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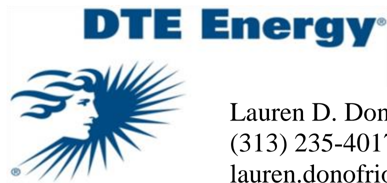

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November 19, 2018

Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

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Michigan Hall of Justice
925 W. Ottawa Street
Lansing, MI 48915

RE: Supreme Court Nos: 158305; 158306; 158307; 158308
Court of Appeals Nos: 340600; 340607
MPSC Case No: 00-018197

Dear Clerk:

Attached for electronic filing in the above referenced matter is Amended Brief in Support of DTE Electric Company as Amicas Curiae. Please note the only change is in the first paragraph on page 13 where "inapplicable" was amended to read "applicable".

Very truly yours,

Lauren D. Donofrio

LDD/lah
Encl.

STATE OF MICHIGAN

IN THE SUPREME COURT

In re RELIABILITY PLANS OF ELECTRIC
UTILITIES FOR 2017-2021

ASSOCIATION OF BUSINESSES ADVOCATING
TARIFF EQUITY,
Appellee,

v

CONSUMERS ENERGY COMPANY,
Appellant,

and

MICHIGAN PUBLIC SERVICE COMMISSION,
ENERGY MICHIGAN, INC., and MICHIGAN
ELECTRIC AND GAS ASSOCIATION,
Appellees,

SC: 158305
COA: 340600
MPSC: 00-018197

ENERGY MICHIGAN, INC.,
Appellee,

v

CONSUMERS ENERGY COMPANY,
Appellant,

and

MICHIGAN PUBLIC SERVICE COMMISSION,
and MICHIGAN ELECTRIC AND GAS ASSOCIATION,
Appellees,

SC: 158306
COA: 340607
MPSC: 00-018197

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ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,
Appellee,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
Appellant,

and

CONSUMERS ENERGY COMPANY, ENERGY MICHIGAN, INC., and MICHIGAN ELECTRIC AND GAS ASSOCIATION,
Appellees,

SC: 158307
COA: 340600
MPSC: 00-018197

ENERGY MICHIGAN, INC.,
Appellee,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
Appellant,

and

CONSUMERS ENERGY COMPANY, and MICHIGAN ELECTRIC AND GAS ASSOCIATION,
Appellees,

SC: 158308
COA: 340607
MPSC: 00-018197

AMENDED BRIEF IN SUPPORT OF DTE ELECTRIC COMPANY AS AMICUS CURIAE

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STATEMENT OF THE BASIS OF JURISDICTION

Amicus Curiae adopts the statements of the basis of jurisdiction of the Applicants in these consolidated matters, the Michigan Public Service Commission (MPSC or Commission) and Consumers Energy Company (Consumers Energy).

QUESTION PRESENTED

1. The Legislature passed Act 341 for the express purpose of ensuring electric reliability in Michigan. Act 341 may be interpreted to give effect to all its terms. Instead, the Court of Appeals interpreted Act 341 in a manner that renders material terms of the Act surplusage or nugatory, so that the Act does not ensure electric reliability. Did the Court of Appeals err?

   Amicus Answer: Yes.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

DTE Electric Company is a regulated utility in the State of Michigan serving 2.2 million customers in southeastern Michigan. The Court of Appeals' decision will impact every one of DTE Electric's customers. The Court of Appeal's decision will impact DTE Electric's ability to provide reliable electricity to its customers.

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INTRODUCTION

This case is about whether alternative electric suppliers may profit from selling cheap out-of-state electricity on the backs of Michigan ratepayers. Electricity is not reliable if there is not enough of it, or there is enough, but transmission or distribution lines cannot deliver the power to where the load, or demand, is. Because it is a peninsula, it is more difficult for Michigan to import electric power from outside the state than it is for most other states without these geographic impediments. Michigan can import only a limited amount of power at any one time. Thus, to ensure reliability, 95% of Michigan's electricity must come from in-state generators. Traditionally, the regulated utilities have owned enough electric capacity in Michigan to ensure reliability, which allowed alternative electric suppliers to acquire their electric capacity from either the regulated utilities at marginal cost, or from less expensive out-of-state generators. But times are changing and as the utilities retire more old coal units, Michigan creeps closer and closer to breaching its capacity import limits.

Aesop tells a fable about the grasshopper and the ant. The ant was always busy storing away food for winter while the grasshopper sang all summer and did not prepare. When winter struck, the grasshopper was in trouble, and it asked the ant for help. In the original fable the ant rebukes the grasshopper for his foolishness and sends him away to starve. In some of the sanitized modern retellings, the ant helps the grasshopper because the ant has more than enough to share. Like the ant, the regulated utilities have been preparing to meet their customers' future capacity needs by building in-state generation. In the past, the regulated utilities have had enough in-state generation to share. But that is no longer a certainty. So, what happens when the ant no longer has enough to share, but only has enough to meet its own needs? In the fable the ant would merely tell the grasshopper "too bad, you should have planned better," for the ant need not worry that the

failing grasshopper will pull the ant down with it. But such is not the case in the utility world. It is not just the grasshopper who will fail – it is the ant too – no matter how diligently the ant prepared. This is because of the physics of electricity.

