State Bar of Michigan

Administrative Law Journal

A publication of the State Bar of Michigan Administrative Law Section

Chair's Column

By Michael J. Watza, Kitch Drutchas Wagner Valitutti & Sherbrook

Kudos to MSU's IPU and the MPSC

As the title suggests, I will take this opportunity to plug a great institution and to thank both it and a state commission for their recognition of the importance of incorporating local issues into policy considerations concerning energy and communications.

The Institute of Public Utilities (IPU) at Michigan State University (http://ipu.msu.edu) was established in 1965 and operates within the College of Social Science at Michigan State University. The Institute draws from multiple academic disciplines including economics, political science, law, accounting, finance, and engineering, as well as from political and social arenas. It is run by Dr. Janice Beecher (beecher@msu.edu).

I became aware of the IPU a number of years ago when I realized in the course of handling various telecommunications and energy-related matters in Lansing on behalf of local government as well as private business clients, that by the time issues arrived before the Michigan legislature, much of the policy groundwork was already established. As I probed further, it quickly became evident that the IPU (along with the MSU Quello Center) serves as the incubator and, perhaps, catalyst for a great deal of what ends up as legislation on utility issues. I soon became a regular attendee at their events and conferences, so that I could see future changes as they developed from their infancy. Over the next several years, I began considering and discussing with Dr. Beecher the possibility of greater involvement with the IPU to allow for greater input into policy considerations on behalf of my clients. Those discussions, I am very pleased and thankful to say, led to my inclusion as a panelist at the IPU Winter Conference the last two years.

In my first appearance, I found myself wrangling a bit with my friendly opposition from the communications industry, which I like to think was beneficial. This year, I found myself in a role I am somewhat unfamiliar with but that I hope becomes the tradition, rather than the exception. I found myself tasked with publicly thanking the Michigan Public Service Commission (MPSC) and staff for some recent developments that I and my municipal clients, in particular, hope signal an era of new understanding and cooperation between the industry and local government. In particular, I speak of the importance of input and a reasonable level of

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Winter 2010, Issue 38

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The *Administrative Law Journal* is published by the Administrative Law Section of the State Bar of Michigan, 306 Townsend Street, Lansing, Michigan 48933-2012. Send proposed articles to Jack Dempsey, Dickinson Wright PLLC, at this email address: *jdempsey@dickinsonwright.com*

Chair's Column. . .

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control on matters of statewide energy and communications policy by "local communities" (that means all of us wherever we live).

In the month of January 2010, the MPSC opened three new files, two of which address what appear to be certain rogue cable providers operating in rural areas without requisite franchise agreements (U-16181 and U-16182). The MPSC also opened one file compelling the energy industry to establish new rates for municipalities that have installed LED lighting in their traffic control devices and elsewhere (U-16186). These developments alone spurred a fair amount of discussion in municipal circles, as we had not seen this kind of favorable sua-sponte treatment of municipal issues from the MPSC in, well, what seems like forever. Then, on January 25, 2010, the MPSC issued its "Report on the Impact of Setback Requirements and Noise Limitations in Wind Zones in Michigan." (http://www.michigan.gov/documents/mpsc/werzb_rpt_01-2010_309001_7.pdf). Contained in that report at page 2 are these words that I condense and abbreviate:

> …decisions regarding appropriate setback distances and noise levels should remain under the province of local planning and zoning authorities … these matters should be decided at the local level where feasible so that the needs of local citizens can be appropriately considered. No evidence presented to the commission suggests that a one-size-fits-all approach would work for the state."

These words ring well in the ears of local residents and local leadership, and it is these words and the policy consideration included that led me to offer a thank you to the commissioners and staff of the MPSC on behalf of the Michigan Municipal League, the Michigan Townships Association, and the Michigan Coalition to Protect Public Rights of Way (PROTEC). These words should also be favored by industry leadership as they embody the only policy that makes sense to any resident of this state who wishes to enjoy some reasonable input and control over the character of the community in which he chooses to live, raise his family, and for most, locate his largest single financial investment. Policy must serve and improve the lot of those whom industry is intended to serve which, in the end, is each of us.

