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STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
Meter, P.J., Gadola and Tukel, JJ

In re RELIABILITY PLANS OF ELECTRIC UTILITIES FOR 2017-2021

MICHIGAN PUBLIC SERVICE COMMISSION and CONSUMERS ENERGY COMPANY

Appellants,

v

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY

Appellee.

---/

Supreme Court No. 158305

Court of Appeals No. 340600

MPSC No. U-18197

In re RELIABILITY PLANS OF ELECTRIC UTILITIES FOR 2017-2021

MICHIGAN PUBLIC SERVICE COMMISSION and CONSUMERS ENERGY COMPANY

Appellants,

v

ENERGY MICHIGAN, INC.

Appellee.

---/

Supreme Court No. 158307

Court of Appeals No. 340607

MPSC No. U-18197

APPELLANT CONSUMERS ENERGY COMPANY'S SUPPLEMENTAL BRIEF
ORAL ARGUMENT REQUESTED

Dated: August 2, 2019

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STATEMENT OF JURISDICTION

This Court has jurisdiction over all appeals from decisions of the Court of Appeals. Const 1963, art 6, § 4, MCR 7.303(B)(1). Appellant Consumers Energy Company ("Consumers Energy" or the "Company") appeals the Court of Appeals' July 12, 2018 decision reversing the Michigan Public Service Commission's ("MPSC" or the "Commission") September 15, 2017 Order in Case No. U-18197 ("September 15 Order"). *In re Reliability Plans of Electric Utilities for 2017-2021*, 325 Mich App 207, 926 NW2d 584 (2018) (Docket Nos. 340600, 340607) (Appendix A to this Brief, pages 3a through 18a). In addition, on June 21, 2019 this Court issued an Order in this docket stating the application for leave to appeal is considered, directing oral argument on the application, and establishing a supplemental briefing schedule, thereby confirming its jurisdiction in this matter.

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IDENTIFICATION OF ORDER APPEALED AND RELIEF SOUGHT

Enacted on December 21, 2016, Public Act 341 of 2016 ("Act 341") and Public Act 342 of 2016 ("Act 342") accomplished a bipartisan, comprehensive update to Michigan's legal framework governing the state's energy policy. Section 6w of Act 341 ("Section 6w") requires each electric provider desiring to provide retail electric service in Michigan to demonstrate annually to the MPSC, on a four-year forward basis, compliance with "capacity obligations" established by the Commission under Act 341. In Orders issued in Case No. U-18197 on June 15, 2017 and September 15, 2017, the Commission found that Section 6w authorizes it to set a "local clearing requirement" as a part of capacity obligations for individual electric providers, which by statutory definition include Alternative Electric Suppliers ("AESs").[1] The June 15, 2017 Order ("June 15 Order") and September 15 Order in Case No. U-18197 are Appendices B and C hereto. The Association of Businesses Advocating Tariff Equity ("ABATE") and Energy Michigan, Inc. ("Energy Michigan") appealed the Commission's decision in Court of Appeals' consolidated Docket Nos. 340600 and 340607.

On July 12, 2018, the Michigan Court of Appeals (Meter, P.J. and Gadola and Tukel, JJ) issued a published decision ("July 12 Opinion") which reversed and remanded the MPSC's June 15 and September 15 Orders, holding that Section 6w does not grant the MPSC authority to impose a Local Clearing Requirement ("LCR") on individual AESs. The Court of Appeals made this holding despite acknowledging (i) that Section 6w(8)(b) requires each electric provider to demonstrate to the MPSC that it owns or has contractual rights to sufficient capacity to meet its

[1] An AES is defined as "a person selling electric generation service to retail customers in this state. Alternative electric supplier does not include a person who physically delivers electricity directly to retail customers in this state. An alternative electric supplier is not a public utility." MCL 460.10g(a).

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"capacity obligations" as that term is used in Section 6w, and (ii) that Section 6w(8)(c) directs the Commission to determine an LCR "in order to determine [electric providers'] capacity obligations." *In re Reliability Plans of Electric Utilities for 2017-2021*, 325 Mich App 207, 224-226; 926 NW2d 584 (2018) (Docket Nos. 340600, 340607). The Court of Appeals also found that the MPSC's imposition of a local clearing requirement as part of individual AESs' capacity obligations would be inconsistent with the practices of the Midcontinent Independent System Operator, Inc. ("MISO"). But that finding contradicted MISO's filed position, which had stated that the MPSC's determination and imposition of capacity obligations on individual electric providers was consistent with and complementary to MISO's requirements. *Id.* at page 226. The Court of Appeals also rejected the Commission's finding that the provision in Section 6w to allow cooperative and municipal utilities to aggregate their electric resources to meet their capacity obligations shows that the Legislature intended all other electric providers to meet their capacity obligations on an individual basis. *Id.* at pages 227-228.

Consumers Energy timely applied for leave to appeal, MCR 7.305(C)(6)(a), and this Court has jurisdiction, MCR 7.303(B)(1). Consumers Energy requests that this Court grant leave to appeal or, in lieu of granting leave, enter a peremptory order pursuant to MCR 7.305(H)(1) that reverses the decision of the Court of Appeals and affirms the MPSC's conclusion that Section 6w authorizes it to set and include an LCR as part of the capacity obligations of individual electric providers, including AESs.

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STATEMENT OF QUESTION PRESENTED

I. DID THE COURT OF APPEALS ERR IN HOLDING THAT 2016 PA 341 DOES NOT AUTHORIZE THE MICHIGAN PUBLIC SERVICE COMMISSION TO IMPOSE A LOCAL CLEARING REQUIREMENT FOR INDIVIDUAL ALTERNATIVE ELECTRIC PROVIDERS?

Appellant Consumers Energy Company answers "Yes."

The Michigan Public Service Commission answers "Yes."

The Michigan Chamber of Commerce presumably answers "Yes."

Appellee Association of Businesses Advocating Tariff Equity presumably answers "No."

Appellee Energy Michigan, Inc. presumably answers "No."

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STATUTE INVOLVED

MCL 460.6W – Section 6w of 2016 Public Act 341

(1) If the appropriate independent system operator receives approval from the Federal Energy Regulatory Commission to implement a resource adequacy tariff that provides for a capacity forward auction, and includes the option for a state to implement a prevailing state compensation mechanism for capacity, then the commission shall examine whether the prevailing state compensation mechanism would be more cost-effective, reasonable, and prudent than the capacity forward auction for this state before the commission may order the prevailing state compensation mechanism to be implemented in any utility service territory in which the prevailing state compensation mechanism is not yet effective. Before the commission orders the implementation of the prevailing state compensation mechanism in 1 or more utility service territories, the commission shall hold a contested case hearing pursuant to chapter 4 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.271 to 24.287. The commission shall allow intervention by interested persons, alternative electric suppliers, and customers of alternative electric suppliers and the utility under consideration. At the conclusion of the proceeding, the commission shall make a finding for each utility service territory under consideration, based on clear and convincing evidence, as to whether or not the prevailing state compensation mechanism would be more cost-effective, reasonable, and prudent than the use of the capacity forward auction for this state in meeting the local clearing requirement and the planning reserve margin requirement. The contested case must be scheduled for completion by December 1 before the independent system operator's capacity forward auction for this state, and the commission's decision shall identify which utility service territories will be subject to the prevailing state compensation mechanism. If the commission implements the prevailing state compensation mechanism, it shall implement the prevailing state compensation mechanism for a minimum of 4 consecutive planning years unless such period conflicts with the federal tariff. The commission shall establish the charge as a capacity charge under subsection (3) and determine that charge consistent with the approved resource adequacy tariff of the appropriate independent system operator.

(2) If the appropriate independent system operator receives approval from the Federal Energy Regulatory Commission to implement a resource adequacy tariff that provides for a capacity

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forward auction, and does not include the option for a state to implement a prevailing state compensation mechanism for capacity, then the commission shall examine whether a state reliability mechanism established under subsection (8) would be more cost-effective, reasonable, and prudent than the capacity forward auction for this state before the commission may order the state reliability mechanism to be implemented in any utility service territory. Before the commission orders the implementation of the state reliability mechanism in 1 or more utility service territories, the commission shall hold a contested case hearing pursuant to chapter 4 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.271 to 24.287. The commission shall allow intervention by interested persons, alternative electric suppliers, and customers of alternative electric suppliers and the utility under consideration. At the conclusion of the proceeding, the commission shall make a finding for each utility service territory under consideration, based on clear and convincing evidence, as to whether or not the state reliability mechanism would be more cost-effective, reasonable, and prudent than the use of the capacity forward auction for this state in meeting the local clearing requirement and the planning reserve margin requirement. The contested case must be scheduled for completion by December 1 before the independent system operator's capacity forward auction for this state, and the commission's decision shall identify which utility service territories will be subject to the state reliability mechanism. If, by September 30, 2017, the Federal Energy Regulatory Commission does not put into effect a resource adequacy tariff that includes a capacity forward auction or a prevailing state compensation mechanism, then the commission shall establish a state reliability mechanism under subsection (8). The commission may commence a proceeding before October 1 if the commission believes orderly administration would be enabled by doing so. If the commission implements a state reliability mechanism, it shall be for a minimum of 4 consecutive planning years beginning in the upcoming planning year. 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).

(3) After the effective date of the amendatory act that added section 6t, the commission shall establish a capacity charge as provided in this section. A determination of a capacity charge must be conducted as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.271 to 24.287, after providing interested persons with notice and a reasonable opportunity for a full and complete hearing and

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conclude by December 1 of each year. The commission shall allow intervention by interested persons, alternative electric suppliers, and customers of alternative electric suppliers and the utility under consideration. The commission shall provide notice to the public of the single capacity charge as determined for each territory. No new capacity charge is required to be paid before June 1, 2018. The capacity charge must be applied to alternative electric load that is not exempt as set forth under subsections (6) and (7). If the commission elects to implement a capacity forward auction for this state as set forth in subsection (1) or (2), then a capacity charge shall not apply beginning in the first year that the capacity forward auction for this state is effective. In order to ensure that noncapacity electric generation services are not included in the capacity charge, in determining the capacity charge, the commission shall do both of the following and ensure that the resulting capacity charge does not differ for full service load and alternative electric supplier load:

(a) For the applicable term of the capacity charge, include the capacity-related generation costs included in the utility's base rates, surcharges, and power supply cost recovery factors, regardless of whether those costs result from utility ownership of the capacity resources or the purchase or lease of the capacity resource from a third party.

(b) For the applicable term of the capacity charge, subtract all non-capacity-related electric generation costs, including, but not limited to, costs previously set for recovery through net stranded cost recovery and securitization and the projected revenues, net of projected fuel costs, from all of the following:

(i) All energy market sales.

(ii) Off-system energy sales.

(iii) Ancillary services sales.

(iv) Energy sales under unit-specific bilateral contracts.

(4) The commission shall provide for a true-up mechanism that results in a utility charge or credit for the difference between the projected net revenues described in subsection (3) and the actual net revenues reflected in the capacity charge. The true-up shall be reflected in the capacity charge in the subsequent year. The methodology used to set the capacity charge shall be the same methodology used in the true-up for the applicable planning year.

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(5) Not less than once every year, the commission shall review or amend the capacity charge in all subsequent rate cases, power supply cost recovery cases, or separate proceedings established for that purpose.

(6) A capacity charge shall not be assessed for any portion 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 the appropriate independent system operator 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. Any electric provider that has previously demonstrated that it can meet all or a portion of its capacity obligations shall give notice to the commission by September 1 of the year 4 years before the beginning of the applicable planning year if it does not expect to meet that capacity obligation and instead expects to pay a capacity charge. The capacity charge in the utility service territory must be paid for the portion of its load taking service from the alternative electric supplier not covered by capacity as set forth in this subsection during the period that any such capacity charge is effective.