Unlike water or natural gas in a pipe, which will go where you send it, once a generator puts electricity on the grid, the generator has little or no control over where that power goes; electrons flow per the laws of physics, not according to where a utility's load is. And, if there is not enough electricity on the grid in a certain area to meet local demand, the grid will pull from other locations to fill the need – regardless of who has put the energy on the grid and regardless of whose load it is. This means that even if a utility generated enough energy or purchased enough capacity in Michigan to cover 100% of its load, if alternative suppliers, who supply nearly 10% of Michigan's load, get their capacity outside Michigan, and their combined capacity exceeds the capacity import limits (the limit on how much power can physically flow into Michigan from outside the state), there will not be enough capacity to meet the total load. And what happens when there is not enough capacity to meet load? Blackouts. And, blackouts will happen to everyone, not just to those who failed to procure in-state capacity. All utility customers will be at risk of cascading failures (recall the 2003 blackout where one overloaded line knocked out power to most of the northeastern United States and parts of the Midwest and Canada). Because when one generator overloads and goes off line, this increases the demand on nearby generators, and if those generators are already running at or near capacity, they will likely also shut down to avoid overloading. It is in this context we must examine and interpret Act 341. For it was just this situation the Legislature intended the Act to protect Michigan citizens against. The Act protects Michigan citizens when there are too many grasshoppers and not enough ants.

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The Court of Appeals' interpretation of Act 341, however, guts the Act of its intended purpose. The Court of Appeals found that though the Legislature authorized the MPSC to set a local capacity requirement, the Legislature did not authorize the MPSC to implement it. This decision means that suppliers of 10% of Michigan's load need not plan for long-term resource adequacy. Today the capacity import limit is about 17.6% of total load, but capacity import limits are steadily declining. When the capacity import limit falls to less than 10% of total Michigan load, as experts project it will by 2032, if AESs are permitted to buy all their power from out-of-state, Michigan will be in grave danger of blackouts, even if the utilities procure 100% of their capacity in-state.[1] The only way to ensure Michigan has enough in-state capacity four years in the future is to impose a local capacity requirement on all electric providers as the Legislature intended. The Legislature did not intend to place an additional burden on the regulated utilities so that alternative energy suppliers could continue to get a free ride – if that was its intent the Legislature had no need to pass this law – because as the Court of Appeals has interpreted the Act, it does nothing to secure long-term resource adequacy, and maintains the status quo. This Court should take this case because it is vitally important to ensure that Michigan customers get the reliable electricity they deserve, without subsidizing the grasshoppers or risking blackouts.

[1] MPSC Case No. U-20165, Testimony of Charles Marshall, p 6, Ex ITC-1 at p 5, at https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t00000030zKrAAI, accessed 11/1/18.

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ACCEPTANCE OF STATEMENT OF FACTS

DTE accepts the statements of facts filed in these consolidated matters by the Applicants, the MPSC and Consumers Energy.

STANDARD OF REVIEW

DTE accepts the standards of review filed in these consolidated matters by the Applicants, the MPSC and Consumers Energy.

ARGUMENT

I. This Court should hear this case because it is vitally important to all residents and businesses in Michigan, the Court of Appeals got it wrong, and the decision will cause material injustice or harm to Michigan.

While this Court may not consider policy-type considerations when interpreting the meaning of a statute, it should consider the ramifications of the Court of Appeals' statutory interpretation in deciding whether to hear a case. The consequences of a wrong answer in this instance are dire. As explained in the introduction, if all Michigan energy providers do not carry their weight, all Michigan energy users are at risk. A simple example is illustrative: If DTE's load is 55 MW, Consumers Energy's load is 35 MW, and AES's load is 10 MW, there is 100 MW of load on the system. This means that there must be a minimum of 100 MW of available capacity on the system. Assume only 5 MW of load can come from outside Michigan. Even if DTE Electric and Consumers Energy both obtain all their power, 90 MW worth, inside Michigan, if the AESs, as a combined group, do not purchase at least 5 MW inside Michigan, Michigan as a whole will not have enough capacity to meet the existing load; since even if capacity were available outside of Michigan, the physical import limitation would not allow all of that capacity to serve Michigan customers. When this happens, reliability suffers and the system can easily become overloaded,

