Further, there is no authority for the Department of Social Services to enter into any contract for foster care which would place liability on the state where the state is protected by the doctrine of sovereign immunity.

Thus, answering your third question, although foster parents can sue the State of Michigan or the Department of Social Services for reimbursement, recovery in such a suit is barred because of the sovereign immunity from liability in tort provided by statute and the lack of authority of the Department to enter into any agreement abrogating such immunity.

FRANK J. KELLEY,
Attorney General.

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PUBLIC SERVICE COMMISSION: Flow-through of purchase and interchange power expense.

The Public Service Commission is not authorized to adopt a rate schedule allowing an automatic flow-through of purchase and interchange power expense to rate payers without prior notice and hearing.

Opinion No. 4844 November 20, 1974.

Mr. William R. Ralls, Commissioner
Michigan Public Service Commission
5th Floor, Law Building
Lansing, Michigan

QUESTION: Does the Public Service Commission have authority to approve a utility's rate schedule that provides for an automatic flow-through to rate payers of increased cost of purchase and interchange power without requiring notice and hearing prior to each rate increase?

The power and jurisdiction of the Public Service Commission is set out in 1939 PA 3, §6; MCLA 460.6, MSA 22.13(6) which in pertinent part states:

> "The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state except any municipally owned utility and except as otherwise restricted by law. It is vested with power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation or direction of such public utilities. It is further granted the power and jurisdiction to hear and pass upon all matters pertaining to or necessary or incident to such regulation of all public utilities, including electric light and power companies, whether private, corporate or cooperative, gas companies, water, telephone, telegraph, oil, gas and pipeline companies, motor carriers, and all public transportation and communication agencies other than railroads and railroad companies."

In addition, 1909 PA 106, §7; MCLA 460.557, MSA 22.157, also sets forth the Commission's powers in regard to regulation of electrical rates. The statute reads in part:

". . . Said commission may also by order establish such rules and conditions of service as shall be just and reasonable. In determining the proper price, the commission shall consider and give due weight to all lawful elements properly to be considered to enable it to determine the just and reasonable price to be fixed for supplying electricity, including cost, reasonable return on the face value of all property used in the service, depreciation, obsolescence, risks of business, value of service to the consumer, the connected load, the hours of the day when used and the quantity used each month: . . .

". . . The prices, rates and charges of every electric utility shall be just and reasonable. . . ."

Another statutory provision specifically sets forth the procedural requirements that the Commission must follow before granting any increase in utility rates. This provision, 1939 PA 3, §6a, as amended; MLCA 460.6a, MSA 22.13(6a), states that interested parties in a utility's service area must receive notice and have an opportunity to participate in a full and complete hearing prior to the institution of increased rates. Section 6a was added by 1952 PA 243 and, as originally enacted, stated:

"When any finding or order is sought by any gas, telephone or electric utilities to increase its rates and charges or to alter, change or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, notice shall be given within the service area to be affected. When such utility shall have placed in evidence facts relied upon to support its petition or application to so increase its rates and charges, or to so alter, change or amend any rate or rate schedules, the commission, pending the submission of all proofs by any interested parties, may in its discretion and upon written motion by such utility make a finding and enter an order granting partial and immediate relief, after first having given notice to the interested parties within the service area to be affected in the manner ordered by the commission, and after having afforded to such interested parties reasonable opportunity for a full and complete hearing: Provided, that no such finding or order shall be authorized or approved ex parte, nor until the commission's technical staff has made an investigation and report: And provided further, that any alteration or amendment in the rates or rate schedules applied for by any public utility which will result in no increase in the cost of service to its customer may be authorized and approved without any notice or hearing."

Section 6a, as quoted above, was the subject of an Attorney General's opinion shortly after its enactment.[1] That opinion, in answer to a question presented by the chairman of the Public Service Commission as to whether the rates of Consumers Power Company could be increased under a purchase gas adjustment clause to be incorporated in the rate schedules pursuant to notice and public hearing, stated in part, p 8-9:

"However, in view of the expressed provisions of §6(a), no in-

[1] OAG 1955, No. 1906, p 7 (January 14, 1955).