(7) An electric provider shall provide capacity to meet the capacity obligation for the portion of that load taking service from an alternative electric supplier in the electric provider's service territory that is covered by the capacity charge during the period that any such capacity charge is effective. The alternative electric supplier has the obligation to provide capacity for the portion of the load for which the alternative electric supplier has demonstrated an ability to meet its capacity obligations. If an alternative electric supplier ceases to provide service for a portion or all of its load, it shall allow, at a cost no higher than the determined capacity charge, the assignment of any right to that capacity in the applicable planning year to whatever electric provider accepts that load.

(8) If a state reliability mechanism is required to be established under subsection (2), the commission shall do all of the following:

(a) Require, by December 1 of each year, that each electric utility demonstrate to the commission, in a format determined by the commission, that for the planning year beginning 4 years after the beginning of the current planning year, the electric utility owns or has contractual rights to sufficient

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capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable.

(b) Require, by the seventh business day of February each year, that each alternative electric supplier, cooperative electric utility, or municipally owned electric utility demonstrate to the commission, in a format determined by the commission, that for the planning year beginning 4 years after the beginning of the current planning year, the alternative electric supplier, cooperative electric utility, or municipally owned electric utility owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable. One or more municipally owned electric utilities may aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision. One or more cooperative electric utilities may aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision. A cooperative or municipally owned electric utility may meet the requirements of this subdivision through any resource, including a resource acquired through a capacity forward auction, that the appropriate independent system operator allows to qualify for meeting the local clearing requirement. A cooperative or municipally owned electric utility's payment of an auction price related to a capacity deficiency as part of a capacity forward auction conducted by the appropriate independent system operator does not by itself satisfy the resource adequacy requirements of this section unless the appropriate independent system operator can directly tie that provider's payment to a capacity resource that meets the requirements of this subsection. By the seventh business day of February in 2018, an alternative electric supplier shall demonstrate to the commission, in a format determined by the commission, that for the planning year beginning June 1, 2018, and the subsequent 3 planning years, the alternative electric supplier owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable. If the commission finds an electric provider has failed to demonstrate it can meet a portion or all of its capacity obligation, the commission shall do all of the following:

(i) For alternative electric load, require the payment of a capacity charge that is determined, assessed, and applied in

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the same manner as under subsection (3) for that portion of the load not covered as set forth in subsections (6) and (7). If a capacity charge is required to be paid under this subdivision in the planning year beginning June 1, 2018 or any of the 3 subsequent planning years, the capacity charge is applicable for each of those planning years.

(ii) For a cooperative or municipally owned electric utility, recommend to the attorney general that suit be brought consistent with the provisions of subsection (9) to require that procurement.

(iii) For an electric utility, require any audits and reporting as the commission considers necessary to determine if sufficient capacity is procured. If an electric utility fails to meet its capacity obligations, the commission may assess appropriate and reasonable fines, penalties, and customer refunds under this act.

(c) In order to determine the capacity obligations, request that the appropriate independent system operator provide technical assistance in determining the local clearing requirement and planning reserve margin requirement. If the appropriate independent system operator 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.

(d) In order to determine if resources put forward will meet such federal reliability requirements, request technical assistance from the appropriate independent system operator to assist with assessing resources to ensure that any resources will meet federal reliability requirements. If the technical assistance is rendered, the commission shall accept the appropriate independent system operator's determinations unless it finds adequate justification to deviate from the determinations related to the qualification of resources. If the appropriate independent system operator declines, or has not made a determination by February 28, the commission shall make those determinations.

(9) The attorney general or any customer of a municipally owned electric utility or cooperative electric utility may commence a civil action for injunctive relief against that municipally owned electric utility or cooperative electric utility if the municipally owned

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electric utility or cooperative electric utility fails to meet the applicable requirements of subsection (8)(b). The attorney general or customer shall commence an action under this subsection in the circuit court for the county in which the principal office of the municipally owned electric utility or cooperative electric utility is located. The attorney general or customer shall not file an action under this subsection unless the attorney general or customer gives the municipally owned electric utility or cooperative electric utility at least 60 days' written notice of the intent to sue, the basis for the suit, and the relief sought. Within 30 days after the municipally owned electric utility or cooperative electric utility receives written notice of the intent to sue, the municipally owned electric utility or cooperative electric utility and the attorney general or customer shall meet and make a good-faith attempt to determine if there is a credible basis for the action. The municipally owned electric utility or cooperative electric utility shall take all reasonable and prudent steps necessary to comply with the applicable requirements of subsection (8)(b) within 90 days after the meeting if there is a credible basis for the action. If the parties do not agree as to whether there is a credible basis for the action, the attorney general or customer may proceed to file the suit.

(10) The commission shall adjust the dates under this section if needed to ensure proper alignment with the appropriate independent system operator's procedures and requirements. However, any changes to the dates in this section must ensure that providers still meet applicable reliability requirements. The commission shall not permit a capacity charge to be assessed under this section for any year in which it has elected the capacity forward auction instead of the prevailing state compensation mechanism or the state reliability mechanism.

(11) Nothing in this act shall prevent the commission from determining a generation capacity charge under the reliability assurance agreement, rate schedule FERC No. 44 of the independent system operator known as PJM Interconnection, LLC, as approved by the Federal Energy Regulatory Commission in docket no. ER10-2710 or similar successor tariff.

(12) As used in this section:

(a) "Appropriate independent system operator" means the Midcontinent Independent System Operator.

(b) "Capacity forward auction" means an auction-based resource adequacy construct and the associated tariffs

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developed by the appropriate independent system operator for at least a portion of this state for 3 years forward or more.

(c) "Electric provider" means any of the following:

(i) Any person or entity that is regulated by the commission for the purpose of selling electricity to retail customers in this state.

(ii) A municipally owned electric utility in this state.

(iii) A cooperative electric utility in this state.

(iv) An alternative electric supplier licensed under section 10a.

(d) "Local clearing requirement" means the amount of capacity resources required to be in the local resource zone in which the electric provider's demand is served to ensure reliability in that zone as determined by the appropriate independent system operator for the local resource zone in which the electric provider's demand is served and by the commission under subsection (8).

(e) "Planning reserve margin requirement" means the amount of capacity equal to the forecasted coincident peak demand that occurs when the appropriate independent system operator footprint peak demand occurs plus a reserve margin that meets an acceptable loss of load expectation as set by the commission or the appropriate independent system operator under subsection (8).

(f) "Planning year" means June 1 through the following May 31 of each year.

(g) "Prevailing state compensation mechanism" means an option for a state to elect a prevailing compensation rate for capacity consistent with the requirements of the appropriate independent system operator's resource adequacy tariff.

(h) "State reliability mechanism" means a plan adopted by the commission in the absence of a prevailing state compensation mechanism to ensure reliability of the electric grid in this state consistent with subsection (8)."

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SUMMARY OF ARGUMENT

The Court of Appeals misapplied the applicable standard of review in its consideration of whether Act 341 authorizes the MPSC to apply an LCR as part of the capacity obligations of electric providers, including AESs. In addition, the Court of Appeals failed to cite and apply the required burden on the appellants challenging the Commission's authority under MCL 462.28. The Court of Appeals' July 12 Opinion erred in interpreting the plain language of Section 6w, which directs the MPSC to determine and implement an LCR to apply as part of all electric providers' capacity obligations. In fact, the July 12 Opinion is inconsistent with another recently issued, and designated for publication, decision of the Court of Appeals which also interprets the MPSC's authority to implement Section 6w. The Court of Appeals' July 12 Opinion did not provide a cogent reason for overturning the MPSC's interpretation of a key statute directing that agency to establish and apply forward capacity obligations for electric providers who seek to provide service to the retail electric customers in Michigan. The Court of Appeals' July 12 Opinion renders nugatory a key element of Act 341, and contradicts a logical reading of Act 341's plain text and expressly stated legislative purpose of ensuring long-term reliability of the state's electric grid. The July 12 Opinion also erred in its misinterpretation of the resource adequacy practices of MISO. The Court of Appeals' interpretation of the legislative history of Act 341 is clearly erroneous and contrary to the plain text and necessary meaning of that Act. If the Court of Appeals' decision is not reversed, it will lead to material harm to the state of Michigan by jeopardizing the reliability of electric service for the state's residents and businesses. If allowed to stand, the Court of Appeals' July 12 Opinion will also call into question the MPSC's ability to implement all of Act 341's electric reliability provisions for all electric providers, including public utilities, and the MPSC's regulatory authority. The Supreme

Court should grant leave to appeal and reverse the Court of Appeals' July 12 Opinion.

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I. INTRODUCTION AND REASONS FOR GRANTING LEAVE TO APPEAL

The Legislature designed Act 341 to ensure the long-term reliability of the state's electric grid. Coined as "historic," "landmark," and "reforming" in nature when enacted in 2016, Act 341 and Act 342,[2] authorized the MPSC to take several actions impacting electric providers.[3] By requiring every electric provider to demonstrate, on a forward basis, that they have adequate electric capacity resources to avoid blackouts or brownouts, and by ensuring that Michigan controlled its long-term energy security, rather than relying solely on federal regulators, Act 341 and Act 342 required the MPSC to take action to protect Michigan's energy future for all of its citizens.

The Supreme Court should grant Consumers Energy's Application for Leave to Appeal because:

- the Commission's authority to implement a key component of Act 341 - electric resource adequacy - involves a substantial question about the validity of a legislative act;
- the Commission's authority to determine and implement capacity obligations pursuant to Section 6w has significant public interest and the case involves a state agency;
- the Commission's statutory authority to implement a new energy policy law governing electric resource adequacy in Michigan involves legal principles of major significance to the state's jurisprudence; and
- the Court of Appeals' published July 12 Opinion is erroneous, is inconsistent with a more recent to-be-published Court of Appeals' decision concerning the MPSC's authority to implement Section 6w, and will cause material harm and injustice if not reversed. See MCR 7.305(B)(1), (2), (3), and (5)(a).

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[2] Act 342 addresses programs for energy waste reduction (energy efficiency), renewable energy, demand response, distributed generation, and voluntary green pricing.

[3] See, e.g., https://www.michigan.gov/snyder/0,4668,7-277-57577_57657-400490--,00.html and http://www.crainsdetroit.com/article/20161221/NEWS/161229967/snyder-signs-energy-overhaul-legislation.

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The July 12 Opinion erroneously concluded that the plain language of Section 6w does not mean what it states, and rendered a key component of required electric provider capacity obligations nugatory. In addition, the Court's interpretation of federal electric resource adequacy practices is directly contradicted by rules of the applicable federal electric regulator itself. Indeed, the applicable federal regulator's filings made in the proceeding contradict the Court of Appeals' interpretation. And the MPSC—an agency charged by the Legislature to regulate the electric industry—disagrees with the Court of Appeals' interpretation. The Court of Appeals' reliance on legislative history was inappropriate given the plain language of Section 6w. Regardless, such legislative history does not support the Court's conclusion. Consumers Energy requests the Michigan Supreme Court to grant leave to appeal and to reverse the decision of the Court of Appeals because it was clearly erroneous and will cause material harm to the reliability of the state's electric grid for all of Michigan's citizens.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Power Supply in the Michigan Electric Market

Michigan's retail electric generation market is unique and considered a "hybrid" market because it is largely regulated, but partially unregulated. A variety of electric providers provide power supply to Michigan's retail electric customers. Investor-owned utilities such as Consumers Energy provide power supply and electric distribution (i.e., delivery through wires, meters, billing) services to customers located within franchised service territories, pursuant to rates and terms and conditions of service which the MPSC fully regulates. Municipal utilities are owned and operated by municipalities (e.g., Lansing Board of Water and Light, Traverse City Light and Power), and provide power supply and distribution services under rates and terms set by their governing boards. Rural electric cooperatives are member-owned and provide power

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supply and distribution services under rates approved either by the MPSC or by their member-elected boards. AESs are independent power suppliers which provide power generation service to a segment of the state's retail electric market. AESs do not provide electric delivery (distribution) service. Public utilities such as Consumers Energy provide distribution service for the power supply provided by AESs. The prices for customers' purchases of power supply from AESs are not regulated. Electric transmission service for all customers is provided by independent transmission companies such as the Michigan Electric Transmission Company, at rates approved by the Federal Energy Regulatory Commission ("FERC").

