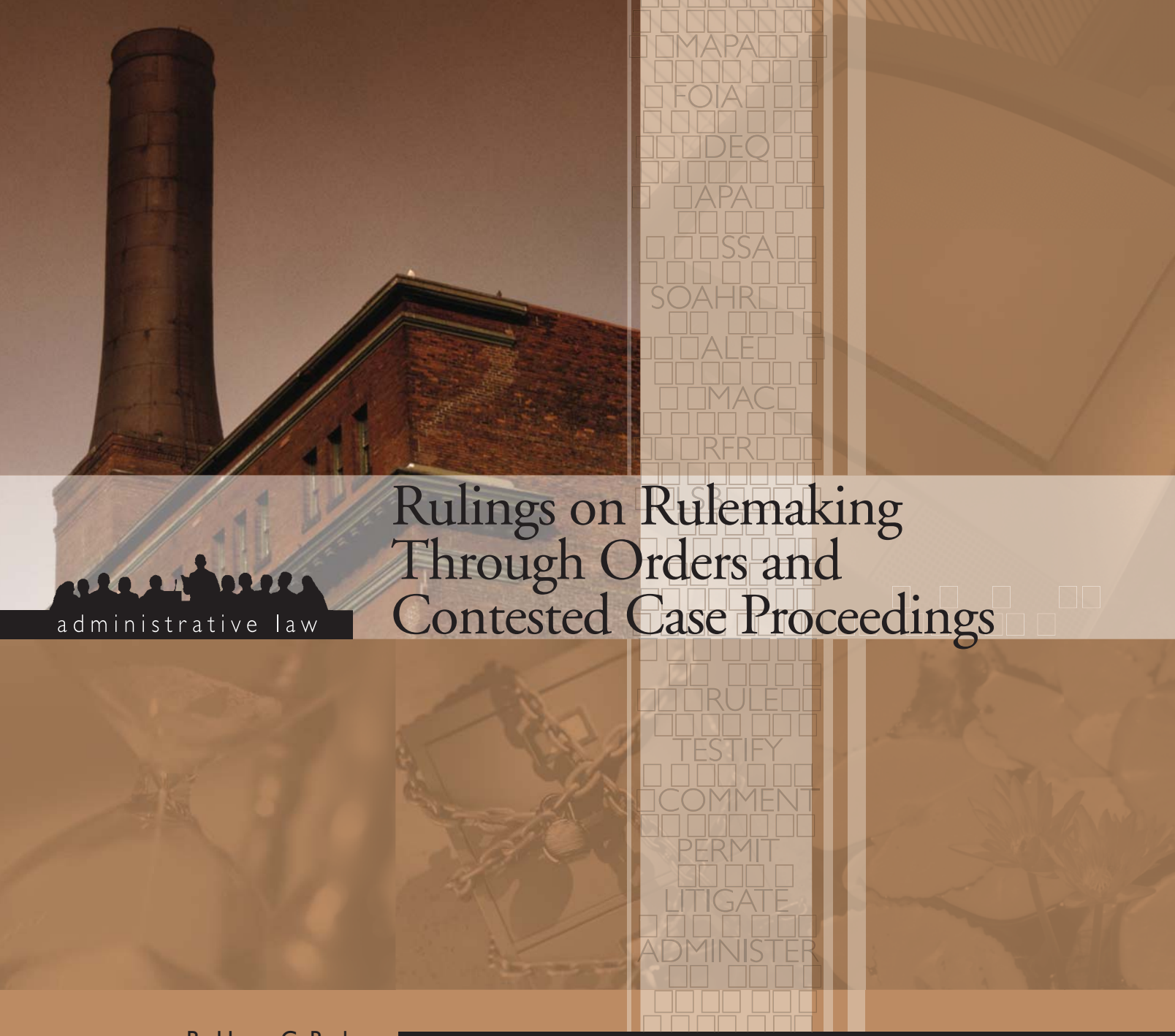

administrative law

Rulings on Rulemaking Through Orders and Contested Case Proceedings

By Haran C. Rashes

FAST FACTS

Procedures for rulemaking are set forth in the Michigan Administrative Procedures Act of 1969 (MAPA) and a series of executive orders issued by Governors John Engler and Jennifer Granholm.

The MAPA contains an exception for "a determination, decision, or order in a contested case" from the requirements of rulemaking.

Departments and agencies that issue "rules" through contested cases or orders should make sure that they follow to the letter the MAPA guidelines for a contested case proceeding.

