created through notice-and-comment rulemaking, the Court could hold simply that there is no judicial deference to rules created through adjudication, leaving aside the question of deference to notice-and-comment rules.

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Amicus curiae does not dispute jurisdiction.

STATEMENT OF QUESTION INVOLVED

In light of Michigan constitutional provisions limiting the power of administrative agencies, should this Court apply a deferential standard of review to agency interpretations within that agency's purview where such a standard of review will expand agency power?

Amicus Curiae answers: No

The Court of Appeals answers: Yes

SBC Ameritech answers: No

Michigan Public Service Commission answers: Yes

STATEMENT OF FACTS

Amicus curiae Mackinac Center for Public Policy is only interested in the first of the four questions presented by this Court, and the facts relevant to that question are fairly straightforward.

William Rovas and Sandra Rovas ("the customers") had a phone line that experienced problems during the period of April 3-13, 2001. A service technician for SBC[1] went to their home on April 4, 2001. The technician performed a test outside the customers' home and determined there to be a dial tone at that time. The technician therefore concluded the problem must have been inside the customers' home, an area that SBC had no duty to maintain. Because of this determination, the customers were charged $71 for a service visit. It was later discovered that the service technician was wrong and that the problem was with an outside line.

According to the testimony of SBC employees before the Michigan Public Service Commission (MPSC), the customers' problem, intermittent service, is difficult to diagnose. The problem is often caused by a break in a phone line's protective casing, which then allows the line to be affected by the elements. Thus, the presence of a dial tone at the point where the phone line enters a home does not mean that there is not a problem with the outside line.

The full course of the repair process eventually led the customers to file a complaint with the MPSC. One charge was that by billing the customers the $71 service fee SBC violated MCL 484.2502(1)(a), which at the time stated:

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[1] The current real party in interest is Michigan Bell Telephone Company. When this matter began, it was known as Ameritech Michigan. It became SBC Ameritech Michigan and then SBC Michigan. It is now known as AT&T Michigan. For ease of reference, amicus curiae will refer to this entity as SBC, the name this Court used in captioning the case. The only exception will be if some other name appears in a citation, in which case that name will be used.

> (1) A provider of a telecommunication service shall not do any of the following:
>
> > (a) Make a statement or representation, including the omission of material information, regarding the rates, terms, or conditions of providing a telecommunication service that is false, misleading, or deceptive.[2]

The Administrative Law Judge recommended that a misdiagnosis does not constitute a false, misleading, or deceptive statement. The MPSC rejected this recommendation:

> [W]hat occurred in this case was more than a simple misdiagnosis. Rather, at least with regard to the April 4, 2001 service tag, the dispute arose from an assertion of fact that was false at the time that it was made, and that [SBC] used as a basis for improperly imposing a $71 charge on the complainants. The Commission therefore concludes that it should reject the ALJ's recommendation and, instead, find that the company violated Section 502(1)(a).
>
> It should also be noted that [SBC]'s general policy regarding the imposition of its $71 service charge is at odds with its duty to inspect and repair, without cost to the customer, all facilities outside the customer's structure. Specifically, the company's propensity for assuming that the problem is with the inside wiring whenever a service technician finds a dial tone at the interface, and for assessing the $71 charge without first verifying

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[2] 2005 Public Act 235 added the following language to the end of MCL 484.2502(1)(a): "As used in this subdivision, 'material information' includes, but is not limited to, all applicable fees, taxes, and charges that will be billed to the end-user, regardless of whether the fees, taxes, or charges are authorized by state or federal law."

> that the problem actually arises from within the customer's premises, can lead to repeated violations of the [Michigan Telecommunications Act]. Thus, the Commission directs [SBC] to refrain from assessing its service charge against a customer unless and until it specifically identifies the phone line's problem, enters the customers premises, and confirms that the problem is located within the inside wiring.

In re Complaint of Rovas, MPSC Case No. U-13079 (February 25, 2002) at 15. For the violation of MCL § 484.2502(1)(a), the Commission fined SBC $15,000.

On June 17, 2004, the Court of Appeals affirmed the ruling "[a]fter reviewing the decision of the PSC under a deferential standard of review." *Ameritech Michigan v Public Service Commission*, unpublished opinion per curiam of the Court of Appeals, decided June 17, 2004 (Docket No. 244742) at 1. The Court of Appeals discussed what it believed to be the standard of review:

> Our review of PSC orders is narrow in scope. The party attacking an order of the PSC bears the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). A decision of the PSC is unlawful when it involves an erroneous interpretation or application of the law and it is unreasonable when it is unsupported by the evidence. To the extent that the decision is based on findings of fact, the challenger must show that those findings are not supported by competent, material, and substantial evidence on the whole record. This Court gives due deference to the administrative expertise of the PSC, and will not substitute its judgment for that of the PSC.
>
> While this Court must give due deference to the administrative expertise of the PSC, the Court may

> not abandon or delegate its responsibility to interpret statutory language and legislative intent.

Id. at 1 (some citations omitted).

The Court of Appeals noted that the dictionary definition of "false" supported two interpretations for MCL 484.2502(1)(a): (1) that the "provision is not intended to proscribe a statement that is simply not true or correct, but is only intended to proscribe those statements tending to deceive or mislead"; and (2) "that the statute does not require an intention to deceive on the part of the telecommunications service provider." *Id*. at 2.

The Court of Appeals indicated that the record did not support a finding that the SBC technician had the intent to mislead; rather, the record only supported a finding that the technician made a mistake. *Id*. at 2. If the standard of review was de novo, the Court of Appeals would have held that MCL 484.2502(1)(a) required the intent to deceive or mislead and that no violation was supported by the record:

> If we were members of the PSC we would have concluded that Ameritech did not violate MCL 484.2502(1)(a) when it indicated to the customers in this case that the problem with their phone originated inside the house, and therefore they would be billed $71.00 for the service call, a determination that was subsequently proven to be incorrect. However, because we must not substitute our judgment for that of the PSC, and must review a decision of the PSC under a deferential standard of review, we find no error.
>
> We are charged with giving great deference to the PSC's construction of a statute which the Legislature has required the PSC to enforce, and therefore the mere establishment of an alternative interpretation of a statute to that given by the PSC will not satisfy the appellant's burden of

> proving the PSC's interpretation was unlawful or unreasonable.