MISO is the FERC-regulated independent system operator charged with coordinating electric transmission planning and with managing the buying and selling of wholesale electricity (i.e., supplier to supplier) in a territory which includes most of the state of Michigan.[4] MISO oversees transmission planning and provides nondiscriminatory access to the region's high-voltage electric transmission system. MISO also manages the applicable wholesale electric market to ensure nondiscriminatory and efficient operations and centralized unit commitment and dispatch which balances supply and demand instantaneously.[5] MISO's resource adequacy planning for its wholesale electric market is limited to a period of a single planning year. MISO does not regulate retail power supply service or the rates charged for that retail service and does not engage in capacity resource adequacy planning for periods of greater than one planning year.

[4] The Upper Peninsula of Michigan is part of Zone 2 of the MISO territory. MISO Zone 7 consists of Michigan's Lower Peninsula, except for a small portion of the southwest portion of the Lower Peninsula, which falls under the authority of the PJM Interconnection LLC, a FERC-regulated regional transmission organization which is part of the Eastern Interconnection grid.

[5] See, https://www.misoenergy.org/markets-and-operations/#t=10&p=0&s=&sd=.

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Electric power suppliers are also termed "Load Serving Entities" ("LSEs"), and include all the entities in Section 6w's definition of "electric providers." MCL 460.6w(12)(c).[6] The electric capacity to be provided by LSEs for an annual period is submitted by LSEs to MISO shortly before the start of each annual "Planning Year," which runs from June 1 through May 31 each year. Electric "capacity" is the amount of electric output a generation unit can reliably produce. Electric "energy" is the amount of electricity actually produced over a specific period of time. For example,[7] a generator with 1 megawatt ("MW") capacity that operates at that capacity for one hour will produce 1 megawatthour ("MWh") of energy. If that generator operates at only half that capacity for one hour, it will produce 0.5 MWh of electric energy. See, https://www.eia.gov/tools/faqs/faq.php?id=101&t=3. MISO dispatches the generation submitted by LSEs on a day-ahead and real-time basis. MISO also provides an ancillary services energy market for necessary voltage support and real-time balancing of supply and demands to ensure short-term reliability.

LSEs provide the capacity of power supply for their retail customer load through the options of self-supply, bilateral market purchases, or purchases from MISO's annual residual auction. Self-supply means that the supplying LSE generates power from plants that it owns or

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[6] MCL 460.6w(12)(c) defines an "electric provider" as any of the following:

(i) Any person or entity that is regulated by the commission for the purpose of selling electricity to retail customers in this state (example, Consumers Energy, DTE Electric Company).
(ii) A municipally owned electric utility in this state (example, Lansing Board of Water and Light).
(iii) A cooperative electric utility in this state (example, Cherryland Electric Cooperative).
(iv) An alternative electric supplier licensed under section 10a.

[7] This is a simplified example. Technically, Zonal Resource Credits ("ZRCs") are submitted to MISO as units of capacity. ZRCs are the maximum demonstrated capability of a generating unit minus a derate representing an expected amount lost to unreliability.

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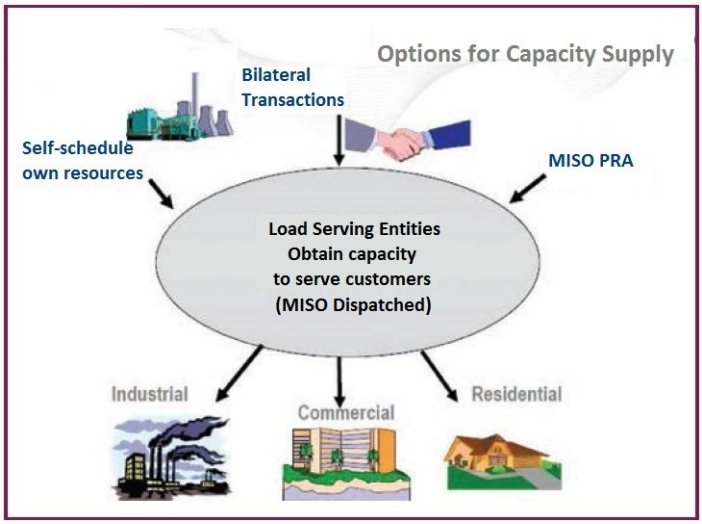
with whom it has rights from power purchase agreements. Supply from bilateral purchases means that the LSE buys power from a power supplier pursuant to a contract. Supply from the MISO residual auction means the LSE purchases power from MISO's annual Planning Resource Auction ("PRA"), for a term of one year (the Planning Year). The PRA allows electric providers to buy and sell electric capacity resources not otherwise claimed by other electric providers and is therefore known as a "residual auction." These supply options are illustrated below:



B. Background of Act 341

In the "Background and Facts" section of the July 12 Opinion, the Court of Appeals stated that Act 341 was part of "new electric utility legislation." 325 Mich App at 210-211. This cursory statement failed to appropriately acknowledge that Act 341 expressly changed Michigan's energy policy to require electric providers other than utilities to comply with specified essential reliability requirements (termed "capacity obligations") determined and implemented by the MPSC as a condition to being authorized to provide electric capacity to Michigan's retail customers. Instead, the Court of Appeals focused on electric deregulation legislation passed 16 years before Act 341 (and over 19 years before the date of this Brief), Public Acts 141 and 142 of 2000. Although the Court of Appeals correctly noted that in 2000

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the Customer Choice and Electricity Reliability Act deregulated the retail electric generation market in Michigan, allowing all customers to buy electric generation from AESs instead of utilities, the State significantly scaled back that deregulation with the passage of Public Act 286 of 2008 ("Act 286"), which established a cap on the unregulated retail electric market of 10% of utilities' sales. In 2016, reflecting increasing concern about the long-term reliability of the state's electric supply, the state's lawmakers again acted to reform Michigan's energy legislation.

In December 2016, Act 341 and Act 342 passed both chambers of the Michigan Legislature with strong bipartisan support. The new energy legislation became effective on April 20, 2017. An express purpose of Act 341 is to promote and ensure the long-term reliability of Michigan's electric grid for the state's retail electric customers. To effectuate this purpose, Section 6w authorizes the MPSC to determine four-year forward capacity obligations for all retail electric providers in the state, and to implement and establish the format for annual electric capacity resource adequacy demonstrations by each electric provider who provides service to retail electric customers in Michigan. Consumers Energy's Application for Leave to Appeal the July 12 Opinion concerns the MPSC's authority to implement Section 6w's directives.

Act 341 retained Act 286's 10% cap on deregulated electric generation load. See MCL 460.10a(1). But, Act 341 required every electric provider, including each AES, to demonstrate to the Commission compliance with MPSC-determined capacity obligations, on a four-year forward basis (i.e., four years before the Planning Year in which the customer loads will be served). Act 341 further provides that if an AES does not demonstrate compliance with the MPSC-determined capacity obligations, the incumbent electric utility must provide capacity service to the AES's customers as the designated provider of last resort. MCL 460.6w(7) and (8); see also *In re Implementing Section 6w of 2016 PA 341 for Cloverland Electric Cooperative*,

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Court of Appeals Docket No. 342552, Slip Opinion for Publication dated July 23, 2019, page 3 ("When an AES fails to demonstrate that it has sufficient capacity to meet its capacity obligations, the electric utility must provide the AES's customer with electric capacity, and in return, [a State Reliability Mechanism] charge must be paid."). A copy of the July 23, 2019 *Cloverland Electric* Slip Opinion is attached as Appendix D, pages 99a through 110a.

C. State Capacity Demonstrations Before and After Act 341

Beginning in 1998, the MPSC required all rate-regulated electric utilities such as Consumers Energy to annually file forward demonstrations of the electric capacity resources they planned to use to provide service to their retail customers in Michigan. The Commission encouraged AESs to file similar capacity demonstrations, but AESs were not legally required to do so. Act 341 changed that voluntary construct as part of the legislative effort to ensure the long-term reliability of electric supply for Michigan.

Section 6w now requires all electric providers, defined as electric utilities, AESs, cooperative electric utilities, and municipally owned electric utilities, to demonstrate to the Commission, in a format determined by the Commission, that the electric provider owns or has contractual rights to sufficient capacity to meet its "capacity obligations" as that term is specified in Act 341, on a four-year forward basis. That is, every retail electric provider in Michigan is now required to demonstrate that it can meet the capacity obligations, as determined by the MPSC pursuant to Section 6w, necessary to serve its retail customers, four years before the Planning Year in which the retail electric provider will serve that customer's electric load. MCL 460.6w(8).

Along with requiring each retail electric provider in Michigan to demonstrate compliance with its capacity obligations on a four-year forward basis, the Legislature also required

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mandatory back-up utility capacity service if an AES fails to demonstrate that it satisfies the capacity obligations established by the Commission pursuant to Section 6w. If an AES does not demonstrate compliance with the capacity obligations determined by the MPSC, Section 6w requires the incumbent utility (e.g., Consumers Energy) to provide electric capacity service to that AES's customer load. MCL 460.6w(7) and (8); *Cloverland Electric*, Slip Opinion at 3 (Appendix D, page 101a). Thus, Act 341 requires the Commission, in consultation with MISO, to establish the "capacity obligations" for all Michigan retail electric providers. Act 341 further requires incumbent electric utilities to provide capacity service for any retail load in their service territories if the customers' respective AES fails to demonstrate compliance with the capacity obligations. The Legislature termed this new construct a State Reliability Mechanism ("SRM").

D. Act 341 and Federal Reliability Requirements

1. The Complementary Nature of MISO's Regulatory Construct with State Regulation

FERC and MISO have both recognized and supported the authority of the states over generation resource investment and long-term generation resource adequacy. *Midwest Indep Transmission System Operator, Inc.*, 153 FERC ¶ 61,229, pp 23-24 (2015).[8] In this proceeding, MISO specifically recognized Michigan's independent right to chart its own long-term resource adequacy path:

> MISO recognizes and supports the independent authority of state regulators over generation resource investment and long-term resource adequacy. This longstanding recognition is

[8] The Federal Power Act, as amended, 16 USC 791a *et seq.*, gives FERC jurisdiction over the "transmission of electric energy in interstate commerce and ... the sale of electric energy at wholesale in interstate commerce." 16 USC 824(b). This FERC jurisdiction includes both wholesale electricity rates and any rule or practice "affecting" such rates. 16 USC 824(b), 824e(a). But the law places beyond FERC's power, and leaves to the States alone, the regulation of "any other sale"—most notably, any retail sale of electricity. 16 USC 824(b). *FERC v Elec Power Supply Ass'n*, 136 S Ct 760, 767; 193 L Ed 2d 661 (2016), as revised (January 28, 2016); *New York v FERC*, 535 US 1, 18–20; 122 S Ct 1012, 1023–24; 152 L Ed 2d 47 (2002).

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> acknowledged in MISO's resource adequacy processes, which respect the rights of states by allowing regulatory authorities to decide how to best meet long-term resource adequacy requirements.[1] Within MISO, nearly all state and local regulators maintain resource planning authority, and are responsible for establishing retail rates and reviewing the prudency of utility investments. [MPSC Case No. U-18197, August 15, 2017, MISO Comments, emphasis added.]

[1] *Midwest Indep Sys Operator, Inc.*, 139 FERC ¶ 61,199 (2012).

MISO's August 15, 2017 Comments are Appendix E to this Application (the above quotation is at pages 112a through 113a of Appendix E). The July 12 Opinion did not address these MISO comments, but contradicted them by erroneously concluding that the MPSC's imposition of a four-year forward LCR on individual AESs would be inconsistent with MISO's requirements.