IN MICHIGAN, WITH A FEW NOTABLE EXCEPTIONS, "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency"[1] is an administrative *rule,* and its promulgation is subject to rulemaking procedures. These somewhat convoluted procedures are set forth in the Michigan Administrative Procedures Act of 1969 (MAPA, also APA)[2] and several executive orders issued by Governors Engler and Granholm.[3] Seeking to avoid the arduous process of rulemaking under the MAPA, agencies have issued what would otherwise be called rules through other, less time-consuming processes. Among these processes is an exception to rulemaking for "a determination, decision, or order in a contested case proceeding."[4]

The Michigan Public Service Commission (MPSC) is one state agency that has attempted to use the contested case exception to rulemaking in recent years. Examining appeals of some of these proceedings leads to a better understanding of when an agency may issue a generally applicable policy by order, rather than promulgating a rule through rulemaking.

Rulemaking under the MAPA

The Michigan Administrative Code (MAC) contains over 10 volumes of rules that have been promulgated by Michigan departments and agencies. The sometimes arduous process for rule promulgation under the MAPA starts when an agency files a request for rulemaking (RFR) with the State Office of Administrative Hearings and Rules (SOAHR), an independent agency within the Department of Labor & Economic Growth. The RFR must include "the state or federal statutory or regulatory basis for the rule; the problem the rule intends to address, and, an assessment of the significance of the problem."[5]

SOAHR may approve, deny, or send the RFR back to the agency for additional information. Only upon SOAHR's approval may the agency begin drafting the proposed rule.

After the agency has drafted the proposed rule, it submits it to both SOAHR and to the Legislative Service Bureau (LSB) for informal review and approval. If either SOAHR or LSB raise any concerns regarding the legal authority of the agency to issue the proposed rule or regarding whether the proposed rule adequately resolves the problems proposed in the RFR, either SOAHR or LSB may return the proposed rule to the agency for modification. Once SOAHR and LSB have approved the proposed rule, the agency must complete a regulatory impact statement (RIS) assessing, among other issues, the economic impact of the proposed rule and its expected benefits. The RIS must be submitted to SOAHR at least 28 days before an MAPA-required public hearing concerning the proposed rule.

At this public hearing, members of the public may comment on the proposed rules either through filed written comments or by appearing in person. Following the public hearing, if the agency or department determines that any modifications are required, it may make such changes and resubmit the proposed rule to SOAHR for reconsideration. If SOAHR does not approve the modifications, it returns the proposed rule to the agency or department for further modification. If SOAHR approves the modifications, the proposed rule is forwarded to LSB for certification to determine "that a proposed rule is proper as to all matters of form, classification, and arrangement."[6] Following LSB certification, SOAHR certifies the rule as to whether SOAHR "considers the proposed rule to be legal" and that it was promulgated in accordance with the MAPA. If either LSB or SOAHR declines to certify the proposed rule, it can be returned to the department or agency for further modifications.

Following certification by LSB and SOAHR, the proposed rule, along with an agency summary of comments received, is submitted to the Joint Committee on Administrative Rules (JCAR). JCAR may either approve the rule or submit to both houses of the legislature a bill regarding the subject matter of the proposed rule.

If JCAR approves the proposed rule, it is submitted to the Office of the Great Seal and is officially promulgated and published in the MAC.

Examples of MPSC Rulemaking through Contested Case Proceedings or Orders

Recognizing the complexity of the time-consuming process for promulgating rules, the legislature enacted an exception for "a determination, decision, or order in a contested case"[7] from the definition of a rule. Some court cases have recognized this, holding that "an agency has the option of setting standards either pursuant to the rule-making provisions of the APA or case by case through adjudication."[8] However, such adjudication (a "contested case" proceeding under the MAPA) must, by definition, be "a proceeding, including ratemaking, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing."[9] Michigan courts have recently made it clear that generally applicable policies issued under this exception to rulemaking must exactly follow the rules for a contested case proceeding under the MAPA.

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Among the departments and agencies that have had their issuance of such "rules" under the contested case exception questioned in appellate proceedings is the MPSC. The MPSC has issued several orders "of general applicability that implements or applies law enforced or administered by the" MPSC which, but for the exception for "determination[s], decisions, or orders issued in contested cases," would be considered "rules" under the MAPA. While these "rules" by statute remain "in force and shall be prima facie, lawful and reasonable until finally found otherwise,"[10] they are not published in the MAC; they are not necessarily disseminated to all affected persons; and they can be changed and modified by the MPSC at any time. In considering the legality of rules issued through an order or a contested case proceeding, Michigan courts have not been consistent in their rulings, resulting in confusion as to when, how, or even if, agencies may issue rules through contested case proceedings.