crease in rates may be authorized by the Michigan Public Service Commission without notice and opportunity for a full and complete hearing being given to interested parties. The legislative intent is apparent in this section when it is remembered that prior to its enactment a utility could file rate schedules and, in the absence of a complaint thereon, the Commission could approve same without previous hearing thereon. (See C.L. 1948, Sec. 460.57 (Stat. Ann. Sec. 22.7)). *City of Lansing* v *Public Service Commission*, Id. Obviously, 608; *City of Saginaw* v *Public Service Commission*, 330 Mich Sec. 6(a) was intended to preclude any rate increases without notice, investigation, and hearing thereon. Where the language of the statute is clear, and unambiguous, no construction thereof is necessary. In *re Estate of Chamberlain*, 298 Mich 278; *Detroit Club* v *State of Michigan*, 309 Mich 271. Likewise, where the legislative intent is plain, certain, and unambiguous, no interpretation is necessary. *Geraldine* v *Miller*, 322 Mich 85; *Knapp* v *Palmer*, 324 Mich 694; *VanAntwerp* v *State*, 334 Mich 592 . . .

"In reply to your second question as to whether a purchased gas cost adjustment clause may be properly incorporated in the utilities rate schedule after notice and public hearing, I am inclined to answer in the negative. While the statute in question, i.e., Sec. 6(a) contains no prohibition containing a cost adjustment clause, it would seem that the incorporation of such a clause in a rate schedule would be in derogation of both the intent and wording of the statute. I am mindful of the fact that many jurisdictions are favoring such clauses inasmuch as they eliminate the necessity for costly and time-consuming rate proceedings every time there is a change in the supplier pipe line's rates on file with the Federal Power Commission. However, the wording of our statute is so precise and unambiguous that, in my opinion, no cost adjustment clause which operated to increase the cost of service to customers without notice and hearing may be validly incorporated in a rate schedule. Perhaps such clauses in rate schedules are desirable from a regulatory standpoint, but an amendment to the statute would be required before this rate-making devise may be used in Michigan."

Following the issuance of the Attorney General's opinion, Section 6a was amended by 1955 PA 172. The amendment consisted of adding the following sentence to the statute as originally enacted:

"Nothing contained in this section shall be construed to prohibit the commission from permitting the incorporation of fuel adjustment clauses in rate schedules for service other than domestic service pursuant to notice and hearing thereon."

1972 PA 300 deleted this amendment, however, and added subsequent paragraphs to section 6(a). As a result the second paragraph of the statute now states:

"The commission shall adopt such rules and procedures for the filing, investigation and hearing of petitions or applications to increase or decrease utility rates and charges as the commission finds necessary

or appropriate to enable it to reach a final decision with respect to such petitions or applications within a period of 9 months from the filing thereof. *This section or any other law does not prohibit the incorporation of fuel or purchase gas adjustment clauses in rate schedules.*" (emphasis added)

Thus the statutory language, as it currently exists, clearly states that fuel or purchase gas adjustment clauses are permissible in rate schedules. It is also clear, as the previous opinion of this office indicates, that Section 6(a) was intended to prevent any rate increases without notice, investigation, and an opportunity for hearing thereon. Therefore, the 1972 amendment providing for the incorporation of fuel or purchase gas adjustment clauses should be viewed as an exception to the requirements of notice, investigation, and hearing prior to the adoption of increased rates as set forth in 1939 PA 3, § 6a(1). Reference to the rules of statutory construction is necessary to determine whether this exception to the notice and hearing requirements of Section 6a should be given a strict or expansive interpretation.

A most basic rule of statutory construction is that the intent of the legislature should control the interpretation of statutes. In reviewing Michigan law, the rule has been stated as follows in 22 Callaghan's Michigan Civil Jurisprudence, "Statutes," § 108, p 457-460:

"The primary, fundamental and cardinal rule, purpose and object in the interpretation and construction of statutes is to ascertain and give effect to the intention of the lawmaking body, without violating the plain wording of the act, and all other rules serve but as guides to assist in determining the intent with a greater degree of certainty. . . . Primarily legislative intention is to be ascertained from the language of the act itself, and when such language is plain and unambiguous, there is no room for construction, but the statute must be given effect according to its plain meaning and manifest intent, for a legislative intention not expressed in some appropriate manner has no legal existence, though, of course, a construction leading to an absurd consequence should be disregarded, but the legislative intent, when manifest, must not be defeated by construction."