So a thank you to the IPU for allowing my participation in this year's conference and another thank you to the MPSC for its inclusiveness of local community issues and needs. May next year see greater cooperation and understanding still. ☆

Please save the date!

Annual Luncheon with the Michigan Public Service Commission commissioners and staff.

Date: Wednesday, May 19, 2010

Time: 11:30 a.m. to 1:30 p.m.

Location: The University Club of MSU, Lansing

Additional details are forthcoming

FCC Enacts New "Shot Clock" For Municipalities to Decide Wireless Cellular Facilities Siting Applications

By Ronald D. Richards, Jr.

The Federal Communications Commission (FCC) recently set new rules that directly impact when and how a municipality can act on a request to locate wireless cellular facilities in that municipality. Those new rules, found in the FCC's recent *Declaratory Ruling,*[1] set specific timelines by which a municipality has to act on an application to locate wireless cellular facilities.

New Rules Regarding Timing to Decide Applications

Specifically, the FCC set out these new rules on the time a municipality has to resolve requests:

- A municipality must act on a wireless facility siting request for "personal wireless services" (1) within 90 days for collocations, and (2) 150 days for all other wireless facility siting applications.
- If the municipality fails to act within that relevant time frame, then a presumptive "failure to act" has occurred, and wireless providers may seek relief in court within 30 days of the failure to act per the Federal Communications Act. However, the municipality will have the opportunity to rebut the presumption in court.
- The timeframes may be extended beyond 90 or 150 days by mutual consent of the wireless provider and the municipality, and in such instances, the commencement of the 30-day period for filing suit will be tolled.
- If the review period in a local ordinance is shorter or longer than the 90-day or 150-day period, the applicant may pursue any remedies granted under local regulation when the applicable local review period has lapsed. So if the local review period is longer, the applicant may sue after 90 days or 150 days, subject to the 30-day limit on filing, and may wait to pursue any remedies granted under local regulation until the applicable local time limit has expired. If the local review period is shorter, the applicant must wait until the 90-day or 150-day period has expired before bringing suit.
- For all currently pending applications that have been pending for fewer than 90 or 150 days as of November 18, 2009, the municipality will have until February 16, 2010, or April 17, 2010, to take action.
- A party whose application has been pending for at least 90 days (for collocations) or 150 days (for other applications) as of November 18, 2009, may, after providing notice to the relevant state or local government, sue if the municipality fails to act within 60 days from the date of such notice.
- If a municipality notifies the applicant within the first 30 days after receipt of an application that it is incomplete, the time it takes for an applicant to respond to a request for additional information *will not count* toward the 90 or 150 days.

No Denials Based Solely On Existence of Other Providers

The FCC also clarified that a municipality may *not* deny a wireless facility siting application solely because there is service is available from another provider. The FCC ruled that such a denial is unlawful since it "prohibits . . . the provision of personal wireless services" under the Federal Communications Act. As a result, a municipality may not base a denial of a wireless facility siting application based solely on the fact that there may be other carriers who provide service to the area in question.

Conclusion

The FCC's *Declaratory Ruling* appears to be strong evidence that the FCC will pursue avenues to further promote the deployment of broadband and other wireless services. Its new timing constraints, while likely viewed with open arms by wireless providers, may be challenging for municipalities to meet. Nevertheless, all should be aware of these new rules given the consequences the FCC set out fornot heeding those new rules. ☆

Endnotes

1 Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket 08-165, FCC 09-99 (adopted November 18, 2009) (the Declaratory Ruling).

State Bar of Michigan | Administrative Law Section

Administrative Law Section • Wednesday, March 3, 2010

Kellogg Center Big Ten Room B, 55 Harrison Road, East Lansing, MI 48823, (517) 432-4000

Register online at http://e.michbar.org
Last date for registration is February 25, 2010. Limited onsite registrations accepted.

Agenda

Lunch with the Michigan Liquor Control Commission. Chairwoman Nida Samona, and Administrative Commissioners Pat Gagliardi and Don Weatherspoon will join the Administrative Law Section for a luncheon program. They will provide a report on the status of the Liquor Control Commission, discuss "hot topics" at the Commission, recent and pending legislation of importance and will be available for questions and answers afterm the presentation.