especially on hot summer days. When there is not enough capacity to meet load, the system will begin to shed load. This is an automatic process that does not consider who paid for in-state capacity and who did not. When the system sheds load, the power goes out. And these blackouts will not affect just AES customer load. AESs customer load is physically located within the service territories of existing utilities, and when the AES fails to procure sufficient capacity for its load, that load will draw from the surrounding utility's generation, which may be insufficient to cover both the utility's load and the AES's load at the same time, causing blackouts for both utility and AES customers. Thus, it is vitally important that a faulty interpretation of what is admittedly a very complex statute covering a subject area with which the Court of Appeals is particularly unfamiliar, and in a context that it appears the Court of Appeals did not fully comprehend, does not foil the Legislature's intent, which was to ensure long-term resource adequacy. A wrong interpretation of the statute, as the Court of Appeals has done in this case, will render the statute impotent to prevent the very harm the Legislature enacted it to protect against. That harm is not merely hypothetical – it is very real.

As DTE explained in its May 26, 2017 comments in this matter, "If the LCR of the zone is not met, then all LSEs will suffer the consequence of diminished reliability, as there is no way to distinguish between LSEs that properly planned and those that did not when firm load shed is performed." (Filing No. 64, 5/26/17 DTE Comments, pp 2-3.) LCR is the local clearing requirement. DTE's July 17, 2017 comments explained that "Historically, Load Serving Entities ("LSEs") serving retail choice load have not been required to provide capacity in the same region as their customer load, as excess utility generation has traditionally been adequate to maintain local system reliability." (Filing No. 94, 7/17/17 DTE Comments, p 1.) But, as DTE also explained "significant recent generation unit retirements have led to decreasing capacity reserves, with

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further decreases projected in the near term." (*Id.*) Currently, Michigan does not have enough in-state capacity to meet its load, and has had to rely upon capacity imports from out of the state in each of the last two Midcontinent Independent System Operator (MISO) Planning Years. (*Id.*) According to MISO, generator performance has been worsening in recent years, no doubt due to the aging of the coal generation fleet. (*Id.* at 3.) This too has a negative impact on the amount of available utility-owned in-state generation and strains capacity import limits.

As in-state generation wanes, and capacity import limits fall, the probability of Michigan exceeding its capacity import limit (and not meeting its LCR) rises exponentially, which leads to decreased reliability. "It is imperative that local requirements are met, because falling short of the LCR results in a higher probability of firm load shed (above the 1 day in 10 year LOLE standard) for all customers, not just those for whom proper planning did not occur." (*Id.*) LOLE stands for loss of load expectation, which is a key reliability metric. In MPSC Case No. U-18444,[2] where the MPSC held a contested case to determine what the appropriate LCR was and how it should be allocated, DTE expert witness Irene M. Dimitry[3] testified about the effect of DTE's planned coal plant retirements on available in-zone capacity:

> Electric resource adequacy is one of the most critical energy issues facing Michigan because many of the State's coal-fired power plants will be retiring soon due to age and environmental factors. DTE Electric plans to retire coal-fired power plants that represent nearly 2,100 MW, or 20% of DTE Electric's total generation capacity by 2023. The health, safety, and well-being of Michigan's citizens is inexorably dependent on having a strong and reliable electricity infrastructure to sully the

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[2] *In the matter, on the Commission's own motion to open a contested case proceeding for determining the process and requirements for a forward locational requirement under MCL 460.6w*, MPSC Case No. U-18444.

[3] Irene M. Dimitry is the Vice President of Business Planning & Development at DTE Electric Company. She has a MBA from the University of Michigan. She is responsible for Renewable Energy, Energy Optimization, Corporate Energy Forecasting, Business Planning, Integrated Resource Planning, and Customer Choice functions of DTE Electric. MPSC Case No. U-18444, Filing No. 0113, 2 TR 195.

power that is essential to modern life. [MPSC Case No. U-18444, Filing No. 0113, 2 TR 199.]

Ms. Dimitry also explained that "Section 6w explicitly recognizes that a certain amount of generation must be physically located in the same resource zone as the customers being served in order to ensure reliability. Thus, an over-reliance on imports could threaten electric reliability in Michigan." MPSC Case No. U-18444, Filing No. 0113, 2 TR 200. Ms. Dimitry explained that "If a resource zone collectively does not have enough local generation to meet the LCR, then that suggests that the resource zone is relying on electricity imports to an extent that can threaten reliability within that resource zone." MPSC Case No. U-18444, Filing No. 0113, 2 TR 201.