Recent Michigan cases have held to this basic tenet of statutory construction, as evidenced by the court's opinion in *Romeo Homes Inc* v *Commissioner of Revenue*, 361 Mich 128 (1960), p 135, 137:

". . . The legislative intent must be ascertained from the language used in the statute under consideration, given its ordinary significance, and with due regard to the form of expression. Where the intent is plain there is no room for construction and the Court is bound by the expressed intent. *MacQueen* v *City Commission of City of Port Huron*, 194 Mich 328. A statutory provision that is in dispute must be read in the light of the general purpose of the act and in conjunction with pertinent provisions thereof. . . ."

"This Court in *L. A. Darling Company* v *Water Resources Commission*, 341 Mich 654, was confronted with a question of like nature, and held as follows:

'The mere literal construction of a statute ought not to prevail if it is opposed to the intention of the legislature apparent from the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention can be better effected that construction should be adopted.'" (p 137)

And in more recent case, in *Dussia* v *Monroe County Employees Retirement System,* 386 Mich 244 (1971), p 249, the Court cited previous Michigan authority and stated:

"As we said in *MacQueen* v *City Commission of the City of Port Huron* (1916), 194 Mich 328, 342:

"'It is a cardinal rule that the legislature must be held to intend the meaning which it has plainly expressed, and in such cases there is no room for construction, or attempted interpretation to vary such meaning.'"

Thus, the overriding statutory rule is to determine and give effect to the intent of the legislature as may be ascertained from the wording of the statute. And when the wording of a statute is unambiguous and plain on its face, there remains little room for varying interpretations. Only when the statute is ambiguous is there room for statutory construction and only in that circumstance will the court give consideration to the construction given by the executive agency responsible for administering the statute. *Detroit Edison Company* v *Department of Revenue,* 320 Mich 506, 513, (1948); *Consumers Power Company* v *Corporation and Securities Commission,* 326 Mich 643, 648 (1950).

Another doctrine of statutory construction which remains viable in Michigan is the principle of *expressio unius est exclusio alterius,* which is summarized as follows in 22 Callaghan's Michigan Civil Jurisprudence, "Statutes," §119, p 474, 475:

"No maxim of law is of more general or uniform application than *expressio unius est exclusio alterius,* and it is never more applicable than in the construction and interpretation of statutes. And the maxim means that the express mention in a statute of one thing implies the exclusion of other similar things. . . .

"When powers are granted by a statute to its creature, the enumeration thereof in a particular field must be deemed to exclude all others of a similar nature in that same field.

"When a statute creates an entity, grants it powers and prescribes the mode of their exercise, that mode must be followed and none other."

A similar principle is noted in 2A Sand, Sutherland Statutory Construction, (4th Ed), §55.03, p 383:

"A statute will not be extended to include situations by implication when the language of the statute is specific and not subject to reasonable doubt."

The doctrine of *expressio unius est exclusio alterius* was utilized in *Taylor* v *Michigan Public Utilities Commission,* 217 Mich 400 (1922), by

four justices in reaching the decision that the Commission could not act upon a request by a customer to fix gas rates in a municipality, in a situation where the franchise contract between the gas company and municipality had expired but could act if requested to do so by the municipality. The case focused on whether the Commission possessed the authority and power under 1919 PA 419 to entertain jurisdiction of the subject matter and proceed with a hearing regarding gas rates. The Michigan Supreme Court split evenly on the issue of whether the Commission was limited in power under the statute and thus unable to establish gas rates for the municipality. Four justices, including Justice Wiest, based their decision on the specific language of 1919 PA 419. The other four justices, including Justice Fellows, disagreed with Wiest's application of the *expressio unius* doctrine, on the grounds that other statutory provisions provided that the Commission inherited all of the powers of the former Railroad Commission, and that the old Railroad Commission would have been able to act on its own motion in such a circumstance. The case is important, however, because of the Court's dicta which has since been repeated in numerous Michigan cases, and which has remained viable regardless of whether it may have been misapplied in that particular instance. The language is important not only for its explanation of the *expressio unius* doctrine, but also because it clarified the rule that the commission possesses only those powers granted to it by statute. In his opinion, concurred in by three other members of the Court, Justice Wiest stated, p 402-403:

> "The Michigan Public Utilities Commission is a creature of the statute, has no inherent or common law power, and its jurisdiction in any instance must affirmatively appear in the statute before it can be invoked or exercised. *Expressio unius est exclusio alterius* has been a long time legal maxim and safe guide in the construction of statutes marking powers not in accordance with the common law. . . .
>
> "When what is expressed in a statute is creative, and not in a proceeding according to the course of the common law, it is exclusive, and the power exists only to the extent plainly granted. Where a statute creates and regulates, and prescribes the mode and names the parties granted right to invoke its provisions that mode must be followed and none other, and such parties only may act. 2 Lewis's Sutherland Statutory Construction (2nd Edition) §§ 491-493. The provisions of this statute cannot be enlarged my implication as they expressly exclude any such intendment. The maximum '*expressum facit cessare tacitum*' is also applicable here. This law designates the actors and when a law designates the actors none others can come upon the stage. The words of the statute are restrictive and the designation therein of the municipality as the party to give the Commission jurisdiction operates to the exclusion of plaintiff. The matter falls squarely within the provision of the statute granting the exclusive privilege to the municipality to petition the Commission to fix the rates and charges in case the franchise of the company has expired."

In regard to the rule that administrative agencies derive their powers from statute and not the common law, see also the court's dicta in *Sparta*

Foundry Co v *Michigan Public Utilities Commission,* 275 Mich 562, 564 (1936).

The interpretation given to a statute or statutes in which only specific enumerated powers were granted to a governmental entity was considered in *Sebewaing Industries, Inc* v *Village of Sebewaing,* 337 Mich 530 (1953). In that case the plaintiff sought to restrain the village council and members of the municipal lighting commission from purchasing equipment for the municipal electric utility with funds raised by the issuance of revenue certificates, which in turn, were to be paid off from net utility revenues over a period of years. The plaintiff asserted that this method of financing was not provided for by the statutes applicable to municipal borrowing for extension or alteration of electrical systems, and that the statute provided the specific and exclusive method to be used. The defendants, on the other hand, contended that the two statutory methods of raising the necessary funds were not exclusive of other available methods, and that although they elected to utilize a means of financing not provided for by statute, it was a method not prohibited, and therefore it was an implied alternative means. The Supreme Court reversed the lower court ruling, pointing out that cities must find their powers in statutory law and can exercise only those powers expressly or impliedly conferred by the statute. The court dealt specifically with the question of whether the power contended for by the defendants could be implied, since it was not expressly granted nor prohibited by statute. The Supreme Court stated:

> "Chapter 12, § 5 of the statute expressly provides 2 methods of financing the acquisition of the equipment in question. *Expressum facit cessare tacitum,* that which is expressed puts an end to or renders ineffective that which is implied. *Galloway* v *Holmes,* 1 Doug (Mich) 330. So stated in the opinion of 4 members of this Court, the other concurring in the result, in *Taylor* v *Public Utilities Commission,* 217 Mich 400 (PUR 1922D, 198). *Expressio unius est exclusio alterius.* Express mention in a statute of one thing implies the exclusion of other similar things. (Cites omitted) . . . When a statute creates an entity, grants it powers and prescribes the mode of their exercise, that mode must be followed and none other. *Taylor* v *Public Utilities Commission, supra* (4 Justices); (2 Lewis' Sutherland Statutory Construction [2d ed], §§ 491-493). When powers are granted by statute to its creature the enumeration thereof in a particular field must be deemed to exclude all others of a similar nature in that same field. So held in *Bank of Michigan* v *Niles,* 1 Doug (Mich) 401 (41 Am Dec 575), . . ." (pp 545, 546)

The court in *Sebewaing, supra,* quoted its decision in *Bank of Michigan* v *Niles, supra,* as follows:

> "It has been held that the powers are simply such as the statute confers, and that the enumeration of them implies exclusion of all others. (citations omitted)"

The court in *Sebewaing, supra,* also quoted its decision in *Michigan Wolverine Student Co-operative, Inc* v *Wm Goodyear & Co,* 314 Mich 590, as follows:

> " 'It is a well-established rule of statutory construction that where powers are specifically conferred they cannot be extended by inference, but that the inference is that it was intended that no other or greater power was given than that specified. *Eikhoff* v *Detroit Charter Commission,* 176 Mich 535, 540.' "

The *exclusio unius* principle in Michigan law is still strong and valid. In *Stowers* v *Wolodzho,* 386 Mich 119, 133 (1971) it was stated:

> ". . . Michigan has recognized the principle of *expressio unius est exclusio alterious*—express mention in a statute of one thing implies the exclusion of other similar things. *Dave's Place, Inc.,* v *Liquor Control Comm.,* 1936, 277 Mich 551; *Sebewaing Industries, Inc.,* v *Sebewaing* (1953), 337 Mich 530."