Id. at 2. The Court of Appeals then cited another standard of review, which included new considerations: whether the interpretation involves a new statute and whether the interpretation is longstanding. Both of these instances would lead to less deference:

> As a general rule, we will defer to the construction placed on a statute by the governmental agency charged with interpreting it, unless the agency interpretation is clearly erroneous. An agency's initial interpretation of new legislation is not entitled to the same measure of deference as is a longstanding interpretation. However, merely establishing that another interpretation of a statute is plausible does not satisfy a party's burden of proving by clear and convincing evidence that the PSC's interpretation is unlawful or unreasonable.

Id. at 2 (citing *In re Canales Complaint*, 247 Mich App 487, 496 (2001)).

Because of the standard of review, the Court of Appeals could not conclude that SBC's "alternative and plausible construction of the statute means that the PSC's interpretation was unlawful or unreasonable." *Id*. at 2. The Court of Appeals concluded; "Since it is undisputed that the statements made by Ameritech to the customers were wrong, and one definition of 'false' is 'wrong,' the PSC's interpretation of the statute was quite literal and certainly not unlawful or unreasonable." *Id*. at 2.

While the Court of Appeals upheld the MPSC's interpretation of MCL 484.2502(1)(a), it remanded the case to the PSC for clarification on when it would be proper for SBC to bill the $71 service-fee charge, and specifically on whether SBC had to go inside the premises before billing for a service fee. *Id*. at 2-3.

On April 8, 2005, this Court denied leave to appeal at that time. Justice Markman dissented and would have explored the standard-of-review question. Because this Court denied leave to appeal, the matter was remanded to the MPSC.

On August 1, 2005, the MPSC clarified that SBC need not enter the premises on each service visit, but indicated that SBC could not charge customers for service visits (here the $71 fee) related to SBC's obligation to maintain outside lines.

On June 12, 2007, the Court of Appeals considered the MPSC order as it related to charges for inside wiring, an area that is unregulated. The Court of Appeals ordered MPSC to clarify that MPSC could not regulate any costs related to a correct determination that "a problem with the telephone service is due to a customer's nonregulated inside wiring." *In re Complaint of Rovas*, 276 Mich App 55, 66 (2007).

SBC and the MPSC both appealed, and the Michigan Supreme Court granted leave stating:

> On order of the Court, the applications for leave to appeal the June 17, 2004 and June 12, 2007 judgments of the Court of Appeals are considered, and they are GRANTED. The parties shall include among the issues to be briefed: (1) what legal framework appellate courts should apply to determine the degree of deference due an administrative agency in its interpretation of a statute within its purview; (2) whether the Court of Appeals erred in deferring to the Michigan Public Service Commission's interpretation of MCL 484.2502(1)(a); (3) whether the Commission abused its discretion in applying this statutory provision to a carrier's diagnostic mistakes; and (4) whether the Court of Appeals erred in holding that the Commission lacks the jurisdiction to prohibit the imposition of a fee for a carrier's inspection of its own services when that inspection eliminates

> the carrier as the cause of a service disruption. The parties shall detail the relationship between state regulatory authority and federal authority regarding de-regulation in addressing the last question.

Amicus curiae filed the instant brief to address issue 1.

ARGUMENT

This Court should not adopt a deferential standard of review for an agency interpretation of a statute under the agency's purview. Michigan's constitution contains explicit limits on administrative power. And unlike the federal courts, the Michigan courts do not allow seemingly limitless delegations of legislative power to administrative agencies. Thus, there is little danger that Michigan judges will be put into the position of elevating their policy preferences over those of the agency. This fact obviates any justification for a deferential standard.

A. Standard of Review

Matters of constitutional and statutory interpretation and questions concerning the constitutionality of a statutory provision are reviewed de novo. *Toll Northville Ltd v Northville Twp*, 480 Mich 6 (2008).

B. Merits

This Court's first question requires examination of the role of the administrative state, which basically materialized in Michigan in the period between the 1908 and 1963 constitutions. During that period, the federal administrative state grew exponentially. In 1952, United States Supreme Court Justice Robert Jackson identified the stress the administrative state was putting on this country's foundational legal theories:

> The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart. They also have begun to have important consequences on personal rights. They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much

> as the concept of a fourth dimension unsettles our three-dimensional thinking.
>
> Courts have differed in assigning a place to these seemingly necessary bodies in our constitutional system. Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.

Federal Trade Comm v Ruberoid Co, 343 US 470, 487-88 (1952) (Jackson, J., dissenting).

The fundamental question of the role of administrative agencies continues to vex both state and federal courts. To a certain extent, this Court is asking whether it should emulate the federal model of almost complete deference to "rules" made either through notice-and-comment rulemaking or formal adjudication (i.e. whether this Court should adopt *Chevron* deference)[3]. It should not.

Michigan allows less latitude in its delegations of legislative power to administrative agencies. Michigan has an explicit separation-of-powers clause, an administrative-review clause, and an agency-rule clause in its constitution, all of which are lacking in the federal constitution.[4] There are strong indications that Michigan's 1963 common understanding was that administrative power was being curtailed, not expanded. In this vein, even if this Court were to eventually hold that some sort of *Chevron*-type deference

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[3] *Chevron USA, Inc v Natural Res Def Council, Inc*, 467 US 837 (1984)

[4] These provisions and the other potentially relevant Michigan constitutional provisions are set out and discussed below.

to agency action might be appropriate when an agency is engaged in notice-and-comment rulemaking (a question not presented in this case), no such deference should apply when an agency seeks to create a "rule" in a formal adjudication.

A discussion of the federal model will provide context to the standard-of-review issue involved in this case.