Due to the factors outlined above, the amount of capacity that Michigan can import from outside the state has been falling steadily each year since MISO created the PRA in 2013 from 4,576 MW in the 2013/14 planning year to 3,320 in the 2017/2018 planning year. MPSC Case No. U-18444, Filing No. 0113, 2 TR 226, Testimony of Angela P. Wojtowicz.[4] And experts expect this trend to continue. For example, Michigan Electric Transmission Company, LLC (METC) (one of Michigan's two transmission providers) recently submitted testimony in Consumers Energy's Integrated Resource Plan case regarding its study showing that because of upcoming planned retirements and other factor, by 2032, while the total peak demand for the state is expected to fall slightly to a little below 21,000 MW, the current capacity import limit will fall by 65% to just over 1,300 MW, which is *just 6.3% of total load, well under the 10% served by AESs*.[5] This means that

[4] Angela P. Wojtowicz is the Director of the Generation Optimization department at DTE Electric Company. She has both a Bachelors and a Master's of Science degree in Nuclear Engineering from the University of Michigan. She is also a North American Electric Reliability Council Certified System Operation for balancing and interchange. MPSC Case No. U-18444, Filing No. 0113, 2 TR 219.

[5] MPSC Case No. U-20165, Testimony of Charles Marshall, p 6, Ex ITC-1 at p 5, at https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t00000030zKrAAI, accessed 11/1/18.

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electric utilities generating or procuring 100% of their capacity in Michigan will not be enough to keep the lights on.[6]

Given the steady downward trend in how much capacity Michigan can import in the future, combined with the waning performance of existing older generating units, and the many planned coal plant retirements, Michigan will likely reach the 10% capacity import limit in fairly short order. Once electric providers breach that threshold, without the SRM requiring AESs to contribute to local resource adequacy, Michigan will be in constant danger of blackouts. In fact, METC estimates that by 2032, the current expected "one day in ten years" loss of load expectation will effectively be replaced with a seven (7) days in ten years loss of load expectation.[7] Federal reliability requires a LOLE of no more than 1 day in ten years. *Id.* Thus, if the Court of Appeals ruling stands, exactly the harm the Legislature sought to prevent in passing Act 341 will eventually come about – Michigan will not meet its MISO zonal requirements and will not have reliable power. This runs contrary to the expressly stated purpose of Act 341: "to ensure reliability of the electric grid in this state." MCL 460.6w(12)(h). As explained below, the Court of Appeals misinterpreted the Act. This Court should consent to hear this case because the consequences of

[6] Electric utilities will not always be able to procure 100% of their capacity resources from inside Michigan, and the Legislature did not intend to require them to do so merely to allow AESs to procure none of their capacity locally. For instance, DTE will be importing 100-300 MW of out of state capacity to compensate for a long-term fire-related outage at DTE's St. Clair Unit 7. MPSC Case No. U-18444, Filing No. 0113, 2 TR 206. Ms. Dimitry stated that "it is possible that DTE will have similar import needs in the future to meet unexpected customer demand growth or to address supply imbalances that may emerge if a generating unit experiences unexpected problems, resulting in reduced capacity or a forced retirement earlier than currently planned." *Id.*

[7] MPSC Case No. U-20165, Filing No. 322, ITC Testimony, p 15. Available at: https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t00000031lpcAAA, accessed 11/8/18.

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an incorrect interpretation of the statutory provisions of MCL 460.6w will impact every Michigan citizen and business in the future.

II. Authority to implement a local clearing requirement on all electric providers is clear and unmistakable in § 6w(8).

Authority to implement a local clearing requirement on all electric providers is clear, unmistakable, and found in the unambiguous language of MCL 460.6w(8). This section governs what the Commission must do in setting the state reliability mechanism required under § 6w(2), including requirements for capacity demonstrations and for determining capacity obligations. Section 6w(8)(a) provides that the Commission must require that each electric utility "demonstrate to the commission…that…the electric utility owns or has contractual rights to sufficient capacity to meet its *capacity obligations* as set by [MISO], or commission, as applicable." (Emphasis added.) Section (8)(b) extends identical language to AESs. The Commission must require that "*each* [AES] …demonstrate to the commission…that…*the [AES]*…owns or has contractual rights to sufficient capacity to meet *its capacity obligations* as set by [MISO], or commission, as applicable." (Emphasis added.) The same language also applies to municipally-owned and cooperative utilities, but the statute allows these non-profit utilities to aggregate their in-state resources in meeting the Local Clearing Requirement. Section 6w(8)(c) in turn governs how the Commission must determine the capacity obligations that are applicable to each electric utility, AES, municipally-owned or cooperative utility:

> In order to determine the capacity obligations, request that [MISO] provide technical assistance in determining the local clearing requirement and planning reserve margin requirement. If [MISO] declines, or has not made a determination by October 1 of that year, the commission shall set any required local clearing requirement and planning reserve margin requirement, consistent with federal reliability requirements. [MCL 460.6w(8)(c).]

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Section 6w(8)(d) continues to explain that "in order to determine if resources put forward will meet such federal reliability requirements, request technical assistance from [MISO] to ensure that any resource will meet federal reliability requirements."