Unlike Act 341's four-year forward capacity planning construct, the MISO resource planning construct applies only for the current, or "prompt," Planning Year. The MISO market serves as a mechanism for electric providers to sell and buy electric capacity in the near-term to provide for the exchange of resources across energy providers and local planning zones. In a presentation to the State Senate Energy and Technology Committee when it was considering the 2016 Energy Policy Legislation, MISO noted that its short-term mechanisms alone are not sufficient to meet long-term electric resource adequacy needs, and that Michigan's legislation could satisfy long-term requirements.[9]

In its August 15, 2017 Comments filed below, MISO supported the Michigan Legislature's decision to enact legislation which would ensure that the short-term MISO planning process was complemented with a long-term process to ensure electric resource

[9] See http://www.senate.mi.gov/committeeMinTestimony/2015-2016/Energy%20and%20Technology/Testimony/2016-SCT-ENERGY-04-27-1-01.PDF, attached hereto as Appendix F, pages 118a through 126a.

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adequacy for the state. MISO stated:

> MISO supports the implementation of Michigan's energy legislation that passed in late 2016, and applauds the State of Michigan, its policy makers, the Michigan PSC, and the Michigan Agency for Energy for taking the initiative to ensure long-term reliability objectives are met through resource adequacy requirements. Many of these requirements, including provisions requiring each electric utility or alternative electric supplier to demonstrate that it has sufficient capacity, are similar to those contained in MISO's filing of its Competitive Retail Solution. These provisions will help the State of Michigan ensure that resource adequacy needs are met across various time horizons. [See Appendix E hereto, pages 113a through 114a.]

(The MISO Competitive Retail Solution is detailed below in Section I.D.2.) In Reply Comments in this case (attached as Appendix G, pages 128a through 129a), MISO reiterated that its resource adequacy processes are complementary to the long-term reliability mechanisms of the states. Appendix G, page 128a.

2. <u>MISO's Competitive Retail Solution Proposal</u>

The Governor signed Act 341 on December 15, 2016. At that time, MISO's November 1, 2016 application for approval of a Competitive Retail Solution ("CRS") Tariff in FERC Docket No. ER17-284-000 was pending before FERC. MISO's CRS proposal requested FERC approval of a tariff which would have established a Forward Resource Auction to operate in conjunction with MISO's residual, annual PRA.[10] MISO's filing also included an optional Prevailing State Compensation Mechanism ("PSCM") for states who could choose to adopt such a proposed mechanism. MISO's proposed CRS tariff would have been effective beginning Planning Year 2018. MISO described its CRS proposal as follows:

> In late 2016, MISO proposed a new resource adequacy construct, known as the Competitive Retail Solution that addressed needs in

[10] The residual PRA operates in March of each year and allows electric providers to buy and sell electric capacity resources which are not otherwise claimed by other electric providers.

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> states that have competitive retail choice. As part of this proposal, MISO included provisions that allowed for state regulatory bodies to exercise their existing jurisdictional authority to assure long-term resource adequacy. Specifically, a state regulatory authority could identify market participants responsible for providing capacity on behalf of retail choice providers, as well as the rate of compensation for such capacity. By electing this alternative, an Load Serving Entity ("LSE") would have been responsible for procuring all of its resources three years in advance either through a forward resource auction or a forward fixed resource adequacy plan. [See Appendix E, page 113a.[11]]

MISO's proposed CRS tariff's PSCM would have required electric providers to: (i) demonstrate forward capacity resources sufficient to meet the electric provider's load-ratio (i.e., proportional) share of the Zone's Planning Reserve Margin Requirement ("PRMR") and LCR; or (ii) have their retail customers take capacity from the incumbent utility for the load associated with the deficiency of the provider's demonstrated capacity resources, and pay the utility a charge for such utility capacity service. See MISO's November 1, 2016 CRS filing in FERC Docket No. ER17-284-000, page 389, attached as Appendix H, page 131a.

FERC rejected MISO's application for approval of the CRS tariff in Docket ER17-284-000. FERC expressed concern that bifurcating MISO's resource adequacy construct into two separate markets (one allowing retail electric choice—in the states of Michigan and Illinois, and one being fully regulated—in the states in MISO's territory other than Michigan and Illinois) could create uncertainty. *Midcontinent Indep Transmission Sys Operator, Inc*, 158 FERC ¶ 61,128 (2017).[12] As a result of this decision, there is currently no MISO capacity forward

[11] The MPSC has noted (page 1, footnote 5, of the MPSC's January 20, 2017 Order in Case No. U-18239, attached as Appendix I, pages 133a through 140a) that the PSCM was intended to ensure that the utility which bears the ultimate responsibility for procuring capacity resources for retail electric customers on behalf of AESs would be properly compensated for providing such capacity resources.

[12] The bifurcated (regulated and unregulated) electric generation market questioned by FERC is much like the hybrid retail electric market in Michigan.

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auction or PSCM. The FERC Order did not impact MISO's existing resource adequacy construct. See Appendix E, page 113a.

3. MISO's Existing Resource Adequacy Construct

MISO described its existing resource adequacy construct as part of the Case No. U-18197 technical conferences.[13] MISO's presentation is attached as Appendix J, pages 142a through 164a. MISO's resource adequacy construct applies only for a single year, and applies to all LSEs providing service in the applicable MISO Zone, which include AESs and utilities such as Consumers Energy. LSEs may demonstrate resource adequacy under MISO's rules by self-supply, bilateral contracting with capacity resource owners, and purchases from MISO's annual residual (left-over) auction, the PRA. LSEs who use a Fixed Resource Adequacy Plan ("FRAP") to meet their annual MISO resource adequacy requirements must designate enough resources located in the Zone in which their load is served to meet their portion of the MISO zonal LCR. *Id.* at page 10. LSEs who choose to "self-schedule" their capacity resources must offer said resources at a price in units of $/megawatt-day in the PRA. *Id.* at page 9. MISO characterizes its PRA as a "residual auction" which "allows buyers and sellers to balance resource portfolio prior to [the] Planning Year." See Appendix E, page 113a. The annual MISO PRA occurs approximately two months ahead of each Planning Year. *Id.* LSEs who choose to obtain capacity from the residual PRA purchase said capacity for the auction clearing price for the Zone where the capacity is physically located. The sum of the capacity submitted via a FRAP and capacity purchased from within the Zone through the PRA must be greater than or equal to the Zone's LCR, as determined by MISO each year. *Id.* at page 11. If the MISO zonal LCR for the prompt year is not satisfied, the auction clearing price of the PRA is set at a penalty price of the

[13] See https://www.michigan.gov/documents/mpsc/6-8-2017_MI_Resource_Adequacy_Overview_573222_7.pdf.

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Cost of New Entry ("CONE") applicable to all purchasers in the PRA in the Zone where the generation resources are located.[14]

Thus, the MISO resource adequacy construct applies only for the prompt Planning Year and does not address capacity planning and resource adequacy beyond that annual time frame. LSEs who use a FRAP must meet a provider-specific proportional share of the Zone's LCR. LSEs who self-schedule and who obtain capacity resources from the PRA risk being economically penalized by being required to pay CONE if the zonal LCR for the year is not satisfied. MISO does not have a resource adequacy construct which extends beyond the annual Planning Year, and does not have a forward capacity auction, only the residual PRA. MISO's LCR requirements only apply to the annual prompt Planning Year. MISO requires no capacity demonstrations of electric providers beyond those made just prior to the Planning Year, and MISO does not have a role in long-term resource adequacy planning. The timeline of the annual MISO resource adequacy construct is set forth on page 145a of Appendix J. Importantly, in light of FERC's rejection of the CRS tariff, the existing MISO short-term resource adequacy construct is the same as that which existed at the time Act 341 was enacted.

4. <u>Act 341's Interaction with the MISO Construct</u>

Section 6w's plain language shows that the Michigan Legislature ensured that the MPSC would be authorized to implement long-term resource adequacy requirements to promote resource adequacy for Michigan electric customers in conjunction with MISO's CRS proposal, or other alternatives. The structure is set forth as follows:

1. Section 6w(1) provides that if the appropriate independent system operator received approval from FERC to implement a resource adequacy tariff that

[14] CONE is calculated by MISO based on the estimated costs to build a new natural gas-fueled combustion turbine plant in the respective Zone.

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provides for a capacity forward auction,[15] and includes the option for Michigan to implement a PSCM for capacity, then the MPSC was mandated to determine whether the PSCM "would be more cost-effective, reasonable, and prudent than the capacity forward auction" for Michigan in meeting the LCR and the Planning Reserve Margin Requirement ("PRMR")[16] before the MPSC could authorize the PSCM to be implemented in one or more utility service territories;

2. Section 6w(2) provides that if the appropriate independent system operator received approval from FERC to implement a resource adequacy tariff that does provide for a capacity forward auction, but does not include the option for Michigan to implement a PSCM for capacity, then the MPSC was mandated to determine whether an SRM under Section 6w(8) "would be more cost-effective, reasonable, and prudent than the capacity forward auction" for Michigan in meeting the LCR and the PRMR before the MPSC could authorize the PSCM to be implemented in one or more utility service territories; and

3. Section 6w(2) further provides that if FERC has not approved a resource adequacy tariff by September 30, 2017 that includes a capacity forward auction or a PSCM, then the MPSC must implement an SRM pursuant to Section 6w(8).

Act 341's structure demonstrates that the SRM was the Legislature's provision for a mandatory "default" if FERC did not approve a capacity forward auction or a PSCM which could apply for Michigan. If FERC had approved MISO's proposed capacity forward auction, the MPSC would have been required to compare that forward auction to either the PSCM or the SRM to determine whether the referenced mechanisms were "more cost-effective, reasonable, and prudent than the use of the capacity forward auction for this state in meeting the local clearing requirement and the planning reserve margin requirement." MCL 460.6w(2) (emphasis

[15] Section 6w(12)(b) defines "capacity forward auction" as "an auction-based resource adequacy construct and the associated tariffs developed by the appropriate independent system operator for at least a portion of this state for 3 years forward or more." MCL 460.6w(12)(b).

[16] Act 341 defines PRMR as "the amount of capacity equal to the forecasted coincident peak demand that occurs when the appropriate independent system operator [defined as MISO] footprint peak demand occurs plus a reserve margin that meets an acceptable loss of load expectation as set by the commission or the appropriate independent system operator under subsection (8)." MCL 460.6w(12)(e).

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added). Although the Legislature provided for consideration of a FERC-approved capacity forward auction (defined as "an auction-based resource adequacy construct and the associated tariffs developed by the appropriate independent system operator for at least a portion of this state for 3 years forward or more"), it provided that such a forward capacity auction would have had to be evaluated in comparison to either the PSCM or the SRM for purposes of meeting the LCR and PRMR. The language of Sections 6w(1) and (2) show that the Legislature designed the SRM to be the state substitute for a FERC-approved forward capacity auction or PSCM if those FERC options were not approved. The SRM is thus the state "back-stop" to apply in the absence of the PSCM or FERC-approved forward capacity auction.

E. Act 341's SRM

Act 341 defines the SRM as "[a] plan adopted by the Commission in the absence of a prevailing state compensation mechanism to ensure reliability of the electric grid in this state consistent with subsection (8) [of Act 341]."

Subsection 6w(8) of Act 341 requires the Commission to implement capacity obligations, including an LCR, and a charge for capacity service, as part of the SRM:

> (8) If a state reliability mechanism is required to be established under subsection (2), the commission shall do all of the following:
>
> > (a) Require, by December 1 of each year, that each electric utility demonstrate to the commission, in a format determined by the commission, that for the planning year beginning 4 years after the beginning of the current planning year, the electric utility owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable.
> >
> > (b) Require, by the seventh business day of February each year, that each alternative electric supplier, cooperative electric utility, or municipally owned electric utility demonstrate to the commission, in a format determined by the commission, that

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for the planning year beginning 4 years after the beginning of the current planning year, the alternative electric supplier, cooperative electric utility, or municipally owned electric utility owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable. One or more municipally owned electric utilities may aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision. One or more cooperative electric utilities may aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision. A cooperative or municipally owned electric utility may meet the requirements of this subdivision through any resource, including a resource acquired through a capacity forward auction, that the appropriate independent system operator allows to qualify for meeting the local clearing requirement. A cooperative or municipally owned electric utility's payment of an auction price related to a capacity deficiency as part of a capacity forward auction conducted by the appropriate independent system operator does not by itself satisfy the resource adequacy requirements of this section unless the appropriate independent system operator can directly tie that provider's payment to a capacity resource that meets the requirements of this subsection. By the seventh business day of February in 2018, an alternative electric supplier shall demonstrate to the commission, in a format determined by the commission, that for the planning year beginning June 1, 2018, and the subsequent 3 planning years, the alternative electric supplier owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable. If the commission finds an electric provider has failed to demonstrate it can meet a portion or all of its capacity obligation, the commission shall do all of the following:

(i) For alternative electric load, require the payment of a capacity charge that is determined, assessed, and applied in the same manner as under subsection (3) for that portion of the load not covered as set forth in subsections (6) and (7). If a capacity charge is required to be paid under this subdivision in the planning year beginning June 1, 2018 or any of the 3 subsequent planning years, the capacity charge is applicable for each of those planning years.