1. Federal model

In the years since Justice Jackson's observation, the federal courts have continued to apply the intelligible-principle doctrine, which allows a great deal of legislative power to be delegated to administrative agencies without interference from the courts.[5] The seminal case, *Chevron,* which established the deferential review standard, was decided in 1984. But the courts still are examining foundational questions about agency power, and the academic articles examining agency power and the implications of *Chevron* are plentiful.[6]

At the federal level, there are two main types of deference for agency actions: "*Chevron* deference," named for the standard developed in that case, and *"Skidmore* deference," named for the concept developed in *Skidmore v Swift & Co*, 323 US 134 (1944).[7] The deference accorded to an agency depends on the kind of action involved. In practice, federal courts have struggled to categorize administrative actions and determine whether *Chevron* or *Skidmore* should apply.

In *Chevron*, the Supreme Court stated the following rule for reviewing agency action:

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[5] In essence, the intelligible-principle doctrine requires just a vague indication of congressional intent, and the agency in question is then allowed extremely broad discretion in creating regulations on the subject of the delegation.

[6] A simple Westlaw search for articles citing *Chevron* in the Lawrev-Pro database led to nearly 4,000 entries.

[7] As will become clear below, *Skidmore* deference is a misnomer since it means the agency view is not binding and is only potentially persuasive to the courts.

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron USA, Inc, 467 US at 842-43 (1984).

The federal courts accept vast delegations of power to administrative agencies under the intelligible-principle doctrine. *See generally*, *Whitman v American Trucking Ass'n*, 531 US 457, 474-75 (2001). This often permits vast "gaps" in the statutory langauge. The federal courts accept the premise that administrative agencies can fill these gaps. *Chevron*, 467 US at 843. Where Congress has explicitly allowed an agency to fill a gap, a regulation doing so is valid unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id*. at 844. The United States Supreme Court indicated that where Congress has only implicitly delegated a particular question to an agency, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency" — a somewhat lower level of deference. *Id*.

The case for deference to an agency is strong when a statute "involves conflicting policies" and where "more than ordinary knowledge respecting the matters subjected to

agency regulation" is necessary to administer the statutory scheme. *Id*. at 845.

The Supreme Court justified its deference to agencies by noting that as between the courts and the executive branch, the executive is more responsive to the people:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.
>
> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones.

Id. at 865-66.

In *Christensen v Harris County*, 529 US 576 (2000), the Supreme Court discussed which agency actions should not receive *Chevron* deference:

> Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters — like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law — do not warrant *Chevron*-style deference.

Id. at 587. The Supreme Court indicated that "interpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore v Swift & Co*, 323 US 134 (1944), but only to the extent that those interpretations have the 'power to persuade.'" *Christensen*, 529 US at 587.[8]

In *United States v Mead Corp*, 533 US 218 (2001), the Supreme Court further examined the instances when *Chevron* deference would apply:

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[8] In his administrative law treatise, Professor Richard J. Pierce, Jr., indicates that agencies sometimes game the system by avoiding judicial review and yet still influencing the regulated community's behavior:

> Sometimes ambiguities in agency statements are created intentionally for strategic purposes. An agency might want to issue a statement that has binding effect without following the notice and comment procedures mandated for legislative rulemaking and without subjecting its statement to the kind of "searching and careful" judicial review courts typically apply to legislative rules. To further these illegitimate strategy goals, an agency might intentionally use ambiguous or inconsistent language in the hope that its regulates will give its statements binding effect while the courts will characterize the statement as an unreviewable general statement of policy exempt from notice and comment procedures.

1 Pierce, Administrative Law Treatise (4th ed 2002) § 6.3, p 317.

> We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

Id. at 226-27.

Christensen and *Mead* signal the revival of *Skidmore* deference. In *Skidmore v Swift & Co*, 323 US 134 (1944), the Supreme Court discussed the standard of review when an agency was not engaged in notice-and-comment rulemaking or formal adjudication:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 140.

Professor Pierce describes what is meant by *Skidmore* deference in his administrative law treatise:

> The deference to be accorded an interpretative rule under *Skidmore* is much weaker than *Chevron* deference . . . because it has an entirely

> different source. *Skidmore* deference is not based on the institutional legitimacy of the agency pronouncement; an interpretive rule [i.e. a general agency pronouncement that is neither from notice-and-comment rulemaking nor formal adjudication] cannot have binding effect because Congress has not authorized any agency to issue an interpretive rule with binding effect. *Skidmore* deference is based solely on common sense. A court should consider adopting the position taken in an agency interpretative rule because there are reasons to believe that the agency positions are often wise and correct.

1 Pierce, Administrative Law Treatise (4th ed. 2002) § 6.4, p 334.

a. Rulemaking versus adjudication in federal courts

The instant case began as a formal adjudication before the MPSC. At the federal level, agencies may announce policy through adjudication rather than through rulemaking. The federal courts now generally accept this as a proper method for an agency to formulate policy, but historically, they have not universally accepted it.

In *NLRB v Bell Aerospace Co Division of Textron Inc*, 416 US 267 (1974), the Supreme Court was faced with the question of whether administrative agencies, in that case the NLRB, must proceed by rulemaking when announcing new policy, or whether they can also choose to announce their policies through formal adjudication. The Supreme Court indicated that such a decision was largely within an agency's discretion:

> [T]he Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion.

> Although there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act, nothing in the present case would justify such a conclusion. . . . It is doubtful whether any generalized standard could be framed which would have more than marginal utility. The Board thus has reason to proceed with caution, developing its standards in a case-by-case manner . . . . The Board's judgment that adjudication best serves this purpose is entitled to great weight.

Id. at 294.

The Supreme Court rejected the contention that a rulemaking would allow a more broad determination of a proper standard:

> It is true, of course, that rulemaking would provide the Board with a forum for soliciting the informed views of those affected . . . before embarking on a new course. But surely the Board has discretion to decide that the adjudicative procedures in this case may also produce the relevant information necessary to mature and fair consideration of the issues. Those most immediately affected, the [entities] in the particular case, are accorded a full opportunity to be heard before the Board makes its determination.