Thus, it is clear from a plain reading of § 6w(8) of the Act that the Commission must require that all electric providers, including AESs, demonstrate to the Commission that each can satisfy its own individual capacity obligations, which § 6w(8)(c) specifies consist of the LCR and the PRMR. The only exception is that the Act allows cooperatives and municipally-owned utilities to aggregate local resources to meet the LCR. MCL 460.6(8)(b). Each cooperative and municipally-owned utility must still individually meet its own PRMR. *Id.* ABATE and Energy Michigan attempt to muddy these clear waters by referencing provisions of a different subsection that is unrelated to capacity demonstrations, but rather, governs capacity charges only. However, as explained below, ABATE and Energy Michigan are wrong and there is no conflict between the terms of § 6w(8) and § 6w(6). This is because § 6w(6) is inapplicable here as it only applies to capacity charges not state reliability charges.

A. Section 6w(6) is inapplicable to state reliability charges.

On December 21, 2016, when Governor Rick Snyder signed Act 341 into law, MISO had pending at the Federal Energy Regulatory Commission (FERC) a petition to amend its tariff to implement a "competitive retail solution" (CRS) in MISO zones that offer customer choice, like Michigan. FERC Docket No. ER17-284. MISO proposed a three-year forward capacity auction for choice zones. Under MISO's CRS, states could opt out of the auction by electing to establish a prevailing state compensation mechanism (PSCM). Section 6w of Act 341 expressly gave the Commission authority to establish a PSCM. The new statute also requires all electric utilities, including alternative electric suppliers (AESs), to demonstrate to the commission, annually, that

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each owns or has contractual rights to sufficient capacity to meet its capacity obligations. MCL 460.6w. Act 341 contemplated three scenarios. The first scenario, found in § 6w(1), presumed that the FERC would approve MISO's CRS, along with a PSCM. The second option, found in § 6w(2), presumed that the FERC would approve MISO's CRS, but not a PSCM. The third option, also found in § 6w(2), presumed that the FERC did not approve MISO's CRS. In the first scenario, the Act required the Commission to set a PSCM "as a capacity charge under subsection (3) and determine that charge consistent with the approved resource adequacy tariff of [MISO]." Of course, FERC rejected the CRS for reasons unrelated to this proceeding, which triggered the third scenario found in § 6w(2) instead of § 6w(1).

Section 6w(2) did not require the Commission to set a "capacity charge." Rather, § 6w(2) required the Commission to implement a State Reliability Mechanism (SRM) and stated, "A state reliability charge must be established in the same manner as a capacity charge under subsection (3) and be determined consistent with subsection (8)." Throughout these proceedings, and the proceedings below, the parties have often used these terms interchangeably, "capacity charge" and "state reliability charge," because both are functionally a charge for capacity (or for lacking capacity) and they operate very similarly, but not identically. The fact that the Legislature intended these to be two separate things is clear from the language "A *state reliability charge* must be established *in the same manner as a capacity charge*." (Emphasis added.) If the two things were intended to be the same exact thing, there would have been no need for the Legislature to identify them separately or give them different names, especially within the same sentence. When "the Legislature uses different words, the words are generally intended to connote different meanings." *Honigman Miller Schwartz & Cohn LLP v City of Detroit*, 322 Mich App 667, 671 (2018) citing

United States Fidelity & Guaranty Co v Michigan Catastrophic Claims Ass'n (On Rehearing), 484 Mich 1, 14 (2009).

ABATE and Energy Michigan argue, incorrectly, that § 6w(6) must mean that an LCR set by the Commission under § 6w(8) cannot apply to AESs. Section 6w(6) states:

> A *capacity charge* shall not be assessed for any potion of capacity obligations for each planning year for which an alternative electric supplier can demonstrate that it can meet its capacity obligations through owned or contractual rights to any resource that [MISO] allows to meet the capacity obligation of the electric provider. The preceding sentence shall not be applied in any way *that conflicts with a federal resource adequacy tariff, when applicable*. [Emphasis added.]

But, the provision is not applicable here because the Commission did not set a "capacity charge." It set a "state reliability charge" under Section 6w(2). And, Section 6w(2) specifically states that the state reliability charge will be subject to subsection (3) and subsection (8). It does not state that it is subject to subsection (6). If the Legislature had intended subsection 6 to apply to state reliability charges, it certainly could have said so in § 6w(6), or it could have included the provision in § 6w(2) along with subsections (3) and (8). But, it did not. And, it makes sense that the Legislature did not do so. This is because the Commission was only to set a "capacity charge" if the FERC approved MISO's long-term resource adequacy plan, the CRS. And, the CRS specifically included a requirement that each AES meet its PRMR *and its pro rata share of the LCR*. FERC Docket No. ER17-284. So, if the Commission had set a "capacity charge" under § 6w(1), then § 6w(6) would have applied. This conclusion is bolstered by the Legislature's statements in both § 6w(1) and § 6w(6) that these provisions must be consistent with and not conflict with MISO's resource adequacy tariff:

- § 6w(1): "The Commission shall…determine that charge *consistent with the approved resource adequacy tariff* of MISO." [Emphasis added.]
- § 6w(6): "The preceding sentence shall not be applied in any way that conflicts with a federal resource adequacy tariff, when applicable."