March 3, 2010
11:30 a.m.–2:00 p.m.
Kellogg Center Big Ten Room B
55 Harrison Road
East Lansing, MI 48823

Cost is $20 for members; $40 for non-members

▶ For additional information contact Mark J. Burzych, past chair, Fahey Schultz Burzych Rhodes, PLC mburzych@fsblawyers.com or (517) 381-3159.

State Bar of Michigan | Administrative Law Section

Administrative Law Section • Wednesday, March 3, 2010

Registration

P #: _____
Name: _____
Your Firm/Organization: _____
Address: _____
City: _____ State: _____ Zip: _____
Telephone: (_____) _____
Enclosed is check # _____ For $ _____
Please make check payable to: State Bar of Michigan
Please bill my: ❑ Visa ❑ MasterCard
Card #: _____
Expiration Date: _____

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Authorized Signature

Section member:	$ 20	$_____
Non-member:	$ 40	$_____
	Total:	$_____

Mail your check and completed registration form to:

State Bar of Michigan
Attn: Seminar Registration
Michael Franck Building
306 Townsend Street
Lansing, MI 48933

OR

Fax back (ONLY if paying by credit card) the completed form and credit card information to:

Attn: Seminar Registration
(517) 372-5921

▶ All cancellations must be received at least 48 business hours before the start of the event and registration refunds are subject to a $20 cancellation fee. Cancellations must be received in writing by e-mail (bhunter@mail.michbar.org), fax (517-372-5921 ATTN: Becky Hunter) or by U.S. mail (306 Townsend St., Lansing, MI 48933 ATTN: Becky Hunter.) No refunds will be made for requests received after that time. Refunds will be issued in the same form payment was made. Please allow two weeks for processing. Registrants who cancel will not receive seminar materials.

Recent Administrative Law Case Activity

By Ronald D. Richards Jr. and Lindsey Bosch

Introduction

Administrative case law activity in the last quarter included two published decisions and two unpublished decisions from the Michigan Court of Appeals. Those cases are discussed below.

The first published decision involved whether a circuit court has authority to review a State Tax Commission's property classification. The second published decision discussed whether the attorney general could force a company to cease activities on the grounds that the activities violated anti-gambling statutes and therefore was a nuisance.

The unpublished decisions involved the Court of Appeals interpreting the scope of a telephone company's access easement over private property, and whether an agreement for the dedication of natural gas reserves to a pipeline was for an indefinite term or a term certain.

Michigan Court of Appeals—Published Decision

Circuit Court Has No Jurisdiction to Review State Tax Commission Classification Decision

The case *Iron Mountain Information Management, Inc v Naftaly*, ___ Mich App ____; ____ NW2d _____ [CITE?] concerned whether the circuit court has jurisdiction to review a State Tax Commission (STC) decision classifying property. In *Iron Mountain*, the plaintiffs protested the classification of several parcels to the Board of Review, and then appealed the Board's decision by filing a classification complaint with the STC under MCL 211.34c(6). When the STC agreed with the assessor's classification and issued its decision by way of letter rather than an order, each plaintiff filed a complaint with the circuit court seeking mandamus or superintending control. The plaintiffs asked the circuit court to compel the STC to issue a valid order and classify the parcels in a particular manner.

The trial court ordered the STC to issue a valid order, but it did not address the STC's jurisdiction challenge. The Michigan Court of Appeals reversed, holding that the circuit court did not have jurisdiction to review the STC's decision.

The court ruled that there was no authority to bring the case in circuit court. It first found that MCL 211.34c(6) did not allow circuit court review. That statute unambiguously states, "An appeal may not be taken from the decision of the state tax commission regarding a classification complaint petition and *the state tax commission's determination is final and binding for the year of the petitioner*." The court found that the language "effectively barred appeals from the STC's decision in such an appeal." Next, the court found that the Michigan Administrative Procedures Act was not applicable in the case because the underlying proceeding was not a contested case since, under MCL 211.34c(6), the STC arbitrated the plaintiffs' petition. Third, the court found that MCR 7.101 does not "restrict or enlarge the right of review provided by law or make an order or judgment reviewable if it is not otherwise reviewable." Since MCL 211.43c(6) provides that the STC's final decision on a property classification appeal is not reviewable, the circuit court could not review the STC's decision under MCR 7.101 either.