Id.

But *Bell Aerospace Co* was not the only case in which the Supreme Court had considered the propriety of using formal adjudication to set rules. In *NLRB v Wyman-Gordon Co*, 394 US 759 (1969), this issue was discussed at length. *Wyman-Gordon* was a plurality opinion. In *Wyman-Gordon*, the NLRB was seeking to apply a "rule" from a prior adjudication. Justice Fortas' four-member opinion chastised the NLRB for announcing the rule in that previous adjudication and then not enforcing it in that same case, while the NLRB was

seeking to apply the "rule" from the prior adjudication in *Wyman-Gordon*. Justice Fortas indicated that if the NLRB wanted to create a rule, it must follow the notice-and-comment procedures found in the federal Administrative Procedures Act: "The rule-making provisions of that Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application. They may not be avoided by the process of making rules in the course of an administrative procedure." *Id.* at 764.

But Justice Fortas then set forth an exception that swallowed his rule: So long as the Board entered an order against a party in the adjudicatory proceeding, the Board could enforce that order. *Id.* at 766. Thus, the only thing the NLRB really did wrong in the prior adjudication was not to enforce its new "rule" in that prior adjudication.

Justice Black, who wrote for himself and two others, indicated that agencies could choose either adjudication or rulemaking: "If the agency decision reached under the adjudicatory power becomes a precedent, it guides future conduct in much the same way as though it were a new rule promulgated under the rule-making power." *Id.* at 771 (Black, J., concurring).

In dissent, Justice Douglas would not have allowed a new "rule" to be created via adjudication:

> The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming. It gives an opportunity for persons affected to be heard. . . .
>
> [In rulemakings, a]gencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice.
>
> This is a healthy process that helps make a society viable. The multiplication of agencies and

> their growing power make them more and more remote from the people affected by what they do and make more likely the arbitrary exercise of their powers. Public airing of problems through rule making makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism in the regime that now governs all of us.
>
> . . .
>
> . . . [W]hen we are lax and allow federal agencies to play fast and loose with rule making, we set a precedent with dangerous repercussions.
>
> . . .
>
> Rule making is no cure-all; but it does force important issues into full public display and in that sense makes for more responsible administrative action.

Id. at 777-79 (Douglas, J., dissenting). Justice Harlan also indicated that he would require that significant changes in policy come from rulemaking, as opposed to formal adjudication. *Id*. at 781.

Professor Pierce contends that there is "near unanimity" between judges and academics in "extolling the virtues of the rulemaking process over the process of making 'rules' through case-by-case adjudication." 1 Pierce, Administrative Law Treatise (4th ed 2002) § 6.8, p 368. Some of the reasons Pierce identifies include: (1) rulemaking often leads to higher-quality rules, since the agency receives more input than in an adjudication against one party; (2) enhanced political oversight, since the notice period allows potentially affected parties to notify politicians, while adjudications often provide no warning about the "rules" being set forth until after the fact; (3) rulemaking is less costly than case-by-case adjudication; (4) rules are more clear than agency opinions; (5) adjudication focuses all the costs of an adverse decision on one actor in the field, while others learn of the

outcome at no cost to themselves; and (6) adjudication leads to more disparate action by the regulators, who can pick and choose targets. *Id*. at 368-73.

One point is worth further development. As noted above, *Chevron* is based in part on there being some political accountability in the chief executive to the public. With rulemaking, political appeals can be made to representatives and senators, who can apply indirect pressure on the agency, thereby increasing the potential for a decision that weighs all societal interests. If the sole politically accountable entity is the chief executive, then the people have lost some of their ability to effectuate quick change. As stated in Federalist 52, the House was made to have "an immediate dependence on, and an intimate sympathy with, the people." The Federalist No 52 at 324 (James Madison) (Clinton Rossiber ed, Signet Classics 1999). Thus, there were to be biennial elections. If the people's ability to influence executive agencies is limited to presidential election years, then a large part of their control over their government's administrative apparatus is lost, and they have fewer avenues to express their frustration with government policy.

2. Michigan law

a. MPSC statutory provisions

When the MPSC receives a complaint, it may "conduct an investigation, hold hearings, and issue its findings and order under the contested hearings provisions of the administrative procedures act [APA] . . . MCL 24.201 to 24.328." MCL 484.2203(1).

MCL 24.302 provides that the APA's final-order-appellate procedures can be superseded by "any applicable special statutory review proceeding." At the time the MPSC's final order was entered, MCL 484.2203(7) set up a special statutory review process and stated, "An order of the [MPSC] shall be subject to review as provided by . . . [MCL] 462.26."[9]

[9] 2005 Public Act 235 eliminated this special-review procedure, and MPSC orders are now reviewable under the auspices of the APA.

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."

b. Michigan Supreme Court case law regarding agency action on ambiguous statutes

As a primary matter, in order for the standard-of-review issue to arrive, a statute must be ambiguous. This Court recently indicated that "a provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision or when it is equally susceptible to more than a single meaning." *Fluor Enter, Inc v Revenue Div, Dep't of Treasury*, 477 Mich 170, 177 n. 3 (2007).

Where there is ambiguity, this Court has not clearly set forth a single standard of review. For instance in *In re MCI Telecommunications Complaint*, 460 Mich 396 (1999), this Court stated:

> We acknowledge that our past case law has not been entirely consistent regarding the subject of the amount of deference to be given when an administrative agency with expertise in its field construes a statute governing the area regulated by the agency. The unique facts of this case, involving a protracted period of litigation, during which statutes were both enacted and repealed, makes [sic] this case poorly suited to resolve such inconsistencies. Accordingly, we express no view on such matters, leaving their resolution for another day.

Id. at 424 n. 4.

Since this Court's admission, there have been only three cases that have touched upon the matter of deference to an agency.