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Conversely, when the Commission does not set a "capacity charge" under § 6w(1), but rather establishes a State Reliability Mechanism under §§ 6w(2) and (8), it does so because the FERC did not approve MISO's resource adequacy tariff. Just like § 6w(6) only applies in instances when a capacity charge exists, § 6w(8) only applies in instances when the Commission sets a state reliability charge under an established SRM. As such, the Court of Appeals' ABATE's and Energy Michigan's argument that § 6w(6) conflicts with and somehow trumps the requirements of § 6w(8) is in serious error. §6w(6) and §6w(8) are mutually exclusive and cannot conflict because they do not cover the same subject matter. In fact, neither can be operational at the same time. Section 6w(6) is only applicable when § 6w(1) is in play; Section 6w(8) is only applicable when the Commission is operating under § 6w(2). The Court of Appeals erred in finding that the language of § 6w(6) had any bearing on capacity obligations, including a LCR, set under the SRM, to which § 6w(6) is entirely inapplicable.

B. It is inappropriate to consult legislative history when interpreting an unambiguous statute.

ABATE and Energy Michigan also urged the Court of Appeals, which unfortunately took the bait, to examine the legislative history for support of a supposedly contrary intention to exclude the LCR from the capacity obligations defined by § 6w(8)(c). But, this Court will not resort to consultation of legislative history to interpret text that is unambiguous. *People v Gardner*, 482 Mich 41, 57 (2008). There was no need for the Court of Appeals to consider the legislative history in this matter because the statute is unambiguous, and clearly confers upon the Commission the authority to set a local clearing requirement, which is one of the capacity obligations that each AES must demonstrate an ability to meet, in each annual capacity demonstration. MCL 460.6w(8)(b), (c).

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III. Alternately, language allowing alternative electric suppliers to meet their capacity obligations using any resource MISO allows to meet the capacity obligation applies to both LCR and PRMR.

It is DTE's position that § 6w(6) is inapplicable, as explained more fully above. However, even if § 6w(6) were applicable, it would still not operate to bar the Commission from implementing an LCR applicable to all electric providers. ABATE and Energy Michigan both claim that the Legislature could not have intended for the Commission to apply the LCR to each individual electric provider in the same way as it does the PRMR, even though the authority to apply the PRMR comes from the very same sentence as the LCR, and with identical wording in §§ 6w(8)(b) and (8)(c). But ABATE and Energy Michigan are wrong. It is vitally important to recall the context of these provisions. As discussed above, § 6w(8) is devoted to the topic of electric provider capacity demonstrations. It also prescribes the penalties for failure to meet capacity demonstrations.

Different penalties apply to the three different types of electric providers. For the first group, AESs, the customers of an AES who fails to meet all or part of its capacity demonstration will see a charge on their electric utility bill for any capacity not covered by their AES. MCL 460.6w(8)(b)(i). For the second group, cooperative or municipally-owned utilities, the Act requires the Commission to "recommend to the attorney general that suit be brought consistent with the provisions of subsection (9) to require that procurement." MCL 460.6w(8)(b)(ii). This section contemplates the attorney general filing suit against the cooperative or municipally-owned utility to require it to purchase sufficient resources to meet the PRMR and LCR. The final group, electric utilities, are subject to audits and the Commission may "assess appropriate and reasonable fines, penalties, and customer refunds." MCL 460.6w(8)(b)(iii).

The reason there are different penalties for each group for failure to make a sufficient capacity demonstration is all about the Commission's jurisdiction. The Commission, prior to Act

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341, already had jurisdiction and authority over electric utilities to ensure they procured sufficient capacity to meet long-term resource adequacy goals because the Commission fully regulates electric utilities. *In the matter of the investigation, on the Commission's own motion, into the electric supply reliability plans of Michigan's electric utilities for the years 2016 through 2020*, MPSC Case No. U-17992, July 22, 2016 Order. Fines and refunds is part of what the Commission already does in its regulation of electric utilities. Not so for cooperative and municipally-owned utilities. The Commission does not have full regulatory authority over these non-profit utilities, which are self-governing under Michigan law, and the Commission only has very limited powers over them. As such, since the Commission does not regulate these utilities,[8] the penalty for non-compliance moves outside of the administrative process for referral to the Attorney General to act in a court of general jurisdiction. MCL 460.6w(8)(b)(ii).