Finally, Const 1963, art 6, § 28 did not help the plaintiffs. That provision states that decisions of an administrative agency are subject to direct review "as provided by law." Const 1963, art 6, § 28. The Court concluded that the language "as provided by law" "clearly vests the Legislature with the authority to exert substantial control over the mechanics of how administrative decisions are to be appealed." Since the express language of MCL 211.34c(6) precludes an appeal of an STC decision on property classification "for the year of the petition," the circuit court did not have jurisdiction to consider the plaintiffs' request for review.

Michigan Court of Appeals—Published Decision

Business Operations Constituted Enjoinable Nuisance for Violating Numerous Anti-Gambling Statutes

Attorney General v PowerPick Players' Club of Michigan, LLC, ___ Mich App ____; ____ NW2d _____; 2010 WL 21066 (January 5, 2010) addressed the issue of whether PowerPick's operations violated numerous anti-gambling statutes, thus constituting an enjoinable public nuisance. The Court of Appeals agreed with the attorney general and enjoined PowerPick's continuing operations.

Powerpick's main business was pooling lottery players. A PowerPick customer would initially choose the type of pool he or she was interested in based on the number of shares in the pool. PowerPick then used a computer system to

randomly assign its customers to the type of pool of his or her choosing. If a particular pool, known as a "PowerPool," won a drawing, the customers in that pool would share in the winnings on a pro rata basis. PowerPick also operated "Million Dollar Clubs." PowerPick would decide how many players would be in this type of club after considering how many shares had been bought. The distinguishing feature of a Million Dollar Club was that the participants in that pool did not know how many other participants would be in the pool at the time they bought their tickets. PowerPick could purchase shares in any of the pools and therefore also received its share of the proceeds of the pools which it chose to join. Further, PowerPick did not use all of the money it collected from its customers to buy lottery tickets. In fact, it used only 51 percent of the money collected from customers to buy lottery tickets. Forty-one percent of collected monies went towards operating costs, and PowerPick claimed eight percent for its profit. Before initiating the proceedings in this case, the attorney general had ordered PowerPick to cease its operations, as illegal under Michigan law.

When PowerPick continued its operations, the attorney general filed a complaint, alleging that PowerPick violated numerous anti-gambling statutes. The trial court denied the attorney general's summary disposition motion, finding questions of fact existed.

The Court of Appeals reversed. It concluded that there were no genuine issues of material fact that would have precluded summary disposition with respect to the attorney general's nuisance claim. The Court explained that the only question was whether PowerPick's operation fell within the scope of the statutes cited by the attorney general. The Court answered that question in the affirmative.

The Court then proceeded to explain how PowerPick violated Michigan's anti-gambling statutes. PowerPick violated MCL 750.301, which prohibits the acceptance of money on the happening or not happening of an uncertain event. This is because PowerPick accepted money from its customers with an express understanding that lottery tickets would be purchased *and* with an express understanding that a valuable prize would be paid out to any customer who was randomly assigned to a pool holding a winning lottery ticket.

Next, PowerPick registered bets in violation of MCL 750.304 by accepting bets from customers, randomly assigning customers to pools in exchange for their bets, and sending out written confirmation certificates verifying these random assignments. Relatedly, PowerPick's possession of "memoranda" of bets violated MCL 750.306, which makes the possession of bet "memoranda" a common nuisance in itself.

The Court then declared that PowerPick violated MCL 432.27 because it sold lottery tickets to customers at a greater price than that fixed by the Michigan lottery commissioner. PowerPick also acted improperly under MCL 750.372 (a person "shall not [s]et up or promote within this state any lottery or gift enterprise for money"). PowerPick's drawings fell within the definition of a "lottery" because its drawings constituted a "drawing of lots" and the process as a whole was "determined by chance." PowerPick's customers were automatically entered into a MegaPool, which the company described as a "free bonus"; therefore, the Court concluded that the MegaPool was a "gift enterprise." Since PowerPick's drawings fit the definitions of "lottery" and "gift enterprises," PowerPick also violated MCL 750.372.