(ii) For a cooperative or municipally owned electric utility,

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> recommend to the Attorney General that suit be brought consistent with the provisions of subsection (9) to require that procurement.
>
> (iii) For an electric utility, require any audits and reporting as the commission considers necessary to determine if sufficient capacity is procured. If an electric utility fails to meet its capacity obligations, the commission may assess appropriate and reasonable fines, penalties, and customer refunds under this act.
>
> (c) In order to determine the capacity obligations, request that the appropriate independent system operator provide technical assistance in determining the local clearing requirement and planning reserve margin requirement. If the appropriate independent system operator 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 requirements, consistent with federal reliability requirements.
>
> (d) In order to determine if resources put forward will meet such federal reliability requirements, request technical assistance from the appropriate independent system operator to assist with assessing resources to ensure that any resources will meet federal reliability requirements. If the technical assistance is rendered, the commission shall accept the appropriate independent system operator's determinations unless it finds adequate justification to deviate from the determinations related to the qualification of resources. If the appropriate independent system operator declines, or has not made a determination by February 28, the commission shall make those determinations. [MCL 460.6w(8), emphasis added.]

Thus, Section 6w requires a new form of annual, four-year forward electric capacity demonstrations by all retail electric providers in Michigan, and provides for incumbent utilities to backstop any shortfall of AES capacity supplies (determined as part of their capacity demonstrations), ensuring that all Michigan retail electric customers will receive reliable electric supply procured by providers well in advance of service. Section 6w sets forth the Legislature's requirement for all providers of retail electric service in Michigan to prove, annually, their

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long-term ability to provide reliable and verifiable electric capacity for their Michigan retail customers, and to ensure that back-up capacity would be provided by utilities if an AES fails to meet its capacity obligations as set by the MPSC.

F. MPSC Implementation of Section 6w

After receiving comments and reply comments by various persons (including ABATE and Energy Michigan), the Commission issued the June 15 Order, finding that:

- the annual electric provider capacity demonstrations should be filed in accordance with the deadlines set forth in Section 6w(8);
- a uniform methodology for annual capacity demonstrations should be applied to all electric providers and service territories;
- Section 6w authorizes the Commission to apply an LCR to individual electric providers as part of capacity obligations as that term is used in Section 6w; and
- the Case No. U-18197 technical conferences should be used to further address the appropriate design of a locational generation requirement for electric providers' capacity obligations for their retail loads in Michigan.

The June 15 Order is Appendix B to this Brief, pages 20a through 35a.

The Commission issued the September 15 Order in Case No. U-18197 and established the format requirements and process for the initial capacity demonstration for electric providers to be made pursuant to Section 6w(8), which would apply to the four MISO Planning Years 2018 through 2021. The September 15 Order is Appendix C to this Brief, pages 36a through 97a. The Commission summarized its findings as follows:

> Section 6w of PA 341 was enacted to enhance the reliability of Michigan's electric grid, specifically by requiring all electric providers to secure sufficient supplies of electric capacity to serve their anticipated customer needs four years in advance. Through this order, the Commission is establishing the requirements and process for each electric provider to make such demonstrations to the Commission.
>
> The Commission is providing flexibility for electricity providers to use a broad range of options to meet the requirements such as new

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> or existing generation, purchased power contracts, and new or existing energy waste reduction or demand response programs consistent with the applicable independent system operator's tariff. Capacity supplies can be sourced from out of state but the electric provider must own or have contractual rights to the supply. This will improve reliability because capacity at the state and regional level will actually be secured in advance, whether that is taking advantage of excess supply that exists today or investing in new resources. This approach is also cost effective because the electric provider is in the best position to pursue the lowest-cost options to meet its customers' needs in a reliable manner and to manage the risk of importing capacity supplies form out of state. Unlike approaches in some states that provide incentives or subsidies to specific types of generation in an attempt to protect reliability or meet other policy objectives, Michigan's approach is 'fuel neutral.' That is, electric providers know their capacity requirement four years into the future through this order and the provider—not the state—determines what fuel or combination of fuels to use, potentially taking into account factors such as reliability, fuel diversity, plant performance, cost, environmental impact, and risk.
>
> Due to fluctuations in customer demand and availability of resources that may occur over the four-year period, the Commission is also allowing electric providers to plan on up to 5% of the portfolio to be acquired through MISO's annual capacity auction. Based on MISO data, this is consistent with the historical use of the auction in Michigan at the aggregate level. [September 15 Order, pages 46-47. See Appendix C hereto, pages 82a-83a.]

In the September 15 Order, the Commission reaffirmed its finding (first set forth in the June 15 Order) that Section 6w authorizes it to apply an LCR to individual electric providers, but determined it would not impose such a requirement for Planning Years 2018 through 2021. The Commission stated it would seek additional information through a formal contested case hearing process to determine the proper methodology and allocation of an LCR which would apply, at the earliest, in Planning Years 2022 through 2023. September 15 Order, pages 47, 49. The September 15 Order is Appendix C hereto (see pages 83a, 85a).

The Commission also addressed the complementary and cooperative interplay between state and federal law and regulations with respect to ensuring reliable electric supply, stating as

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follows:

> The Commission recognizes that ensuring resource adequacy entails involvement of both state and federal regulators, and is implementing the provision of Section 6w with an eye towards maintaining consistency with federal resource adequacy requirements as reflected in the FERC-approved MISO tariff. In setting capacity obligations and establishing a capacity demonstration process pursuant to Section 6w, the Commission does not seek to supplant or replace the MISO prompt year capacity obligations, but to complement MISO's resource adequacy construct by providing longer-term visibility into the resource adequacy planning efforts of electric providers in the state. Further, the Commission recognizes that efforts to ensure resource adequacy have impacts on both full-service and electric choice customers, and intends to continue to work toward maintaining reliability of the electric grid in a consistent and cost-effective manner. [September 15 Order, pages 47-48, emphasis added. See Appendix C hereto, pages 83a-84a.]

On October 11, 2017, the Commission issued an Order Opening Docket initiating Case No. U-18444 ("October 11 Order") to commence a contested case proceeding for determining the process and requirements for a forward LCR under Section 6w. The October 11 Order is attached as Appendix K, pages 166a through 175a. The Commission noted that it had not implemented an LCR in Case No. U-18197, and stated its belief that a contested case "will allow for the development of a full record through a contested case process and for more information and analysis regarding the various approaches proposed for this requirement." October 11 Order, page 2 (Appendix K, page 167a). The Commission expressed interest in exploring an incremental approach to an LCR, but stated that it was "also open to considering other proposals that would result in meeting long-term reliability goals in an equitable, cost-effective manner under Michigan's hybrid [retail electric] market structure." *Id*. The Commission directed the MPSC Staff ("Staff") to submit a proposal with supporting testimony addressing many issues related to an LCR. October 11 Order, pages 2-4 (Appendix K, pages 167a through 169a). The Commission also requested technical assistance from MISO in determining the PRMR and LCR

components of capacity obligations pursuant to Section 6w(8)(c). October 11 Order, page 4 (Appendix K, page 169a). The Commission established an expedited procedural schedule and indicated its intent to read the record "to provide load serving entities with sufficient notice of the forward locational requirement methodology and process well in advance of their respective capacity demonstration deadlines mandated in Section 6w of Act 341." *Id.*

The Commission issued a final Order in Case No. U-18444 on June 28, 2018, which is attached as Appendix L, pages 177a through 313a. In that Order, the Commission determined that beginning in Planning Year 2022 an LCR should be included in individual electric providers' capacity obligations (for MISO Zone 7) under Section 6w, but that it should be implemented on a very gradual basis. Under this approach, electric providers must contribute to LCR in a manner proportional only to the need for new generation to be located in the local resource Zone. This means that AESs would not be required to contribute to LCR in MISO Zone 7 until and unless new generation is required to be added to the Zone to meet reliability requirements. As a result, AESs would not have to meet their load-ratio shares of the Zone 7 LCR for potentially decades, as the existing generation in the Zone is retired and replaced with new capacity.

G. Act 341's Provision for an LCR is Unmistakably Part of Individual Electric Providers' Capacity Obligations

A "local clearing requirement" is a requirement that an electric provider obtain a specified amount of its generation capacity from resources located close to the load being served by the provider. Section 6w(12)(d) defines LCR to be a part of capacity obligations:

> [T]he amount of capacity resources required to be in the local resource zone in which the electric provider's demand is served to ensure reliability in that zone as determined by the appropriate independent system operator for the local resource zone in which the electric provider's demand is served and by the [C]ommission under subsection [6w](8). [MCL 460.6w(12)(d).]

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Thus, under Act 341, the "capacity obligations" for all electric providers are expressly defined to include an LCR. Act 341 authorizes the Commission, in conjunction with technical assistance provided by MISO, to determine the LCR to apply to each electric provider serving retail load in Michigan.

H. The Court of Appeals' July 12 Opinion

ABATE and Energy Michigan appealed the Commission's September 15 Order. After concluding that the appeals were ripe for review, the Court of Appeals' July 12 Opinion reversed and remanded based on the Court's holding that Section 6w does not grant the MPSC authority to implement an LCR on individual AESs. The July 12 Opinion made this holding despite acknowledging that Section 6w(8)(b) requires each electric provider to demonstrate to the MPSC that it owns or has contractual rights to sufficient capacity to meet its "capacity obligations" as that term is used in Section 6w, and that Section 6w(8)(c) directs the Commission to determine an LCR "in order to determine capacity obligations." The Court of Appeals stated, "although section 6w(8)(c) thus requires the MPSC to determine the local clearing requirement in order to determine capacity obligations, it does not specifically authorize the MPSC to impose the local clearing requirement upon alternative electric suppliers individually." 325 Mich App at 225. The July 12 Opinion supported its holding with a finding that the MPSC's implementation of an LCR on individual AESs would be inconsistent with MISO's federal reliability requirements, and reasoned that the legislative history of Act 341 supported its conclusion that the MPSC may not implement an LCR as part of individual AESs' capacity obligations.[17]

[17] The July 12 Opinion found it unnecessary to address Energy Michigan's claims of improper rulemaking procedures.

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III. ARGUMENT

A. Standard Of Review

MCR 7.305(B) sets forth the standards for the Supreme Court to grant an application for leave to appeal. Leave to appeal should be granted if the application demonstrates: (i) the issue involves a substantial question about the validity of a legislative act; (ii) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions; (iii) the issue involves a legal principle of major significance to the state's jurisprudence; and (iv) the Court of Appeals' decision appealed from is clearly erroneous and will cause material injustice if allowed to stand. MCR 7.305(B)(1), (2), (3), and (5)(a).

The standard of review of MPSC orders is narrow and well-established. MCL 462.25 provides that all rates, fares, practices, and services prescribed by the Commission are presumed, *prima facie*, to be lawful and reasonable. An appellant has a heavy statutory burden to demonstrate that the Commission's order is unlawful or unreasonable:

> In all appeals under this section the burden of proof shall be upon the appellant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable. [MCL 462.26(8), emphasis added.]

The Court of Appeals did not acknowledge or cite this statutory burden in the July 12 Opinion.