Like cooperative and municipally-owned utilities, the Commission has very limited powers over AESs. Other than granting licenses to be an AES in Michigan, the Commission had no regulatory authority over AESs at all prior to Act 341. The Legislature patterned the state reliability charge after the MISO's proposed CRS, and it only applies to AES customers. No one other than an AES customer will ever pay a state reliability charge under the SRM. MCL 460.6w(8)(b)(i). Because the Commission has no general regulatory authority over AESs, imposition of the state reliability charge on AES customers (charged to them by their electric utility in return for the electric utility providing the capacity to cover their load in place of the AES) is the only means at the Commission's disposal to enforce the Act's capacity demonstration requirements for AESs.

[8] The MPSC does retain authority to regulate cooperative and municipally-owned utilities in the limited instance of compliance with Michigan's renewable energy portfolio requirement.

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Unlike § 6w(8), which governs capacity demonstrations, what they include, how they are set and which categories of consequences apply to what types of electric providers for not making a sufficient demonstration, § 6w(6) governs the imposition of the capacity charge itself. Section 6w(6) states:

> A capacity charge shall not be assessed for any potion of *capacity obligations* for each planning year for which an alternative electric supplier can demonstrate that it can meet *its capacity obligations* through owned or contractual rights to any resource that [MISO] allows to meet *the capacity obligation of the electric provider*. The preceding sentence shall not be applied in any way that conflicts with a federal resource adequacy tariff, when applicable. [Emphasis added.]

The first two instances of the term "capacity obligations" is plural here. The third "capacity obligation" is singular.[9] The first two terms are plural because there are two (2) different capacity obligations: the LCR and the PRMR. MCL 460.6w(8)(c). The third instance is purposely singular and refers to "the capacity obligation" – so, when we are talking about the LCR, the LCR is "the capacity obligation" and when we are talking about PRMR, the PRMR is "the capacity obligation." As such, when we are determining if an AES has demonstrated that it has met its "capacity obligations" we must separately look at each capacity obligation to determine compliance because the plural form of the term encompasses all the different types of capacity obligations whatever they may be. The Legislature then purposely followed up its two uses of the plural term with a singular form "capacity obligation" when referring to what resources an AES could use to meet the capacity obligation. MCL 460.6w(6). This denotes that we must look at each capacity

[9] While MCL 8.3b does state that the plural may encompass the singular and the singular may encompass the plural, application of §8.3b is not mandatory and cannot be used if inconsistent with the Legislature's intent. Here, because the Legislature chose to use the same term three times in the same short paragraph and twice used the term in its plural sense and once in its singular, it is evident that that the Legislature's choice of the form, plural or singular, was intentional here and has its ordinary meaning. *Robinson v City of Detroit*, 462 Mich 439, 461 n 18 (2000); *Branch Co Bd of Comm'rs v MERC Int'l Union*, 260 Mich App 189, 200 (2003) citing *Sclafani v Domestic Violence Escape*, 255 Mich App 260, 267 (2003).

obligation separately. And for each one, MISO allows a different set of resources to meet the capacity obligation. MISO allows different resources to meet LCR and PRMR. And, MISO only counts in-zone resources towards LCR. MISO Tariff § 69A.9.[10] As MISO would not allow an out-of-zone (out-of-state in the case of Michigan Zone 7) resource to meet the LCR, neither should Michigan. *Id.*

ABATE and Energy Michigan argue that MISO does not impose an individual LCR on load serving entities, and so neither may Michigan. But they are wrong, and so was the Court of Appeals in its ruling on this issue. As explained by Consumers Energy and the MPSC in their applications, MISO applies its LCR individually, via several different mechanisms. *Amicus Curiae* will not repeat the arguments of the Applicants here, but does agree with them. *Amicus Curiae* also agrees with the Applicants that the SRM is not inconsistent with MISO's resource adequacy construct just because it is different. This is because "consistent with" does not mean "identical to." And, historically, State resource adequacy requirements were supposed to be stricter than the federal ones, which in MISO's case, are only designed to ensure short-term reliability, not long-term resource adequacy. In this way, State resource adequacy constructs are generally more prescriptive than federal requirements without coming into conflict. It is only where the State requirements allow something that MISO's tariff prohibits that the provisions are actually in conflict.

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[10] Available at https://cdn.misoenergy.org/Tariff%20As%20Filed%20-%20Highlighted114461.pdf, accessed 11/8/2018, §69A.9 is found at page 1501 of the document.

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A. Language allowing municipally-owned and cooperative utilities to aggregate resources to meet the LCR is different because it is referring to only the LCR not to both the LCR and the PRMR.