In her dissent in *Fluor*, a case involving a formal adjudication, Justice Kelly, joined by Justice Cavanagh and Justice Weaver, indicated that a provision of the

Single Business Tax was ambiguous. She deferred to the agency's interpretation of the statute by giving the agency's interpretation "weight." *Fluor*, 477 Mich at 190 (Kelly, J., dissenting).

In *Koontz v Ameritech Services, Inc*, 466 Mich 304 (2002), Justice Corrigan, joined by Justice Weaver, Chief Justice Taylor, and Justice Young, indicated that "this Court generally accords due deference to an administrative agency charged with executing a particular statute." *Id*. at 323-24. But there was no discussion of what constitutes "due deference," since the statute was unambiguous.

In *In re Brown*, 461 Mich 1291 (1999), this Court remanded a case to the Judicial Tenure Commission (JTC) and ordered that body to create standards for judicial discipline. This Court indicated that the JTC "is entitled, on the basis of its expertise, to deference both with respect to its findings of fact and its recommendation of sanction." *Id*. at 1292. But that deference would occur only once "standards have been promulgated and reasonably followed." *Id*. What standard of review would then apply was not discussed.

Even if this Court were to consider allowing *Chevron* deference where a rule has been made through notice-and-comment rulemaking — which is not an issue in this case, since the proposed "rule" in question is from a formal adjudication — *In re Brown* would support a holding of not extending that deference to a formal adjudication. *In re Brown* evidences a concern about the arbitrary decisions that would be possible if this Court were to defer to agency ad-hoc rulemaking through litigation.

Just nine days prior to the *MCI* ruling mentioned earlier, this Court decided *Consumers Power Co v Public Service Commission*, 460 Mich 148 (1999), which involved a formal adjudication. Justice Corrigan wrote the majority opinion and stated that while "this Court ordinarily accords an agency's longstanding interpretation of a statute due deference," no deference was necessary, because the statute was unambiguous. *Id*. at 157 n. 8.

Justice Brickley, joined by Justice Cavanagh and Justice Kelly, dissented. Because he believed the statute was ambiguous, he addressed the standard of review. After noting that this Court's jurisprudence on this issue has not been a model of clarity, he recommended *Chevron*-type deference:

> The Legislature's ability to delegate authority to an agency is bounded only by the constitution, and there is no allegation of unconstitutional delegation of legislative authority in this case. Therefore, given that the relevant statutory language is ambiguous, that there is no clear indication of the Legislature's intent, and that the PSC exercises some of the Legislature's policy-making authority in this area, this Court should avoid striking down the policy decision inherent in the PSC's permissible interpretation of the electric transmission act.
>
> . . .
>
> . . . [B]ecause of a lack of reliable guideposts in determining legislative intent in this case, I would adopt a rule that this Court defer to an agency's permissible, policy-based interpretation of the statutes that it administers.

Id. at 176-77 (citation omitted).

As noted above, however, differences between Michigan administrative law and federal administrative law should prevent the adoption of a *Chevron*-type standard here.

c. Scope of delegation and legislative power in Michigan

One manner in which Michigan's administrative law differs from federal law is that Michigan has more stringent delegation standards, even if the exact contours of delegations permissible under Michigan's constitution are not clear. Unlike the federal courts, Michigan courts do not adhere to the intelligible-principle doctrine and require

more standards before the Legislature may delegate power to an administrative agency.

In *Westervelt v Natural Resources Commission*, 402 Mich 412 (1978), this Court discussed delegation. *Westervelt* was a 3-3 decision. The lead opinion held that a delegation must meet two tests: (1) a separation-of-powers test, which requires "standards as reasonably precise as the subject matter of the legislation requires or permits"; and (2) a due-process test, which requires the presence of safeguards "assuring that the public will be protected against potential abuse of discretion at the hands of administrative officials." *Id*. at 444-45. The concurring three justices would review a delegation only under the separation-of-powers test, and would look at a potential due-process issue at a later time. *Id*. at 454 (Ryan, J., concurring).

Which of these opinions is correct has not been authoritatively settled, but in a recent remand order in *DPG York, LLP v Michigan*, 474 Mich 987 (2005), this Court cited *Westervelt*'s footnote 20, which states:

> This emphasis on the "safeguards, including 'standards' which the legislation affords" in order to best effectuate the due process foundation of the "delegation doctrine" echoes the judicial approach argued by Professor Davis:
>
> > The non-delegation doctrine can and should be altered to turn it into an effective and useful judicial tool. Its purpose should no longer be either to prevent delegation of legislative power or to require meaningful statutory standards; its purpose should be the much deeper one of protecting against unnecessary and uncontrolled discretionary power. The focus should no longer be exclusively on standards; it should be on the totality of protections against arbitrariness, including both

> safeguards and standards. The key should no longer be statutory words; it should be the protections the administrators in fact provide, irrespective of what the statutes say or fail to say.
>
> Davis, Administrative Law Treatise, 1970 Supplement, pp. 40-41.
>
> See also Justice Levin's dissenting opinion in [*People v Fields*, 391 Mich 206, 231-32 (1974)].
>
> We wish to emphasize that this approach best effectuates the due process foundation of the delegation doctrine, i. e. the "standards test" as it has evolved in our jurisprudence no longer in itself assures due process protection. However, Professor Davis in his commentary, does not consider the "standards test" in terms of the "separation of powers" constitutional foundation of the "delegation doctrine." As we have carefully ruled, the "standards test" is an effective means for assuring that the constitutional "separation of powers" is maintained vis-a-vis a particular delegation of power to an administrative agency.

Thus, while the exact contours are not known, it is clear that the Michigan delegation test is more stringent than the federal test.