The Court then turned to Michigan's public nuisance law. Any act in violation of law is a public nuisance because public harm is presumed to flow from the violation of a valid statute. Because Michigan enacted anti-gambling statutes to "preserve the public safety, morals, and welfare" and PowerPick violated several of those statutes, the Court concluded that PowerPick's business operations constituted a public nuisance.

Finally, the Court concluded that PowerPick's office and the contents of that office were also a nuisance. It relied on MCL 600.3801, which states that "[a]ny building . . . or place used for the purpose of . . . gambling is an enjoinable nuisance."

Judge Hoekstra dissented in part. He opined that a question of fact remained as to whether MCL 432.27 was actually enacted to preserve public health, safety, and welfare. For this reason, he would have remanded the case to the trial court "for initial consideration of whether a violation of MCL 432.27(1) constitutes a public nuisance, and if so, whether and to what extent, the violation is subject to the sanctions of MCL 600.3801."

Michigan Court of Appeals—Unpublished Decision

Court Reverses Finding That Phone Company's Access Easement Allowed New Cable Installation

In *Hunters Square Office Building v Michigan Bell Telephone Co*, unpublished opinion per curiam of the Court of Appeals, issued October 1, 2009 (Docket No. 286180), the Court addressed whether the defendant phone company exceeded its easement rights and therefore trespassed on the plaintiff landowner's property when it installed a new underground cable and attached it to an existing crossbox cabinet. The easement at issue granted the company the following access rights:

> "an easement to reconstruct, maintain, operate, and/or remove only those communication facilities and related equipment and appurtenances constructed

> and in place as of this date, with the right of ingress and egress for the purposes of this grant, in, under, upon, over and across the Westerly 20 feet of property . . . ."

The plaintiff argued that the company exceeded the scope of its easement by installing a new cable to the existing cabinet. The company claimed that the easement allowed it to connect the new cable to the cabinet.

The trial court granted summary disposition for the company. It ruled that the company's acts were clearly allowed by the easement.

The Court of Appeals reversed. The Court reasoned that the easement at issue was unclear as to whether the company had the right to install a new underground cable. It noted both parties had reasonable but different interpretations of the easement agreement. It determined that the easement agreement was ambiguous on its face whether the company could install a new underground cable. Therefore, the Court remanded the matter to the trial court to look beyond the four corners of the easement agreement and determine the true intent of the easement agreement.

Michigan Court of Appeals—Unpublished Decision

Court Affirms MPSC Finding That Dedication of Gas Reserves Had Perpetual Existence

In *Dominion Midwest Energy, Inc v Michigan Serv Comm'n*, unpublished opinion per curiam of the Court of Appeals, issued October 27, 2009 (Docket No. 280391), the Michigan Court of Appeals affirmed an order of the Michigan Public Service Commission (MPSC) that a dedication of natural gas reserves endured for the life of the pipeline or reserves. Mich Con Gathering Company (MGAT) owned and operated a gas pipeline, while Dominion owned reserves of the natural gas. The dispute started when Dominion's predecessor entered into an agreement (ASATT #1) with MGAT's predecessor in interest. Per ASATT #1, Dominion agreed to transport its gas through MGAT's pipeline for 10 years. At the same time, the parties executed a dedication of the natural gas with no specified term. A subsequent agreement (ASATT #16), between Dominion and MGAT's predecessor, was also for 10 years. A commitment of reserves was also executed with ASATT #16, which included some of the reserves referenced in the ASATT #1 dedication. Dominion claimed that the dedication under ASATT #1 covered only the 10-year period of ASATT #1. However, MGAT argued that the dedication under ASATT #1 had a perpetual existence and was intended to continue for the life of the reserves or pipeline.

Each party had a different interpretation of how the ASATT and the dedication were to be construed. Dominion's predecessor claimed that ASATT #1 and the dedication were presented as one agreement and that the intent was for the dedication to expire after 10 years. Further, a senior gas marketer for Dominion Exploration & Production, Inc claimed that it was the industry standard to express the term of the dedication and it was "inconceivable" for a producer to dedicate its reserve in perpetuity yet only agree to have the security of a contract for a portion of that time.