ABATE and Energy Michigan also argue that the language in § 6w(8)(b) that allows municipally-owned and cooperative utilities to aggregate their resources to meet LCR must mean that AESs don't have to meet an LCR since the language is different from that in § 6w(6). As stated above, DTE's position is that § 6w(6) is inapplicable here. But even if it was applicable, the language ABATE and Energy Michigan cite does not support their cause. In § 6w(8), the statute is addressing capacity demonstrations and makes a special allowance for non-profit municipally-owned and cooperative utilities to aggregate their resources for purposes of meeting the LCR. The statute mentions LCR here because it is necessary to differentiate between LCR and PRMR. Municipally-owned and cooperative utilities may aggregate to meet LCR, but they may not aggregate to meet PRMR. In § 6w(8), which talks about the imposition of a capacity charge on AESs only, it provides, as explained above, that AESs will not be charged a capacity charge for any portion of its load for which it can demonstrate that it can meet its capacity obligations, using any resource that MISO would allow to meet whichever capacity obligation is applicable, whether it is LCR or it is PRMR. It does not mention either LCR or PRMR specifically because there is no need to differentiate between the two here, as it was necessary to do in § 6w(8)(b), as one obligation was being singled out from the other.

Thus, ABATE and Energy Michigan are wrong. All the language of § 6w(8) allowing non-profit utilities to aggregate means is that those utilities may aggregate to meet their LCR demonstrations but must still individually meet PRMR. Electric utilities and AESs may not aggregate to meet any of their capacity obligations. The language in § 6w(6) has nothing to do with aggregation so there was no need to differentiate between LCR and PRMR. This Court should not allow the Court of Appeals decision in this matter to stand.

IV. The Court of Appeals' interpretation frustrates the purpose of the statute and there is a simpler interpretation available that harmonizes all parts of the statute and fulfills the stated legislative purpose of the act.

MISO's short-term resource adequacy construct is insufficient to ensure long-term resource adequacy. As Ms. Dimitry explained in her testimony in MPSC Case No. U-18444:

> Because MISO's price signal mechanism does not actually prevent an over-reliance on imports or ensure the development of needed local generating resources, it is not an effective means for ensuring long-term reliability and resource adequacy for Michigan. In fact, MISO has been quite clear that the responsibility for resource adequacy ultimately resides with the states. [MPSC Case No. U-18444, Filing no. 113, 2 TR 202.]

And, the interpretation given Act 341 by the Court of Appeals twists the Act so out of shape that it now suffers from the same infirmities as MISO's short-term resource adequacy requirement – it does nothing to ensure the development of needed local generating resources. It is the task of courts to interpret statutory language not alone, but "in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute…" *Honigman*, 322 Mich App at 672 citing *Arrowhead Dev Co v Livingston Co Rd Comm*, 413 Mich 505, 516 (1982). The Court of Appeals did not do this. Instead it interpreted the statute in such a way that rather than harmonizing all the words and phrases in the act, it rendered material provisions of the Act surplusage or nugatory. This Court has stated that "as a general rule, 'we must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory.'" *People v Pinkney*, ___ Mich ___; 2018 Mich. LEXIS 874, at *27 (May 1, 2018). This Court explained the concept further citing Justice Thomas Cooley:

> The rule applicable here is, that *effect is to be given, if possible, to the whole instrument, and to every section and clause*. If different portions seem to conflict, the courts must harmonize them, if practicable, and lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory. [*Id.* (Emphasis added.)]

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This cannon of statutory construction is important to recall here. The Court of Appeals' interpretation renders the authority granted to the Commission to set an LCR surplusage or nugatory when the Commission no longer can apply the LCR it has set. Even worse, the Court of Appeals' interpretation renders the entire purpose of the Act nugatory. This Court has stated that "[*w*]*hen possible*, we strive to avoid constructions that would render any part of the Legislature's work nugatory." *Pinkney,* at *27-28 (emphasis in original). And it is one thing when there are no interpretations that would harmonize all of the parts of the statute, but it is quite another when there are one or more interpretations that harmonize all the parts of a statute, but the Court of Appeals nevertheless selects an interpretation that renders part of the statute nugatory. "Logically the canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute." *Id.* Such is the case here. DTE's interpretation of the interplay between § 6w(1) and (6) and § 6w(2) and (8) harmonizes all parts of the statute. And, even DTE's alternative interpretation fully harmonizes the statutory provisions. The Court of Appeals' interpretation, urged here by ABATE and Energy Michigan, renders the work of the Legislature meaningless, or nugatory.

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CONCLUSION

For the reasons stated herein, *Amicus Curiae* DTE Electric Company respectfully requests that this honorable court grant the Applications for Leave to Appeal of Consumers Energy and the MPSC and overturn the Court of Appeals decision in this matter.

Respectfully submitted,

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