As stated earlier, the specifically mentioned provision contained in 1939 PA 3, § 6a, MCLA 460.6a; MSA 22.13(6a) which authorizes the inclusion of fuel or purchase gas adjustment clauses in rate schedules, represents an exception to the notice and hearing requirements of that section. As such, it is also similar to a proviso or an exemption. And Michigan courts have been consistent in refusing to extend exemptions or provisos of a statute beyond their obvious meaning. In *Grand Rapids Motor Coach Co* v *Public Service Commission,* 323 Mich 624, 634 (1949), the court considered the interpretation of an exemption in the Motor Carrier Act. The court, in dicta, stated:

> "In coming to our conclusion we have not overlooked the general rule that exemptions in a statute are carefully scrutinized and not extended beyond their plain meaning. . . ."

Similarly, in *People* v *Bissonette,* 327 Mich 349, 357 (1950) the court, in dicta, stated:

> ". . . A proviso which creates and defines a right or power is to be accepted according to its natural, common, and most obvious meaning, strictly construed and limited to the objects fairly within its terms, as gathered both from the section from which it forms a part and a general purview of the whole context." (Citations omitted)

It is important to view 1939 PA 3, § 6a, in the light of the above case law on statutory construction. The part of the statute under scrutiny herein states:

> "This section or any other law does not prohibit the incorporation of fuel or purchase gas adjustment clauses in rate schedules."

It should be emphasized that the statute as a whole does *not* prohibit the inclusion of purchase and interchange power expense in rate schedules. Reference to MCLA 460.557, MSA 22.157, *supra,* indicates that the commission may establish "just and reasonable" electric rates based on such factors as cost, reasonable return, and other considerations. The overall statutory scheme, however, led by 1939 PA 3, § 6a, *does* require that any order for increased rates must be preceded by notice to all interested parties followed by a reasonable opportunity for a full and complete hearing, except for increases pursuant to a fuel or purchase gas adjustment clause which incorporated in the rate schedule. It is my opinion that

the fuel and purchase gas adjustment clauses mentioned in the statute represent two enumerated exceptions to the notice and hearing requirements of section 6a and that all other, albeit similar, clauses to cover any other variable expense are hereby excluded under the *expressio unius est exclusio alterius* doctrine. The legislature specifically mentioned that increases under fuel or purchase gas adjustment clauses would be exempt from the notice and hearing requirements of the statute, but did not provide for any general term in the statute to indicate that any other variable expenses could be so treated. Thus, it cannot be assumed that the legislature intended that purchase and interchange power expense, or any other variable expense, other than fuel or purchase gas, could be passed on to the rate payers without the requisite notice and hearing as guaranteed by 1939 PA 3, § 6a(1), *supra.*

The conclusion is therefore inescapable that the legislature did not authorize the Public Service Commission to permit an automatic flow-through of purchase and interchange power expense to the rate payer by way of an adjustment clause without prior notice and hearing. If the Public Service Commission is to adopt a clause in a rate schedule allowing purchase and interchange power expense, it may do so only after a clear mandate is obtained from the legislature.

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Attorney General.

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SCHOOL DISTRICTS: Auxiliary Services.

A board of education that provides street crossing guard services to resident children attending the public schools is required to provide street crossing guard services to resident and nonresident students attending nonpublic schools located within the public school district boundaries. A public school board is not required to provide these services outside the boundaries of the public school district.

Opinion No. 4842 December 9, 1974.

Dr. John W. Porter
Superintendent of Public Instruction
Department of Education
Lansing, Michigan

You have requested my opinion on a question which may be phrased as follows:

> Under § 622 of 1955 PA 269, added by 1965 PA 343, when a board of education provides street crossing guard services to resident children attending the public schools, is the board of education required to provide street crossing guard services to students attending nonpublic schools located within the public school district boundaries, irrespective of whether the nonpublic school students are residents or nonresidents of the public school district?