On March 8, 1999, the MPSC invited interested parties to participate in a proceeding to modify existing guidelines for transactions between affiliates that applied to four specifically identified public utilities.[11] As part of this proceeding, the MPSC asked parties to consider "whether the guidelines should be imposed on a larger or smaller group of entities" and indicated that "[c]ontested case proceedings should be initiated to consider" changes to the guidelines.

Though the MAPA specifically defines a "guideline" as "an agency statement or declaration of policy which the agency intends to follow, which does not have the force or effect of law, and which binds the agency but does not bind any other person,"[12] the MPSC's affiliate transaction guidelines were clearly not such a guideline under the MAPA. Rather, the affiliate transaction guidelines were a generally applicable agency regulation—by definition, a rule.[13]

The MPSC issued its affiliate transaction guidelines on May 3, 2000, following evidentiary hearings, briefs, a proposal for decision issued by an administrative law judge, and exceptions filed thereto.[14] The MPSC applied the guidelines "to all public utilities that provide electric or natural gas service subject to the statutory authority of the Commission."

Several of the affected utilities appealed the MPSC's order. On appeal, the court of appeals invalidated the guidelines and the process under which they were issued.[15] The court found that

> the proceeding initiated by the PSC was wholly incompatible with the definition of "contested case" under the APA. The PSC's order initiating this contested case did not list any named parties, as required by MCL 24.203(3), but instead directed "any person wishing to intervene and become a party to the case" to file a timely intervention petition . . . . [B]ecause "the legal rights, duties, or privileges of a named party" were not determined, the proceeding was not a contested case.[16]

Finding no named party to the proceeding, the court held that the MPSC "eschewed the procedural mandates of the APA in favor of its own course of action." The court found that the MPSC "culled elements of rulemaking, adjudication, and general policy formulation, with little regard for the dictates of the APA" in "a rather heavy-handed rebuke of established APA procedures."

In 1999, the MPSC recognized the need for a generally applicable code of conduct for incumbent utilities as they began to compete in non-regulated fields. The MPSC commenced a contested case proceeding against two specific named utilities to consider modifications to their codes of conduct.[17] Following an evidentiary hearing, legislation was enacted requiring the MPSC to "establish a code of conduct that shall apply to all electric utilities."[18] Following the change in the law, the MPSC issued notice to all electric utilities in Michigan and all known alternative suppliers, inviting them to participate in the still-pending proceeding. Additional parties intervened, presented witnesses, and participated in a new evidentiary hearing. On December 4, 2000, the MPSC issued an order establishing the code of conduct.[19]

In two separate appeals, the court of appeals found that the issuance of the code of conduct was different from that of the affiliate transaction guidelines because the proceeding that developed the code of conduct was "conducted as a contested case in that the order commencing the matter listed [the original two utilities] as parties and provided them and the intervening parties with the opportunity for a hearing as required by MCL 24.203(3)."[20] The court held that the intervening legislation and the MPSC's "renoticing of the proceedings for the purpose of complying with" the legislation "does not change the dynamic of a contested case."[21]

However, the Supreme Court disagreed, finding that "the Court of Appeals erroneously concluded that a generally applicable industry code of conduct may be promulgated through a contested case proceeding."[22] The Supreme Court based its ruling on Sections 203(3) and 207 of the MAPA as well as on the holdings in *Michigan Elec Coop Ass'n v Public Serv Comm'n*[23] and *Detroit Base Coalition for Human Rights of Handicapped v Dep't of Social Services*.[24] However, the Court recognized the legislature's subsequent and specific ratification of the code of conduct when it enacted an amendment to MCL 460.10a, and the code of conduct remains valid.[25]

Despite such rebukes of its issuance of policies by order, on May 2, 2003, the MPSC issued an order sua sponte modifying its procedures for conducting an arbitration of a telecommunications interconnection agreement[26] pursuant to the Federal Telecommunications Act of 1996.[27] The MPSC invited interested parties to "comment" on the proposed procedures. Over a year later, without the benefit of an evidentiary hearing or reply comments, the MPSC issued arbitration procedures.[28]