The MPSC staff countered the above testimony. One of its witnesses claimed that the reason the dedication was for an unlimited term was to avoid a demand charge for transportation, and that in Michigan the majority of transportation contracts are done without separate dedications. Another staff witness testified that MCGC operated on the assumption that a dedication is for the life of the reserves unless the parties specified another term.

The MPSC ruled against Dominion. It found that the dedication was intended to run for the life of the pipeline or reserves.

The Court of Appeals affirmed. It explained that the dedication's merger clause required the MPSC to look at the dedication documents alone to determine the parties' intent. Since the dedication did not contain an actual termination date, the MPSC found that there was no termination date and that the dedication would not expire until there was no reserve left. The MPSC also noted the staff's witnesses supported this conclusion. It therefore upheld the MPSC's decision. ☆

Submissions

The *Administrative Law Journal* welcomes unsolicited manuscripts, particularly those dealing with issues of law, government, and public policy in Michigan, and letters to the editor. There is no average or expected length to submissions.

Inquiries, information, suggestions, and items for publication can be directed to the Publications Committee: Jack Dempsey of Dickinson Wright PLLC (*jdempsey@dickinsonwright.com*) and Kim Breitmeyer of the Michigan Department of Energy, Labor and Economic Growth (*breitmeyerk@michigan.gov*).

2009-2010 Pending Administrative Law Legislation

By Jon P. Christinidis

Senate Bill 0013 amending Sections 3 and 45 (MCL 24.203 and 24.245) and adding Section 45b to the Administrative Procedures Act

This bill, out of a concern that some administrative rules are negatively impacting regulated industries and economic recovery, amends the Administrative Procedures Act to (*in addition to various clean-up, agency/State Office of Administrative Hearings and Rules "SOAHR" website posting requirements and replacing the State Office of Regulatory Reform with SOAHR*) define the "Decision Record" of agency advisory committee/entity (*see Senate Bill 0431*) and generally require the Notice of Transmittal to SOAHR to contain, in addition to a regulatory impact statement, (1) the request for rulemaking, and (2) a small business impact statement. In addition, the Regulatory Impact Statement would thereafter be required to contain (a) a comparison of the proposed rule to standards in other states in the Great Lakes Region, (b) a statement of whether the rule exceeds standards in such cases, (c) the methodology utilized in determining the existence and extent of the impact of a proposed rule, (d) a cost-benefit analysis of the proposed rule, and (e) a detailed recitation of the efforts of the agency to comply with the mandate to reduce the disproportionate impact of the rule upon small businesses. *The bill is tie-barred to Senate Bills 0431 and 0434*.

Senate Bill 0431 amending Section 39 (MCL 24.239) of the Administrative Procedures Act

This bill, also out of a concern that some administrative rules are negatively impacting regulated industries and economic recovery, amends the Administrative Procedures Act to (*in addition to various clean-up and agency website publishing requirements and replacing the State Office of Regulatory Reform with SOAHR*) require agency advisory committees/entities to issue a "Decision Record" relating to a request for rule-making. The bill also provides that SOAHR *"is not required to approve a request for rule-making and shall do so only after it has indicated in its response to the request for rule-making submitted by an agency that there are appropriate and necessary policy and legal bases for approving the request for rule-making."* The bill then reiterates that SOAHR *"shall issue a written or electronic response to the request for rule-making that specifically addresses the issues of whether the request has appropriate and necessary policy and legal bases for approving the request for rule-making." The bill is tie-barred to Senate Bills 013 and 0434*.

Senate Bill 0434 amending Sections 32, 40, 43, 61 and 64 (MCL 24.232, 24.240, 24.243, 24.261 and 24.264) of the Administrative Procedures Act

This bill would (1) prohibit rules from designating an act or omission as a crime unless authority to do so is provided by statute, (2) prohibit an agency from promulgating or adopting a rule more stringent than the applicable federal standard unless specifically authorized by statute to do so, (3) require an agency implementing a federally delegated program to adopt the rules and standards promulgated or adopted by the federal government unless a more efficient process is specifically authorized by statute, and (4) prohibit rules from exceeding the rule-making delegation contained in the statute authorizing the rule-making.