A long line of appellate cases provides that establishing that an order of the MPSC is unlawful or unreasonable is subject to a high standard:

> The standard of review for [M]PSC orders is narrow and well established. Pursuant to MCL 462.25; MSA 22.44, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the [M]PSC are presumed, prima facie, to be lawful and reasonable. [*Michigan Consolidated Gas Co v Public Service Comm*, 389 Mich 624; 209 NW2d 210 (1973).]
>
> A party aggrieved by an order of the [M]PSC bears the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8). The

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> term "unlawful" has been defined as an erroneous interpretation or application of the law, and the term "unreasonable" has been defined as unsupported by the evidence. [*Associated Truck Lines, Inc v Pub Serv Comm*, 377 Mich 259; 140 NW2d 515 (1966).]

In *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90; 754 NW2d 259 (2008), the Court discussed the standard of review that courts must apply to decisions of administrative agencies, such as the MPSC. The *Rovas* Court reaffirmed that questions of statutory interpretation are reviewed *de novo* by appellate courts. *Id.* In *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 158; 627 NW2d 247 (2001), the Supreme Court set forth standards for interpreting a statute, stating:

> In considering a question of statutory construction, this Court begins by examining the language of the statute. We read the statutory language in context to determine whether ambiguity exists. If the language is unambiguous, judicial construction is precluded. We enforce an unambiguous statute as written. Where ambiguity exists, however, this Court seeks to effectuate the Legislature's intent through a reasonable construction, considering the purpose of the statute and the object sought to be accomplished. [*Macomb Co Prosecutor*, *Id.*, at 158, citations omitted. See also, *Coldwater v Consumers Energy Co*, 500 Mich 158, 167; 895 NW2d 154 (2017).]

The Supreme Court in *Rovas* reaffirmed that an agency's interpretation of a statute it is charged to execute "is always entitled to the most respectful consideration and out not to be overruled without cogent reasons." *Rovas* 482 Mich at page 103, quoting *Boyer-Campbell Co v Fry*, 271 Mich 282; 260 NW 165 (1935). The *Rovas* court stated:

> [T]he construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. However, these are not binding on the courts, and [w]hile not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature.

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> This standard requires "respectful consideration" and "cogent reasons" for overruling an agency's interpretation. Furthermore, when the law is "doubtful or obscure," the agency's interpretation is an aid for discerning the Legislature's intent. However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue. [*Rovas*, 482 Mich at 103.]

The Court should not base its statutory review of the MPSC's authority based on the political or economic wisdom of the challenged statute, and should adhere to the following admonition of the Michigan Supreme Court expressed in *Straus v Governor*, 459 Mich 526, 531; 592 NW2d 53 (1999):

> We cannot serve as political overseers of the executive or legislative branches, weighing the costs and benefits of competing political ideas or the wisdom of the executive or legislative branches in taking certain actions, but may only determine whether some constitutional provision has been violated by an act (or omission) of the executive or legislative branch. As has been long recognized, when a court confronts a constitutional challenge it must determine the controversy stripped of all digressive and impertinently heated veneer lest the Court enter—unnecessarily this time—another thorny and trackless bramblebush of politics. [Quotation marks and citations omitted.]

See also *Hammel v Speaker of House of Representatives*, 297 Mich App 641, 646-647; 825 NW2d 616 (2012); *Consumers Power Co v Pub Serv Comm*, 460 Mich 148, 131; 596 NW2d 126 (1999).

The issues involved in the underlying MPSC Orders involve complex considerations of a key component of the energy legislation enacted in December 2016 expressly designed to ensure the long-term reliability of retail electric service for all customers in Michigan, and to ensure that all electric providers meet capacity obligations designed to achieve long-term reliability for all of the state's electric customers, no matter what type of electric provider is providing their electric supply. The primary goal of statutory interpretation is to ascertain and give effect to the Legislature's intent. *Casco Twp v Secretary of* State, 472 Mich 566, 571; 701 NW2d 102 (2005).

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The Supreme Court has previously granted leave to appeal challenges to the MPSC's implementation of the Michigan energy policy legislative rewrites which occurred in 2000 and 2008, respectively. See, *Detroit Edison Co v Pub Serv Comm*, 472 Mich 897; 695 NW2d 336 (2005) and *In re Application of International Transmission Company for Expedited Siting Certificate*, 828 NW2d 23 (Mem) (2013). It should do so again herein. The Court of Appeals provided no "cogent reason" to reverse the Commission, and was clearly erroneous in: (i) rendering part of Section 6w nugatory; (ii) ignoring the clearly stated requirements for all individual electric providers, including AESs; (iii) substituting its incorrect interpretation of MISO's resource adequacy requirements for that of MISO and the MPSC; and (iv) ignoring the express purpose of Act 341. The Supreme Court should grant leave to appeal the July 12 Opinion and find that an LCR is a component of all individual electric providers' capacity obligations under Act 341, including those of individual AESs.

B. The MPSC Has Statutory Authority to Implement an LCR for Individual Alternative Electric Providers as Part of Resource Adequacy Demonstration Requirements Pursuant to Section 6w

1. Section 6w Requires the MPSC to Implement an SRM, and Authorizes the MPSC to Determine the LCR Which Will Apply to Individual Electric Providers' Resource Adequacy Demonstrations, and to Determine the Format for Such Demonstrations

Section 6w: (i) mandates the MPSC implement an SRM to ensure the reliability of the electric grid in the state of Michigan; and (ii) calls for the MPSC, in conjunction with MISO or on the Commission's own accord, to determine the PRMR and LCR "in order to determine the capacity obligations" of the state's electric providers (see Section 6w(8)(c)) (emphasis added). Subsections 6w(8)(a) (for electric utilities) and 6w(8)(b) (for AESs, cooperative utilities, and municipal utilities) of the statute require each electric provider to demonstrate compliance with these capacity obligations. There would be no need or reason to determine the PRMR and LCR

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pursuant to Subsection 6w(8)(c) if those requirements were to have no effect on the sufficiency of individual AES resource adequacy demonstrations pursuant to Section 6w(8)(b). The Legislature's express authorization for the Commission to establish an LCR "in order to determine the capacity obligations" of the state's retail electric providers means that the Legislature empowered the Commission to apply the determined LCR to those individual electric providers' capacity demonstrations made pursuant to Section 6w(8). Pursuant to its regulatory authority to establish electric provider capacity obligations pursuant to the requirements of Section 6w(8) and ensure the reliability of retail electric service in Michigan, the MPSC is required to include a requirement of an LCR for all electric providers in Michigan as part of those capacity obligations. There would be no need to "determine" the LCR as part of capacity obligations if the MPSC is prohibited from applying it as part of each electric provider's capacity obligations, including those of an individual AES.

The Commission described the concept of an LCR and its importance to grid reliability in the June 15 Order, and articulated the statutory bases for its authority to implement an LCR on electric providers:

> In general, a "locational requirement" refers to a requirement that an individual LSE procure a certain percentage of its capacity (that is, a share of the LCR) from resources located within the [Local Resource Zone] that the LSE operates in. . . .
>
> The premise underlying Section 6w is to safeguard Michigan's long-term resource adequacy and ensure that all providers contribute to reliability in the state. In order to do that, the law requires the Commission to set forward capacity obligations for electric providers in the state. While the law recognizes the association between the MISO capacity construct and the new capacity obligations to be set by the Commission to ensure resource adequacy over the long term, this does not mean that the Commission's framework is bound by the minimum requirements of MISO. To the contrary, the Legislature recognized that there is no existing obligation on providers to show that over the long haul there is adequate electricity supply to meet customer demand. The

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Commission is required to establish capacity obligations for the period four years in the future, that electric providers will be required to meet. MISO has no requirements four years out—not even mandatory reporting of LSE's capacity resources over that timeframe. Moreover, Section 6w(8)(c) requires the Commission, "in order to determine the capacity obligations" to "request that the appropriate independent system operator provide technical assistance in determining the local clearing requirement and the planning reserve margin requirement [PRMR]." The definitions of LCR and PRMR in Section 6w(12) explicitly acknowledge the role of the Commission in setting the LCR and PRMR under subsection (8).

Further, the law clearly provides that "capacity obligations" includes a local clearing requirement. As defined in Section 6w(12)(d), "local clearing requirement" means "the amount of capacity resources required to be in the local resource zone in which the electric provider's demand is served to ensure reliability in that zone as determined by the appropriate independent system operator for the local resource zone in which the electric provider's demand is served and by the commission under subsection (8)." As noted above, in requesting assistance from MISO in determining capacity obligations, the Commission is tasked with requesting technical assistance in determining this local clearing requirement.

Section 6w(8) also requires individual electric providers to demonstrate to the Commission that they can meet capacity obligations. The Commission is directed to require each electric provider to demonstrate that it "owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission as applicable" four years into the future. These capacity obligations necessarily include a local clearing requirement.

It is clear that the statute requires the Commission to create capacity obligations, that these capacity obligations include a locational requirement, and that the Commission, in setting locational capacity obligations, is allowed to require a demonstration by individual electric providers that the resources that they use to meet their capacity obligations meet a local clearing requirement. The Commission acknowledges the inter-relatedness of the MISO and Section 6w capacity demonstration processes, but also points out that these are distinct activities. These activities should be harmonized to the extent practicable, but the fundamental responsibility of the Commission is to meet Michigan's statutory obligations. [June 15 Order, pages 8-10.]

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Section 6w's language illustrates the legislative intent to ensure that AES resource adequacy demonstration standards include meeting a Commission-established level of PRMR and LCR:

> (c) In order to determine the capacity obligations, request that the appropriate independent system operator provide technical assistance in determining the local clearing requirement and planning reserve margin requirement. If the appropriate independent system operator 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.
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> (d) In order to determine if resources put forward will meet such federal reliability requirements, request technical assistance from the appropriate independent system operator to assist with assessing resources to ensure that any resources will meet federal reliability requirements. If the technical assistance is rendered, the commission shall accept the appropriate independent system operator's determinations unless it finds adequate justification to deviate from the determinations related to the qualification of resources. If the appropriate independent system operator declines, or has not made a determination by February 28, the commission shall make those determinations. [MCL 460.6w(8)(c) and (d), emphasis added.]

If the resource adequacy requirements under Section 6w did not include PRMR and LCR, there would be no logical reason for the MPSC or MISO to determine PRMR and an LCR as required by Subsections 6w(8)(c) and (d) of Act 341. And there would be no need to define LCR in Subsection 6w(12)(d) and PRMR in Subsection 6w(12)(e). No party has challenged the MPSC's statutory authority to include a PRMR as part of individual AESs' capacity obligations, even though Act 341's direction for the Commission to determine the PRMR is the same as its direction for the MPSC to establish LCR as part of capacity obligations. Adopting the Court of Appeals' conclusion that the Commission lacks authority to require an LCR as part of an AES's

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resource adequacy demonstration renders Subsections 6w(8)(c), (d), and (12)(d) of Act 341 nugatory and irrelevant. Such a result goes against established principles of statutory construction as well as the express purpose of an SRM—to ensure state electric grid reliability.

Under well-established rules of statutory construction, Section 6w, and in particular the provisions of Subsection 6w(8) providing for the SRM, support the MPSC's conclusion that the SRM's resource adequacy requirements include PRMR and LCR. Statutory construction should give effect to every clause and word of a statute. Every word has meaning and, as far as possible, the Court must give effect to every sentence, phrase, clause, and word, and must avoid a construction that would render any part of the statute surplusage or nugatory. *Pohutski v City of Allen Park*, 465 Mich 675, 683–684; 641 NW2d 219 (2002). It is also true that the most basic requirement of legislative intent requires words to be read in light of the general purpose sought to be accomplished by the statute. *Gen Motors Corp v Erves*, 399 Mich 241, 254–55; 249 NW2d 41 (1976), citing *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441; 208 NW2d 469 (1973) and *Melia v Employment Security Commission*, 346 Mich 544; 78 NW2d 273 (1956). In addition, the words in a statute should not be construed in a void, but should be read together to harmonize the meaning in order to give effect to the Act as a whole. *Gen Motors Corp v Erves, supra*, citing *Dussia v Monroe County Employees Retirement System*, 386 Mich 244; 191 NW2d 307 (1971); *Fowler v Bd of Registration in Chiropody*, 374 Mich 254; 132 NW2d 82 (1965); *Presque Isle Twp School Dist v Presque Isle County Bd of Education*, 364 Mich 605; 111 NW2d 853 (1961); and *In re Estate of Chamberlain*, 298 Mich 278; 299 NW 82 (1941). Subsections 6w(8)(c) and (d) of Act 341 require the determination of PRMR and LCR <u>for the purpose of establishing electric providers' capacity obligations</u>. This statutory language is controlling. *Rovas*, 482 Mich at 106. These requirements are consistent with, and provide

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guidance on how to achieve, the Legislature's expressly stated goal of improving and ensuring the reliability of the electric grid in Michigan. The Court's primary obligation is to discern and give effect to this legislative intent. *Coldwater, 500 Mich* at 167.