The only party to file comments appealed the arbitration procedures, specifically challenging the fact that the procedures were not adopted following the rulemaking requirements of the MAPA. In an unpublished opinion, the court of appeals found that because the MPSC had limited its proceeding to a "comment proceeding," there were no "parties" with rights to appeal. "Instead, SBC merely submitted comments . . . which the PSC declined to adopt."[29] The court thus raised the troubling, and as yet unanswered, question of whether or not "rules" issued by order may be unappealable because there can be no "party" to the proceeding resulting in the "rule." Had the MPSC followed the rulemaking requirements of the MAPA, its "rules" clearly would have been subject to judicial review under the MAPA.[30]

Conclusion

In Michigan, "the preferred method of policymaking is by promulgation of rules. When action taken by an agency alters the status quo, those who will be affected by its future application should have the opportunity to be heard and to participate in the decisionmaking."[31] Despite the MAPA's exception to the requirements of rulemaking for "a determination, decision, or order in a contested case proceeding," agencies should avoid creating policies that fit the definition of a rule through any method other than

rulemaking. Doing so may not afford all potentially affected parties their statutory right to full notice and participation, rendering the "rule" unlawful. ◆

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Footnotes

1. MCL 24.207.
2. MCL 24.201 *et seq.*
3. Executive Order Nos 1995-6, 2000-1, and 2005-1.
4. MCL 24.207.
5. MCL 24.239.
6. MCL 24.245(1).
7. MCL 24.207(f).
8. *Northern Michigan Exploration Co v Public Serv Comm'n,* 153 Mich App 635, 649; 396 NW2d 487 (1986); See also *American Way Life Ins Co v Ins Comm'r,* 131 Mich App 1, 5–7; 345 NW2d 634 (1983), lv den 419 Mich 937 (1984).
9. MCL 24.203(3).
10. MCL 462.25.
11. *In re guidelines for transactions between affiliates,* MPSC Case No. U-11916, 1999 Mich PSC LEXIS 87, Mar 8, 1999.
12. MCL 24.203(6).
13. See LeDuc, Michigan Administrative Law, § 4:05, pp 154–156. "What an agency calls or does not call a 'rule' is not of controlling significance."
14. *In re guidelines for transactions between affiliates,* MPSC Case No. U-11916, 2000 Mich PSC LEXIS 175; 201 PUR4th 209, May 3, 2000.
15. *Michigan Elec Coop Ass'n v Public Serv Comm'n,* 252 Mich App 254; 652 NW2d 1 (2002).
16. *Id.,* p 267.
17. *In re Restructuring of the Electric Utility Industry,* MPSC Case Nos. U-11290 & U-12134, 1999 Mich PSC LEXIS 253, Sep 14, 1999.
18. MCL 460.10a(6), 141 PA 2000.
19. *In re approval of a code of conduct,* MPSC Case No. U-12134, 2000 Mich PSC LEXIS 523; 205 PUR4th 508, Dec 4, 2000, revised on rehearing, *In re approval of a code of conduct,* MPSC Case No. U-12134, 2001 Mich PSC LEXIS 418; 213 PUR4th 252,Oct 29, 2001.
20. *Detroit Edison Co v Public Serv Comm'n,* 261 Mich App 1, 12; 680 NW2d 512 (2004), vacated in part, 472 Mich 897; 695 NW2d 336 (2005); See also *Michigan Elec Coop Ass'n v Public Serv Comm'n,* Nos. 244425, 244429, 244531, 2004 Mich App LEXIS 2165 (Mich App Aug 17, 2004).
21. *Detroit Edison Co v Public Serv Comm'n,* 261 Mich App at 12.
22. *Detroit Edison Co v Public Serv Comm'n,* 472 Mich 897; 695 NW2d 336 (2005).
23. 252 Mich App 254; 652 NW2d 1 (2002).
24. 431 Mich 172, 185; 428 NW2d 335 (1988).
25. 2004 PA 88.
26. *In re modification of arbitration procedures,* MPSC Case No. U-13774, 2003 Mich PSC LEXIS 121, May 3, 2003.
27. 47 USC 252.
28. *In re modification of arbitration procedures,* MPSC Case No. U-13774, 2004 Mich PSC LEXIS 169, May 18, 2004.
29. *SBC Michigan v Public Serv Comm'n,* No. 256177, 2005 Mich. App. LEXIS 2743 (Mich Ct App, Nov 3, 2005).
30. MCL 24.263 and 24.264.
31. *Detroit Base Coalition,* 431 Mich at 185.