

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ATTORNEY GENERAL JENNIFER M.  
GRANHOLM,

Plaintiff-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION  
and DETROIT EDISON COMPANY,

Defendants-Appellees.

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FOR PUBLICATION  
December 8, 2000  
9:10 a.m.

No. 215919  
PSC  
LC Nos. 00-011449; 00-011528

Updated Copy  
February 2, 2001

Before: Meter, P.J., and Griffin and Talbot, JJ.

METER, P.J. (*dissenting*).

I respectfully dissent because I do not believe that this case presents the appropriate circumstances in which to address the Attorney General's ability to sue a party whom she also represents.

The majority's opinion fails to adequately address a key issue directed to us by the October 11, 2000, order of the Supreme Court: "whether the conflict of interest question raised at the oral argument presents a live controversy in this case or the dispute is purely hypothetical."<sup>1</sup> I conclude that the conflict of interest question raised at oral argument is indeed purely hypothetical in this case and that its merits should therefore be addressed in the context of a future, more appropriate case.

There is no conflict of interest per se in the Attorney General representing a state agency and appearing as a litigant on the opposing side. See, e.g., *Attorney General v Public Service Comm*, 412 Mich 385; 316 NW2d 187 (1982) (in which the Attorney General sued a party whom he also represented), and *State ex rel Allain v Mississippi Public Service Comm*, 418 So 2d 779 (Miss, 1982) (in which the attorney general appeared as an intervening party opposite an agency that he also represented). In *Allain*, the court discussed the possibility of a conflict of interest and stated that no inherent conflict existed:

The prevailing rule is that where the attorney general has common law powers, he has the inherent right to intervene in all suits affecting the public interest when he had no personal interest therein.

\* \* \*

Considering our scheme of laws with respect to the attorney general being the chief legal officer of the State with the duty to represent the many agencies of the State and his duty to protect the public interest, we are of the opinion and hold that the majority rule will afford maximum protection to the public interest as well as afford complete legal representation to the various state agencies.

The attorney general has a large staff which can be assigned in such a manner as to afford independent legal counsel and representation to the various agencies. The unique position of the attorney general requires that when his views differ from or he finds himself at odds with an agency, then he must allow the assigned counsel or specially appointed counsel to represent the agency unfettered and uninfluenced by the attorney general's personal opinion. If the public interest is involved, he may intervene to protect it. [*Id.* at 783-784.]

See also *Weaver v Blue Cross & Blue Shield of Alabama*, 570 So 2d 675, 681-682 (Ala, 1990) (indicating that the attorney general could appear as counsel for opposing sides of a dispute).

These cases indicate that no conflict of interest per se existed in this case. Indeed, the office of the Attorney General has historically assigned its large staff to separate divisions for representation of state agencies in such a manner as to essentially afford those agencies

independent legal counsel. Moreover, although an *actual* conflict of interest (as opposed to a conflict per se) could potentially arise in a given case, the Public Service Commission (PSC) in this case neither demonstrated nor suggested such an actual conflict. The PSC did not even question the Attorney General's representation of it until after this Court raised the conflict of interest issue during oral argument. Subsequently, the PSC failed to allege or show how the Attorney General's dual representation on the underlying issue compromised the PSC. Accordingly, the conflict of interest issue in this case is purely hypothetical and should not be addressed by this Court. See, e.g., *Kent Prosecuting Attorney v Kent Circuit Judges*, 110 Mich App 404; 313 NW2d 135 (1981).

Even if this case were analogized to a declaratory judgment action in which the PSC asked for a ruling regarding the Attorney General's ability to sue a party whom she also represents, there would still exist no live controversy. Indeed, for such an action to be justiciable, the PSC would have to provide particularized facts showing how the Attorney General's dual representation on the underlying issue compromised the PSC or how adverse interests between the Attorney General and the PSC necessitated a sharper rule regarding the Attorney General's ability to represent two sides of a dispute. The PSC did not provide such facts. Accordingly, there exists no live controversy regarding the Attorney General's actions in this case. See *Shavers v Kelley*, 402 Mich 554, 589; 267 NW2d 72 (1978) (indicating, in the context of a declaratory judgment action, that a party seeking declaratory relief must "plead[] facts entitling him to the judgment he seeks and prove[] each fact alleged, *i.e.*, a plaintiff must allege and prove an actual *justiciable* controversy) (emphasis in original). See also *Michigan State AFL-CIO v Civil Service Comm*, 191 Mich App 535, 545; 478 NW2d 722 (1991).

This Court simply does not address hypothetical issues in which no live controversy exists. See *Shavers, supra* at 589, and *Blue Cross & Blue Shield of Michigan v Governor*, 422 Mich 1, 72; 367 NW2d 1 (1985). Moreover, the Court of Appeals cannot exercise original jurisdiction to grant a declaratory judgment. See *Musselman v Governor*, 200 Mich App 656, 667-668; 505 NW2d 288 (1993). Accordingly, I would not use this instant case to address the issue of the Attorney General's dual representation but would wait instead to address it in the context of an actual controversy.<sup>2</sup>

/s/ Patrick M. Meter

<sup>1</sup> While the majority opinion addresses the question of mootness, it fails to address whether a live controversy existed in this case. Contrary to the majority's implication, whether a particular case is moot and whether it involves a live controversy are two separate questions. Indeed, there can be cases involving live controversies that are subsequently rendered moot because the requested relief has already been granted. Conversely, if no live controversy exists in the first place, like in the instant case, then one does not even reach the question of whether the issue has become moot.

<sup>2</sup> The PSC contends that an actual controversy does exist here because the Attorney General initially refused, against the PSC's wishes, to allow the PSC to retain independent counsel to brief the conflict of interest issue raised during oral argument (the Attorney General subsequently reconsidered and authorized the PSC to retain outside counsel). However, the fact remains that no actual controversy was proved *with regard to the Attorney General's representation in the underlying case*. Accordingly, because no actual controversy existed regarding the Attorney General's potential conflict of interest in the underlying case, I do not believe that the conflict of interest issue is properly before this Court or that it should be addressed by this Court.