Related to the standards test is this Court's definition of what constitutes legislative power that cannot be delegated. In *Blank v Department of Corrections*, 462 Mich 103 (2000), this Court stated that "Policy determinations are fundamentally a legislative function." *Id.* at 116. General language may be used in the authorizing statute only so "long as the exact policy is clearly made apparent." *Id.* at 126 (internal citation omitted).[10]

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[10] Professor Pierce indicates that the United States Supreme Court used a similar test — that agencies could only fill in details and not make major policy decisions — during the period between its decision in *United States v Grimaud*, 220 US 506 (1911) and its decision in *Hampton & Co v United States*, 276 US 394, 409 (1928), where the

The United States Supreme Court justified the deferential *Chevron* standard of review in large part because it did not want to become enmeshed in policy decisions. But such entanglement is far less of a concern in Michigan, since this Court does not allow the nearly limitless delegations prevalent in the federal system and thus avoids the subject of what a policy "should" be. This Court instead tries to deal with policy as it is — in other words, with the policy as set forth in legislative statute. By not allowing major policy questions to reach the agencies unless clear standards are provided, this Court avoids the risk of substituting its policy viewpoints for that of the agencies. And because the Michigan agencies must receive a clearer dictate from the Legislature than do their federal counterparts, it makes sense for the Michigan courts to hold the Michigan agencies to those dictates. In short, the federal courts must defer to agencies because oftentimes there are no standards limiting delegation, while in Michigan such deference is improper because those standards exist.

d. Michigan constitutional material

The Michigan Constitution has a number of provisions that appear potentially relevant to this issue: (1) Const 1963, art 1, § 17 — fair and just treatment in executive hearings; (2) Const 1963, art 3, § 2 — separation of powers; (3) Const 1963, art 4, § 1 — legislative power vested in senate and house; (4) Const 1963, art 4, § 37 — suspension of administrative rules between regular legislative sessions; (5) Const 1963, art 5, § 2 — setting principal executive departments; (6) Const 1963, art 5, § 8 — governor shall take care that laws are faithfully executed; (7) Const 1963, art 6, § 1 — judicial power vested in one court of justice; and (8) Const 1963, art 6, § 28 — court review of agency action. An examination of the Address to the People and the Constitutional Convention debates indicates that only Const 1963, art 4, § 37 and Const 1963, art 6, § 28 provide any guidance about administrative agencies.

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court first set out the easier-to-satisfy intelligible-principle test. 1 Pierce, Administrative Law Treatise (4th ed. 2002) § 2.6, pp 90-91.

It should be noted at the outset that constitutional debate over agencies' rulemaking and formal adjudications was bifurcated. Separate committees had jurisdiction over these two agency functions at the constitutional convention.[11] Art 4, § 37 was meant to limit an agency's rulemaking power between legislative sessions. While the delegates believed that the Legislature had a sufficient check on improper rules by being able to counteract them with superseding legislation, they remained concerned about rules that were issued when the Legislature was out of session and that the Legislature was therefore temporarily unable to override.

The courts' ability to review formal adjudications was covered in art 6, § 28. As will be seen later, the constitutional convention delegates clearly were seeking to limit agency power. The debates show that at the very least, the delegates wanted a factual review of agency adjudications. Discussions of legal review, though infrequent, indicated that courts could review agency legal determinations. There is absolutely nothing in the constitutional convention debates that indicates that Michigan's courts would defer to agency legal interpretations. Given the fairly frequent statements displaying hostility toward agencies, such a standard of deference would likely have been rejected by the delegates.

In *Studier v Michigan Pub Sch Employees' Ret Bd*, 472 Mich 642 (2005), this Court discussed the role of Constitutional Convention delegate statements in the common-understanding analysis:

> [A]lthough this Court has continually recognized that constitutional convention debates are relevant to determining the meaning of a particular provision, *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156 (2003); *People v Nash*, 418 Mich 196, 209 (1983) (opinion by Brickley, J.), we take this opportunity to clarify that, when necessary,

[11] The legislative committee was primarily responsible for art 4, § 37 and the judiciary committee was primarily responsible for art 6, § 28.

> the proper objective in consulting constitutional convention debates is not to discern the intent of the framers in proposing or supporting a specific provision, but to determine the intent of the ratifiers in adopting the provision. [*People v Nutt*, 469 Mich 565, 574 (2004)].[13] We highlighted this distinction in *Univ of Michigan Regents v Michigan*, 395 Mich 52, 59-60 (1975), in which we stated:
>
> > The debates must be placed in perspective. They are individual expressions of concepts as the speakers perceive them (or make an effort to explain them). Although they are sometimes illuminating, affording a sense of direction, they are not decisive as to the intent of the general convention (or of the people) in adopting the measures.
>
> Therefore, we will turn to the committee debates only in the absence of guidance in the constitutional language ... or when we find in the debates a recurring thread of explanation binding together the whole of a constitutional concept.
>
> [13] "Constitutional Convention debates and the Address to the People are certainly *relevant as aids in determining the intent of the ratifiers*." (Emphasis added.)

Id. at 655-56.

The debates about Const 1963, art 1, § 17[12] did not deal in any manner with the scope of executive power or the standard of review. Nor did the Address to the People add anything of note.

[12] Const 1963, art 1, § 17 states:

> No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

Each of Michigan's four constitutions has had a separation-of-powers provision. Const 1963, art 3, § 2; Const 1908, art 4, §§ 1-2; Const 1850, art 3, §§ 1-2; and Const 1835, art 3, § 1. The current version 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 3, § 2.

The committee report from the 1961-62 Constitutional Convention indicated that these provisions were based on Montesquieu's political theories. The basic concept was: "Desirous of protecting a free people, their [the framers'] idea was that if, somehow, the powers of government could be divided, it could not grow so large as to enslave them."[13]

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[13] Unmentioned were other political theorists whose writings have been used to challenge the administrative state. For instance, John Locke indicated in his *Second Treatise of Government* that delegation of legislative power was improper:

> The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others. . . . The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.