In holding that the MPSC cannot impose an LCR on individual AESs, the July 12 Opinion stated, "a review of the statute reveals that no provision of MCL 460.6w clearly and unmistakably authorizes the MPSC to impose a local clearing requirement upon individual alternative electric providers." *In re Reliability,* 325 Mich App at 224. The Court of Appeals acknowledged that "section 6w(8)(b) provides that each electric provider must demonstrate that it owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or the MPSC as applicable," and that Section 6w(8)(c) "directs that '[i]n order to determine the capacity obligations,' the MPSC must 'set any required local clearing requirement and planning reserve margin requirement, consistent with federal reliability requirements,' and seek technical assistance from MISO in doing so." (Emphasis added.) Yet the Court of Appeals erroneously concluded that "although section 6w(8)(c) thus requires the MPSC to determine the local clearing requirement to determine capacity obligations, it does not specifically authorize the MPSC to impose the local clearing requirement upon alternative electric suppliers individually." *Id*. at pages 224-225; emphasis added. Section 6w(8) directly contradicts the Court of Appeals' conclusions.

The Court of Appeals reasoned that although the MPSC may establish an LCR "in order to determine capacity obligations" (under Section 6w(8)(c)) and each AES must demonstrate to the MPSC, on a four-year forward basis that the AES "owns or has contractual rights to sufficient capacity to meet its capacity obligations" as set by the MPSC (pursuant to Section 6w(8)(b)), the MPSC does not have authority to implement the LCR component of capacity

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obligations on individual AESs. This reasoning contradicts the text of Section 6w and the entire purpose of that section - to establish new capacity obligations for individual electric providers, which by statutory definition include AESs. Act 341 makes an LCR a component of the capacity obligations of all electric providers, including those of AESs. There would be no need for the MPSC to be authorized to determine the LCR component of electric providers' capacity obligations if the MPSC cannot implement that obligation as part of individual AESs' mandated capacity demonstrations pursuant to Section 6w(8). The Court of Appeals' finding that Section 6w does not "clearly and unmistakably" authorize the Commission to "impose" an LCR as a component of individual AESs' "capacity obligations" nullifies the actual text of the statute, and is clearly erroneous. The "capacity obligations" as that term is used throughout Section 6w, are designed to be a requirement applied to all individual electric providers, which by express definition (see Section 6w(12)(c)(iv)) include "an alternative electric supplier." The Legislature provided for individual electric providers, including AESs, to be required to demonstrate compliance with capacity obligations established by the MPSC. The July 12 Opinion rendered nugatory this requirement, with no cogent reason for doing so.

Although statutes which confer authority to administrative agencies are to be strictly construed, "due regard must always be had to legislative intent, and power necessary to a full effectuation of authority expressly granted will be recognized as properly appertaining to the agency." *In re Quality of Service Standards for Regulated Telecommunication Services*, 204 Mich App 607, 613; 516 NW2d 142 (1994), emphasis added. See also *Ranke v Corporation & Securities Comm*, 317 Mich 304; 26 NW2d 898 (1947); *Coffman v State Bd of Examiners in Optometry*, 331 Mich 582, 590; 50 NW2d 322 (1951) (an administrative agency's "'powers are limited by the statutes creating them to those conferred expressly or by necessary or fair

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implication.'"); *Midland Cogeneration Venture Limited Partnership v Pub Serv Comm*, 199 Mich App 286; 501 NW2d 573 (1993) (holding that the MPSC could require nonregulated affiliates of a regulated utility to provide information when reasonably necessary to the performance of the Commission's duties to regulate the utility). Under the Court of Appeals' reasoning, the MPSC would not be permitted to "impose" any requirement it is authorized to determine and implement unless language specifically directing it to "impose" such statutorily authorized requirements is in all of the authorizing statutes. Such a result would render much of the entire body of statutes setting forth the MPSC's regulatory authority null and void. The Supreme Court should grant leave to appeal to remedy the clearly erroneous decision of the Court of Appeals.

Section 6w(8)'s entire purpose is to authorize the Commission to determine and require compliance with capacity obligations by each electric provider serving retail customers in Michigan, including AESs. That statute expressly authorizes and directs the MPSC to determine the LCR to apply to electric providers' capacity obligations. The Court of Appeals, holding that the Commission may not include the LCR in individual AESs' capacity obligations, illogically constrains the MPSC from effectuating the plain language of Section 6w(8). The MPSC's interpretation of Section 6w(8) – which should not be reversed without "cogent reasons" - logically reflects the conclusion that the Legislature intended the Commission to implement all elements of the capacity obligations it is authorized to determine under that section, and to impose them on individual alternative electric providers as expressly contemplated by that statute. The Commission's conclusion was not "interpretive gymnastics" as characterized by the Court of Appeals, but a reasonable reading of the text and legislative purpose of Act 341, and a practical recognition that if it lacks authority to impose an LCR, the authority to determine it as

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part of electric providers' capacity obligations would be rendered irrelevant, pointless, and nugatory.

The Commission's authority to implement an LCR on individual alternative electric providers pursuant to Section 6w is readily distinguishable from the case of *Consumers Power Co v Pub Serv Comm*, 460 Mich 148; 596 NW2d 126 (1999) and other Michigan Supreme Court cases which have held that the MPSC exceeded its statutory authority. In the *Consumers Power* case, the Supreme Court held that the MPSC lacked statutory authority to require public utilities to transmit electricity from a third-party power provider to retail customers pursuant to an experimental retail wheeling program. When the Supreme Court decided the *Consumers Power* case, no statute authorized such retail open access in Michigan. (The Legislature later enacted statutes authorizing retail open access in Michigan.) In contrast, herein, Section 6w unmistakably authorizes the MPSC to determine an LCR to be included in electric providers' capacity obligations, and expressly requires individual electric providers, including AESs, to demonstrate compliance with those capacity obligations in filings made with the Commission. The Court of Appeals' conclusion to the contrary is illogical and should be rejected.

The seminal case addressing the requirement for the MPSC to have statutory authority to act, *Union Carbide v Pub Serv Comm*, 431 Mich 135; 428 NW2d 322 (1988), also involved the MPSC's authority to direct a public utility to undertake management business decisions. The *Union Carbide* Court held that the MPSC did not have statutory authority to order Consumers Energy to cease operations of the D.E. Karn generating plant which were considered noneconomic, or to order Consumers Energy to cease contracting with a counterparty. *Id.* at page 162. Similarly, in *Huron Portland Cement Co v Pub Serv* Comm, 351 Mich 255; 88 NW2d 492 (1958), the Supreme Court held that the MPSC did not have authority to order a utility to

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provide direct electric service from a transmission line to an industrial customer served by another local utility where the former utility did not offer service in the area and had no certificate of public convenience and necessity to serve in that area. See also, *Ford Motor Co v Pub Serv Comm*, 221 Mich App 370, 389, 562 NW2d 224 (1997), where the Court of Appeals held that the MPSC did not have authority to modify a demand-side management program which had been proposed by the Detroit Edison Company, but did have authority to determine the costs for such program which should be included in that utility's rates.

Unlike the Supreme Court cases which have held the MPSC lacks authority to make management decisions on the part of a regulated utility, there are no cases decided by the Michigan Supreme Court or the Court of Appeals (other than the July 12 Opinion) which hold that the MPSC cannot "impose" a requirement that it is required by statute to determine. The July 12 Opinion, if allowed to stand, would allow AESs to evade a reliability requirement which the Legislature required to be included in the capacity obligations to apply to them. The Supreme Court should reject such a clearly erroneous result.

There would be no reason for the Commission to determine an LCR if it is prohibited from including it as a component of electric providers' capacity obligations under Section 6w(8). The Court of Appeals' conclusion that the MPSC is authorized to determine LCR, but not implement it as part of individual AESs' capacity obligations, which are the very subject of Section 6w(8), is not logical and inconsistent with the text and the purpose of the statute. The July 12 Opinion would eliminate the Commission's ability to implement a key component of ensuring long-term reliability for the state's electric grid and will threaten reliability of electric supply for the entire state. The Court of Appeals' holding handcuffs the MPSC's ability to implement a key component of Act 341. It could also be construed to prohibit the MPSC from

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implementing many other aspects of its regulatory responsibilities, including, but not limited to, other elements of the capacity obligations it determines under Section 6w. The Supreme Court should grant leave to appeal to reverse these negative outcomes of the July 12 Opinion.

2. The Legislative Structure of Section 6w, Which Expressly Provided for the SRM to Act as a "Backstop" to a PSCM, Demonstrates the Statutory Authorization for the Commission to Implement an LCR as Part of Alternative Electric Providers' Capacity Obligations

The layered structure of Section 6w further demonstrates the Legislature's provision for an LCR to be a component of electric providers' capacity obligations and resource adequacy demonstrations. The structure is set forth as follows:

1. Section 6w(1) provides that if the appropriate independent system operator received approval from FERC to implement a resource adequacy tariff that provides for a capacity forward auction, and includes the option for Michigan to implement a PSCM for capacity, then the MPSC was mandated to determine whether the PSCM "would be more cost-effective, reasonable, and prudent than the capacity forward auction" for Michigan in meeting the LCR and the PRMR before the Commission could authorize the PSCM to be implemented in one or more utility service territories;

2. Section 6w(2) provides that if the appropriate independent system operator received approval from FERC to implement a resource adequacy tariff that does provide for a capacity forward auction, but does not include the option for Michigan to implement a PSCM for capacity, then the MPSC was mandated to determine whether an SRM under Section 6w(8) "would be more cost-effective, reasonable, and prudent than the capacity forward auction" for Michigan in meeting the LCR and the PRMR before the Commission could authorize the PSCM to be implemented in one or more utility service territories; and

3. Section 6w(2) further provides that if FERC has not approved a resource adequacy tariff by September 30, 2017 that includes a capacity forward auction or a PSCM, then the Commission must implement an SRM pursuant to Section 6w(8).

Because FERC rejected MISO's resource capacity tariff, Section 6w requires the MPSC to implement an SRM pursuant to Section 6w(2). The SRM constitutes the Legislature's provision for a "default" if FERC did not approve a capacity forward auction or a PSCM for

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Michigan. If FERC had approved a forward capacity auction, the MPSC would have had to compare that auction to either the PSCM or the SRM to determine whether the referenced mechanisms were "more cost-effective, reasonable, and prudent than the use of the capacity forward auction for this state in meeting the **local clearing requirement** and the planning reserve margin requirement." MCL 460.6w(2), emphasis added. Although the Legislature provided for consideration of a FERC-approved forward capacity auction, it provided that such an auction would have had to be evaluated in comparison to either the PSCM or the SRM for purposes of meeting the LCR and PRMR. The text of Section 6w shows the legislative intent for the SRM to be the state substitute for a FERC-approved PSCM if the PSCM was not approved, and the SRM was structured to mirror the PSCM proposal pending at FERC when Act 341 was enacted. The Legislature's actions were an appropriate exercise of state rights and cooperative federalism.