In addition, the bill modifies the precedential effect and application of agency guidelines, operational memoranda, bulletins, interpretive statements, and forms with instructions. The bill states that these agency issuances are "considered merely advisory and shall not be given the force and effect of law" and that agency shall not rely upon these issuances "to support an agency's decision to act or refuse to act if that decision is subject to judicial review." The bill also admonishes that "[a] court shall not rely upon [these issuances] to uphold such an agency decision." Furthermore, in a circumstance where an agency has the statutory choice between proceeding by rule-making or order, an order issued in this circumstance may not be given general applicability to persons who were not parties to the proceeding or contested case prior to the issuance of the order.

The bill would also generally require agencies to consider exempting small businesses from rules that would have a disproportionate impact on small business and otherwise consider various enumerated issues and standards that might mitigate impacts on small business.

Finally, the bill modifies the Administrative Procedures Act provisions affecting challenges to the validity of rules. The bill adds compliance with Sections 39, 40, and 45(3) to Sections 41 and 42 (or any combination thereof) as bases for challenging the validity of a rule promulgation. The bill also adds the potential to recover damages up to 10 times the cost of any permit fees (plus actual and reasonable costs relating to witness and attorney fees) from an agency determined by the proper circuit court to have violated rule processing requirements. The bill eliminates the rebuttable presumption

of compliance with all requirements of the Administrative Procedures Act relative to a rule arising from publication of a rule in the Michigan Register, the Michigan Administrative Code (or an annual supplement to the Code), adds a court determination that an agency failed to accurately assess the impact of a rule on businesses (including small businesses) in its regulatory impact statement as a basis for pursuing a declaratory judgment, and removes the statutory prohibition to filing a request for declaratory judgment prior to requesting a declaratory ruling from the agency and receiving an agency denial (or lack of expeditious agency action). *The bill is tie-barred to Senate Bills 013 and 0431.* ☆

About the Author

Jon P. Christinidis has represented DTE Energy and its affiliated companies for 15 years in a wide variety of state and federal energy regulatory proceedings and related matters. He is also a member of the Energy Bar Association.

In Memoriam— James Henry Quello

James Henry Quello, often referred to as the "Dean" of the Federal Communications Commission, died on January 24, 2010. Born in Laurium, Michigan on April 21, 1914, he graduated from Michigan State University, served in the U.S. Army during World War II, and began a career in radio broadcasting immediately after returning from Europe in 1945. He worked at WXYZ and WJR radio stations in Detroit before being appointed to the FCC by President Nixon in 1974. He was confirmed to four different terms and served until 1997, including a stint as acting chairman of the Commission for 11 months in 1993.

Current FCC Chairman Julius Genachowski lamented Quello's passing, saying, "He was a role model to generations of FCC employees and advocates for his decency, personal charm, and commitment to his work. He leaves behind an extraordinary legacy of service to the FCC, the communications industry, and the American people."

In 1998, Michigan State University honored both Mr. Quello and his wife with the creation of the James H. Quello and Mary B. Quello Center for Telecommunication Management and Law.

News from the State Bar of Michigan

SBM Blog Launches

To keep Michigan attorneys up to date on current news, commentary, and issues of interest, SBM is launching a blog. SBM Blog aims to keep a close eye on the blogosphere, the national legal scene, changes in court rules, the Michigan Supreme Court, the state legislature, and the governor's office, as well as what's going on in local and specialty bars in Michigan. SBM Blog will also strive to highlight the critically important and urgent efforts of the Judicial Crossroads Task Force, as it works to protect and advance the judicial branch of government in the face of enormous fiscal and transformational challenges in Michigan. The Task Force needs to hear as many SBM members' voices as possible, and SBM Blog will be an important vehicle for members to share their input. The blog will forward all comments pertaining to the Task Force directly to its committee members. Visit the SBM Blog today. It will evolve with your input.