Locke, *The Second Treatise of Government* (Thomas P Peardon ed, Library of Liberal Arts 1952), § 141, p 81. Also unmentioned was James Madison's Federalist No. 62, which discussed the Senate and indicated that difficulty in creating laws could be a virtue:

> Another advantage accruing from this ingredient in the constitution of the Senate is, the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then, of a majority of the States. It must be acknowledged that this complicated check on legislation may in some instances be injurious as well as beneficial. . . . But . . . as the faculty and excess of law-making seem to be the diseases to

1 Official Record, Constitutional Convention 1961, at 601. During the short debate on this provision, a delegate asked about its impact on administrative agencies. *Id.* at 602. He was informed that other committees were working on "this problem of administrative law." *Id.* The Address to the People adds nothing of significance.

There was nothing in the debates about Const 1963, art 4, § 1[14] concerning executive agencies or the standard of review. There was no mention of either in the Address to the People.

Const 1963, art 4, § 37 states:

> The legislature may by concurrent resolution empower a joint committee of the legislature, acting between sessions, to suspend any rule or regulation promulgated by an administrative agency subsequent to the adjournment of the last preceding regular legislative session. Such suspension shall continue no longer than the end of the next regular legislative session.

Id.

The majority of the debate surrounding Const 1963, art 4, § 37 related to 2 OAG, 1958, No 3352, (October 8, 1958), wherein the attorney general opined that a statute permitting a legislative veto of rules promulgated by agencies was unconstitutional. The opinion indicated the only way the legislature could affect a rule it did not like was to pass

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> which our governments are most liable, it is not impossible that this part of the Constitution may be more convenient in practice than it appears to many in contemplation.

The Federalist No 62, at 376 (James Madison) (Clinton Rossiber ed, Signet Classics 1999). But, while interesting, both of these quotes argue against any delegation of rulemaking, some of which is presumably proper in Michigan due to implications from Const 1963, art 4, § 37.

[14] Const 1963, art 4, § 1 states: "The legislative power of the State of Michigan is vested in a senate and a house of representatives."

a law contrary to it. Some delegates at the convention were concerned about rules enacted while the legislature was out of session, since the legislature could not enact any legislation then. This new provision set up a process that allowed the legislature to suspend some rules until a new legislative session convened and the legislature could review the possibility of nullifying the rules altogether.

The Address to the People accurately reflects the debates surrounding Const 1963, art 4, § 37:

> This is a new section permitting the legislature to set up a joint committee to act between sessions and to suspend until the end of the next regular legislative session any rule or regulation of an administrative agency promulgated when the legislature is not in regular session.
>
> It provides a legislative check on the rule-making authority of administrative agencies when the legislature is not in regular session.

2 Official Record, Constitutional Convention 1961, p 3376.

There was nothing in the convention debates regarding Const 1963, art 5, § 2,[15] Const 1963, art 5, § 8,[16] or Const 1963, art 6, § 1[17] that is illuminating. Nor does the Address to the People contain anything that would assist in determining the proper standard of review.

Const 1963, art 6, § 28 states:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under

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[15] Const 1963, art 5, § 2 states:

> All executive and administrative offices, agencies and instrumentalities of the executive branch of state government and their respective functions, powers and duties, except for the office of governor and lieutenant governor and the governing bodies of institutions of higher education provided for in this constitution, shall be allocated by law among and within not more than 20 principal departments. They shall be grouped as far as practicable according to major purposes.
>
> Subsequent to the initial allocation, the governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders and submitted to the legislature. Thereafter the legislature shall have 60 calendar days of a regular session, or a full regular session if of shorter duration, to disapprove each executive order. Unless disapproved in both houses by a resolution concurred in by a majority of the members elected to and serving in each house, each order shall become effective at a date thereafter to be designated by the governor.

[16] Const 1963, art 5, § 8, in pertinent part, states "Each principal department shall be under the supervision of the governor unless otherwise provided by this constitution. The governor shall take care that the laws be faithfully executed."

[17] Const 1963, art 6, § 1 states:

> The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

> the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law.
>
> In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation.

The initial committee recommendation did not include anything about either workmen's compensation or property taxes. 1 Official Record, Constitutional Convention 1961, at 1440. The committee report that accompanied that recommendation noted that since the 1908 constitution, "the field of administrative law has assumed a more significant position in the jurisprudence of our state." *Id*. Art 6, § 28 was "designed, in the main, to afford a full and adequate method of review of administrative agency decisions consistent with established principles of sound administrative practice." *Id*.

Most of the course of the constitutional convention debates focused on three issues: the quantum of evidence necessary to sustain an agency decision; this new provision's impact on workmen's compensation; and the value of adding administrative decisions involving licenses to the proposal. But a consistent undercurrent of the convention debates was mistrust of agencies. Delegate Iverson indicated that members of the judiciary committee were "familiar with the growth of the administrative law over the years and perhaps

more with its abuse in some instances." *Id.* at 1444. He noted the committee proposal "is a safeguard, if you please, against bureaucratic action by an administrative agency which might, so to speak, get the bit in its teeth and run with it." *Id.* Delegates Gover, King, and Boothby did not want individuals judged and prosecuted by the same body. *Id.* at 1444, 1447, 1451. Delegate Lawrence stated he was for anything that "would clip the wings of these administrative agencies and give some rights to the individual citizens." *Id.* at 1451. Delegate Shackleton discussed "autocratic," "paradoxical" bureaucrats who engage in their "whims and fancies." *Id.* at 1466.

There were some discussions of legal, as opposed to factual, review. Delegate Leibrand, a judge, indicated that the committee proposal "provides for review, both as to the facts and the law on the transcript." *Id.* at 1445. He lamented that administrative agencies who "are transferring thousands and millions of dollars worth of property every year . . . are almost totally removed from judicial review." *Id.* Delegate Nord, who was generally more comfortable with agency action, stated that even without art 6, § 28, appeals for legal errors were guaranteed:

> The present system we have, without Committee Proposal 95 [the genesis of art 6, § 28], does guarantee government according to law, even in administrative tribunals. They cannot get away with violating the law. If they depart from the statutory authority, there can always be an appeal on that. That is one of the grounds for appeal, always has been, and always will be. . . . Therefore, if there is a violation of the law that is always appealable and always has been appealable; that will be without the committee proposal.
>
> The question that we have to consider is not whether an administrative tribunal is going to break the law. They can't.