New Electronic SBM Election Process

A new process for the SBM elections will be implemented for the 2010 State Bar elections. This process will allow all active members to vote securely online at the State Bar of Michigan website. The new process saves money, is more environmentally conscious, and will be more convenient for members.

All members with computer access currently have the ability to access the State Bar website member area using their unique password to pay their dues, register for conferences and seminars, and order publications. Those members will now have the opportunity to cast their vote in June for candidates in the Board of Commissioners, Representative Assembly, Young Lawyers Section Executive Council, and the Michigan Judicial Tenure races in the areas that they are entitled to vote.

Over 90% of the State Bars members have provided e-mail addresses for their contact information. SBM members who do not have online access will have the opportunity to request that a paper ballot be sent to them. Look for more information in the March Bar Journal.

First Annual Word Shape-Shifting Invitational

By Co-Editor Jack Dempsey

In November of last year, *The Washington Post*'s annual "Mensa Invitational" asked its readers to take a word and transmogrify it by adding, subtracting, or changing only one letter, then provide an appropriate definition for the new creation. Winning entries included:

- **Intaxication**: Euphoria at getting a tax refund, which lasts until you realize it was your money to start with.
- **Reintarnation**: Coming back to life as a hillbilly.
- **Bozone**: The substance surrounding stupid people that stops bright ideas from penetrating. The bozone layer, unfortunately, shows little sign of breaking down in the near future.
- **Sarchasm**: The gulf between the author of sarcastic wit and the person who doesn't get it.
- **Decafalon:**[1] The grueling event of getting through the day consuming only things that are good for you.
- **Dopeler effect**: The tendency of stupid ideas to seem smarter when they come at you rapidly.
- **Caterpallor**: The color you turn after finding half a worm in the fruit you're eating.

Here at the *Administrative Law Journal*, we thought it might be of interest to stretch the mental faculties of readers by offering our own contest modeled after the *Post*'s. First, though, we've come up with a few of our own "ad law" terms that have been genetically altered—without any material risk to living humans, animals, or plants—devised during a lull in reading transcripts of utility rate cases and liquor license revocation hearings. We offer them for your reading enjoyment:

- **Proposal for Derision**: An administrative law judge's recommended decision, provided to the governing agency, in which arguments of the parties are subjected to paroxysms of laughter and other appropriate ridicule
- **Contested cake**: A proceeding in which a determination of the legal rights, duties, or privileges during a festivity as to a high-caloric baked good smothered in frosting is required by law to be made by an agency after an opportunity for an evidentiary hearing
- **Office of regulatory deform**: The place in state government where rules go to be misshapen and bent far from their original agency intent
- **Point committee on administrative rules**: The legislative body, consisting of term-limited but continually ambitious office holders, with power to disapprove rules through appropriate negative gestures
- **Preheating conference**: The duly convened and on-the-record hearing held before the evidentiary hearing at which parties debate and discuss the procedure for baking their arguments into the record[2]
- **Rudemaking**: An agency proceeding in which the views of the public regarding mandatory conduct they must comply with after adoption are told to "talk to the hand"
- **Declamatory ruling**: An agency's issuance of a statement comprised of pretentious rhetoric, bombast, and orotundity in which the requestor is advised that this and all future such requests deserve summary rejection
- **Witless**: A person called to testify under oath at an administrative hearing who, despite extensive attempts at coaching, persists in ignoring the advice of counsel and ruining his request for relief via admissions, grandstanding, and self-inflicted wounds
- **Despondent:** One against whom a complaint is filed or against whom an investigation, order to show cause, or other proceeding on the agency's own motion is commenced, and who faces penalties and sanctions that will hide the sun from view for a long time

The contest is now open and in your hands, good readers. We will publish winning entries in a forthcoming issue, along with appropriate credits – if you have courage enough to submit them. Please send your entries to the editors. So go ahead: prove your superior brain power and good humor.

Endnotes

1 The editors call your attention to the *Post*'s gaffe in not excluding this entry, requiring the displacement of two ("th") letters.

2 This term should not be confused with "reheating," a procedural step in which a party, against whom the agency's original decision has been rendered, files the same half-baked and unpalatable arguments that lost initially.