Id. at 1468. Delegate Nord believed the only pertinent issue was who was going to determine facts and what standard of review would apply to that determination. *Id*. Delegate Pugsley stated that the "authorized by law" language was meant to cover legal errors: "[T]he appeal court is called upon first to determine as a minimum whether the decisions, findings, and orders are authorized by law. In other words, did the tribunal make a mistake in its interpretation of the law?" *Id*. at 1477. Delegate Lawrence indicated the proposal meant that legal errors and scope-of-authority errors could be reviewed:

> All that second sentence says is that the review that is to be exercised by the court, as a minimum, shall determine first whether the decision of that administrative tribunal is authorized by law. In other words, did it exceed the law? Did it get into a field it shouldn't have gotten into, that it wasn't authorized to get into?

Id. at 1478.

The committee proposal went to style and drafting without either the workmen's compensation or tax language included. *Id*. at 1487. When the proposal returned, the convention modified the evidentiary standard from "reliable" and "probative" to its current "competent, material and substantial," which was borrowed from the Michigan Administrative Procedures Act. 2 Official Record, Constitutional Convention 1961, at 2714. An amendment to exempt workmen's compensation passed 58-57. *Id*. at 2715-16. A later amendment added the "unless otherwise provided by law" language to give the Legislature room to change the law and increase oversight of workmen's compensation decisions. *Id*. at 2717.[18]

After the draft constitution was returned from the committee on style and drafting, more amendments were

[18] So, in essence, art 6, § 28 just sets a default position for workmen's compensation claims that the Legislature is free to change.

put forth. One was to add the tax valuation language to art 6, § 28. The proponents sought to exempt tax assessor valuations. The debate on this amendment was limited to 10 minutes. *Id*. at 3241. The amendment stated:

> No appeal may be taken from any court from a decision of the state tax commission fixing the value of described property for property tax purposes or determining an appeal from a decision of the county tax allocation board.

Id. The amendment was adopted. *Id*. at 3242. An amendment to strike all of art 6, § 28 was defeated. In arguing against that amendment, Delegate King rhetorically asked, "Do we believe that the rulings of administrative agencies need not be in accordance with the law? . . ." *Id*. at 3243.

The committee on style and drafting considered all of the late changes. It recommended changing the above paragraph to its current language, which reads:

> In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation.

There was no explanation of the need for this, and the change was considered en masse with a number of other style and drafting changes. *Id*. at 3291-93. The changes passed 136 to 5. *Id*. at 3293.

In reviewing the history and meaning of art 6, § 28, Dean LeDuc questions whether the courts should be able to review legal errors under art 6, § 28. He contends that because the framers used the "authorized by law" language at the beginning of the provision and the "error of law" language at the end that they must be different. LeDuc, Michigan Administrative Law (2nd ed 2000), § 9:07, pp 610-11. Dean LeDuc would limit constitutionally mandated judicial review to the question of whether "the decision was

within the authority of the agency; that is, within its power to act or its jurisdiction." *Id*. at § 9:05, p 607.

Given the history cited above, reliance on this distinction between "authorized by law" and "error of law" is dubious. The addition of the "error of law" language was made by the committee on style and drafting and was part of a last-minute vote that essentially tied up loose ends. The history of the debates does not indicate that the delegates sought to limit judicial review of agency legal errors. Rather, the debates indicate that the delegates sought judicial review over arbitrary agency action and that they singled out the administrative procedures that they wanted to protect from this review.

The Court of Appeals has held that "authorized by law" allows for review of all legal errors. In *Ross v Blue Care Network of Michigan*, 271 Mich App 358 (2006), the Court of Appeals stated:

> An administrative decision is unauthorized by law if it is: (1) in violation of a statute or the Constitution, (2) in excess of the statutory authority or jurisdiction of the agency, (3) made upon unlawful procedures resulting in material prejudice, or (4) arbitrary and capricious.

Id. at 379.

The Address to the People stated:

> This is a new section recognizing the increased significance assumed by administrative law in the legal system of the state in recent years. It provides that decisions, findings, rulings and orders of administrative officers or agencies which affect public rights be subject to judicial review.
>
> Excepted in this section are findings of fact in workmen's compensation proceedings. These findings would be conclusive in the absence of fraud,

> unless otherwise provided by law. Also excepted are appeals of certain decisions of agencies dealing with the administration of property tax laws.

2 Official Record, Constitutional Convention 1961, p 3389.

The Michigan Constitution supports a holding that this Court should not afford binding deference to an agency in its interpretation of a statute within its purview. The case is particularly strong for not doing so in the formal adjudication setting. As Dean LeDuc notes, no Michigan Supreme Court decision has adopted the federal *Bell Aerospace Co* decision holding that "rules" may be made in formal adjudications. LeDuc, Michigan Administrative Law (2nd ed 2000), § 4:17, p 186. Thus this Court could enter the fairly narrow holding that no deference is owed to administrative determinations made in the process of a formal adjudication and leave to another day whether deference would be proper for notice-and-comment rulemaking. Moreover, the Michigan courts have not allowed unlimited delegations to agencies, a fact that lessens the need for judicial deference, since wide-ranging policy questions are not handed to the agencies in the first place. These narrower delegations thus prevent the courts from having to substitute their policy preferences for those of the agencies.

To the extent that this Court extends any deference to an agency interpretation of a statute under the agency's purview, that deference should be the equivalent of *Skidmore* deference. In other words, the agency's view should be respectfully considered as potentially persuasive, but in no means binding on the courts.

RELIEF REQUESTED

For the reasons stated above, amicus curiae requests this Court to recognize that agency interpretations of statutes within the agency's purview are entitled to respectful consideration, but those interpretations should not be deferred to.

Dated: February 27, 2008

Respectfully submitted,

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