The previously proposed MISO CRS tariff's PSCM would have required electric providers to (i) demonstrate forward capacity resources sufficient to meet the electric provider's load-ratio share of the applicable Zone's PRMR and LCR; or (ii) have their retail customers become subject to a state capacity charge for the load greater than the provider's demonstrated capacity resources. See MISO's November 1, 2016 CRS filing in FERC Docket No. ER17-284-000, page 389, attached to this Brief as Appendix H, page 131a. The SRM, which is expressly intended to be the state substitute for the PSCM in the event FERC did not approve the PSCM, is structured similarly. This structure provides more textual support for the express authorization for the MPSC to determine and apply an LCR as one component of individual electric providers' capacity obligations under Act 341.

The July 12 Opinion failed to provide a "cogent reason" for blocking the Legislature's

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provision for the Commission to implement an LCR on all electric providers. The Supreme Court should grant leave to appeal to address the substantial issue of implementing the legislative act, to address the issue of significant public interest regarding a state agency, to address the legal principle of major significance to the state's jurisprudence, and to correct a clearly erroneous decision which will cause material harm to the entire state.

3. Section 6w(8)'s Provision Which Allows Cooperative and Municipal Utilities to Aggregate Their Capacity Resources to Meet the LCR Supports The Commission's Authority to Apply an LCR to Other Individual Electric Providers' Capacity Obligations, Including AESs

Section 6w(8)(b) expressly provides municipal and cooperative electric utilities an allowance to aggregate their capacity resources to meet their capacity obligations, including the LCR:

> One or more municipally owned electric utilities may aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision. One or more cooperative electric utilities may aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision. A cooperative or municipally owned electric utility may meet the requirements of this subdivision through any resource, including a resource acquired through a capacity forward auction, that the appropriate independent system operator allows to qualify for meeting the local clearing requirement. [MCL 460.6w(8)(b).]

This language supports the Commission's statutory authority to include an LCR for all individual electric providers' capacity obligations under Act 341, including AESs. The Commission appropriately found that the referenced allowance for cooperative and municipal utilities logically supports the proposition that Act 341 authorizes it to impose an LCR on all electric providers:

> This provision allowing municipally-owned and cooperative electric utilities to aggregate their resources in order [to] meet the

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> requirements of Section 6w(8) clearly implies that these utilities would otherwise be required to meet the requirements on an individual basis. The Commission finds that it would be unreasonable to interpret the statute such that this obligation for individual compliance "for meeting the local clearing requirement" is placed solely on municipally-owned and cooperative utilities under Section 6w. The Commission can find nothing in the law, and no rational basis, to indicate an intent to place a local clearing requirement only on non-profit utilities. Instead, the law is more logically understood to require that all individual utilities be treated similarly in terms of requirements, and that the aggregation option was intended to assist non-profit utilities (many of which are small) to comply more easily. Thus, this language further supports the Commission's interpretation that a locational requirement is authorized and may be applied to individual electric providers. [September 15 Order, page 38 (see Appendix C, page 74a.)]

The LCR component of capacity obligations referenced in Section 6w(8)(b) with respect to the aggregation of capacity resources by cooperative and municipal utilities is grounded in the same provisions of Section 6w which also apply to individual AESs. There would have been no reason to provide allowance for aggregation of capacity resources to meet LCR if the Commission had no authority to implement LCR on these electric providers in the first place. The quoted provision of Act 341's Section 6w(8)(b) is an express accommodation which makes compliance with a generally-applicable LCR easier to achieve for cooperative and municipal utilities. That accommodation does not diminish the applicability of an LCR for all electric providers, including individual AESs, in the first place. The allowance for aggregation of capacity resources by cooperative and municipal utilities to meet capacity obligations, including an LCR, supports the Commission's finding that Act 341 authorizes it to implement an LCR as part of capacity obligations for all electric providers, including individual AESs.

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4. Act 341's Requirements for Individual Incumbent Utilities to Meet an LCR Determined by the MPSC Supports the Commission's Conclusion That It Has Authority to Implement an LCR for All Individual Electric Providers, Including AESs

Section 6w(8)(a) requires electric utilities whose rates are regulated by the Commission to annually demonstrate to the Commission, on a four-year forward basis, that they own or have contractual rights to sufficient capacity to meet their capacity obligations as set by MISO or the MPSC, as applicable. This reliability requirement for electric utilities such as Consumers Energy is analogous to the reliability requirement for AESs, cooperative electric utilities, and municipal utilities set forth in Section 6w(8)(b). The Commission is authorized to determine the "capacity obligations" which apply to all of these categories of electric providers pursuant to Section 6w(8)(c), which includes an LCR. In addition to making annual four-year forward demonstrations of their ability to meet the capacity obligations established by the Commission pursuant to Section 6w(8), Section 6t(3) of Act 341 also requires rate-regulated utilities such as Consumers Energy to include 5-year, 10-year, and 15-year projections of their ability to meet, among other requirements, their customer load obligations, "including meeting planning reserve margin and local clearing requirements determined by the Commission." MCL 460.6t(3).

Thus, Act 341 expressly authorizes the MPSC to determine capacity obligations, including an LCR, for all electric providers providing retail service in the state. It requires all electric providers, which are statutorily defined to include regulated electric utilities such as Consumers Energy, cooperative utilities, municipal utilities, and AESs, to make specified forward demonstrations to the Commission of their ability to meet their individual capacity obligations as the Commission determines. The textual foundation for the Commission's authority to determine and implement an LCR as one component of all individual electric providers' capacity obligations is the same (see MCL 460.6w(8)(c) and MCL 460.6w(12)(d)).

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The Court of Appeals' conclusion that AESs are exempt from a capacity obligation which applies to all other electric providers is unsupported by the text of Act 341 and should be rejected. The July 12 Opinion, if allowed to stand, would mean that AESs may avoid a key component of capacity obligations intended to apply to all electric providers in the state. The July 12 Opinion allows AESs to contract to sell electric power to retail customers without contributing to a key component of capacity obligations which the Legislature and the Commission have determined is necessary to ensure grid reliability. This result disregards the text of Section 6w and intent of Act 341. It will cause material harm to the entire state. The reliability of electric service for all electric customers will be jeopardized if AESs can evade a key component of grid reliability. The Supreme Court should grant leave to appeal to remedy this material injustice and harm to the state of Michigan.

5. Act 341's Authorization for the MPSC to Implement an LCR as Part of Individual Electric Providers' Capacity Obligations Is Consistent with MISO Requirements

In the July 12 Opinion, the Court of Appeals found that an MPSC imposition of an LCR as part of individual AESs' capacity obligations under Section 6w would be inconsistent with MISO's requirements. 325 Mich App at pages 225-226. The Court of Appeals reasoned that because an AES can avoid demonstrating a proportionate share of the applicable Zone's LCR (by participating in the annual residual auction--which does not apply for capacity needs beyond the annual Planning Year--and risking an economic penalty if the Zone as a whole does not meet the LCR), the MPSC is therefore prohibited from establishing "any local clearing requirements beyond what MISO has established, and instead impose upon the MPSC a continuing obligation to observe MISO's general practice of imposing local clearing requirements on a zonal, not individual, basis." *Id.* at page 226. The Court supported this reasoning by noting that Section 6w(6) provides that a charge for capacity service shall not be assessed against an AES who

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demonstrates that "it can meet its capacity obligation through owned or contractual rights to any resource that the appropriate system operator (MISO) allows to meet the capacity obligation of the electric provider." As explained below, the Court's conclusions are clearly erroneous, because the MPSC's implementation of an LCR as one part of AESs' capacity obligations pursuant to Section 6w is consistent with, and complementary to, MISO's resource adequacy requirements.

The prohibition set forth in Section 6w(6) against the MPSC imposing a charge for capacity service if an AES "can meet its capacity obligations through owned or contractual rights to any resource that the appropriate independent system operator [defined as MISO in MCL 460.6w(12)(a)] allows to meet the capacity obligation of the electric provider" does not prohibit the MPSC from implementing an LCR as one part of AESs' capacity obligations under the SRM. The term "capacity obligation" is also used in Section 6w(8), which expressly authorizes the MPSC to determine LCR as a part of AESs' "capacity obligations." As explained above, under the SRM, Section 6w(8) requires AESs to demonstrate owned or contracted capacity resources sufficient to meet their "capacity obligations" four years in advance of the Planning Year in which they will serve customers. There is no means to satisfy the provider's "capacity obligation," as that term is used in Section 6w, under the existing MISO resource adequacy construct. When the Legislature passed Act 341, there existed the MISO CRS tariff proposal, which included a MISO "capacity forward auction" which could have been used by suppliers to obtain capacity resources beyond the annual prompt Planning Year. Section 6w(12)(b) defines "capacity forward auction" as "an auction-based resource adequacy construct and the associated tariffs developed by the appropriate independent system operator for at least a portion of this state for 3 years forward or more." As noted above, FERC rejected the MISO CRS tariff

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proposal, and there is no capacity forward auction, as defined by Section 6w(12)(b), and there is also no existing MISO resource adequacy construct beyond the current annual Planning Year MISO requirements. In short, there is no way, under current MISO rules, to satisfy a forward capacity obligation, which is what Section 6w requires. Electric providers cannot meet the state's forward capacity obligations required by Section 6w using the existing MISO resource adequacy construct, because that MISO construct has no mechanism to satisfy resource adequacy requirements for any period beyond the current Planning Year. If MISO obtained approval for a capacity forward auction in the future, that auction might satisfy the requirements of Section 6w. But, that set of facts does not currently exist.

Had the Legislature intended to allow AESs to rely on the existing MISO one-year resource construct to demonstrate four-year forward capacity obligations, there would have been no need to implement Section 6w to ensure the long-term reliability of retail electric capacity service in Michigan. The existing MISO resource adequacy construct is the same as that existed before the enactment of Act 341. The Court of Appeals' conclusion that an AES may satisfy its long-term capacity obligation by relying on the MISO one-year prompt year resource adequacy construct incorrectly ignores the additional four-year forward capacity obligation required by Section 6w. Act 341's authorization for the MPSC to implement an LCR as a component of AESs' four-year forward capacity obligations is consistent with, and complementary to, MISO's short-term annual resource adequacy construct. The Court of Appeals' conclusion that the MPSC's implementation of LCR as a component of state long-term capacity obligations would contradict MISO's rules and was a clearly erroneous misinterpretation of MISO's resource adequacy construct. Section 6w(6) prohibits the MPSC from assessing any capacity charge in a manner that "conflicts with a federal resource adequacy tariff, when applicable." (Emphasis

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added.) The Court of Appeals' conclusion about the MPSC's authority erroneously failed to recognize that no federal resource adequacy tariff is applicable to electric providers' four-year forward capacity obligations.

Another reading of Section 6w(6) that is in harmony with the entirety of Section 6w is that Section 6w(6) prohibits the assessment of a capacity charge where the AESs' capacity resources are consistent with the resources that MISO permits to satisfy the Zone's LCR, and which LSEs may use to meet their provider-specific portion of the Zone's LCR (e.g., providers who use a FRAP rather than a PRA for MISO's Planning Year requirements). The MPSC addressed what resources can be counted toward meeting the LCR as a component of the state's capacity obligations in its June 28, 2018 Order in Case No. U-18444. The MPSC determined that "all resources that MISO currently counts toward meeting MISO's LCR, count towards meeting Michigan's forward locational requirements," noting that "this is consistent with federal reliability standards as required by Section 6w(8)(c)." MPSC Case No. U-18444, June 28, 2018 Order, pages 125-126; Appendix L, pages 301a-302a. The MPSC further determined that it "agrees to adopt any changes in eligibility criteria for a resource to count toward the MISO zonal LCR unless the Commission determines otherwise in a future contested case." *Id*. at page 126.

MISO itself has recognized that the MPSC's implementation of capacity obligations under Section 6w is consistent with, and complementary to, MISO's resource adequacy construct. The Commission articulated its authority to implement an LCR as part of individual electric providers' capacity obligations under Section 6w in the June 15 Order. MISO then filed Comments and Reply Comments in which it noted the complementary resource adequacy constructs of its rules with Act 341. In its August 15 Comments, MISO stated as follows:

> MISO supports the implementation of Michigan's energy legislation that passed in late 2016, and applauds the State of

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> Michigan, its policy makers, the Michigan PSC, and the Michigan Agency for Energy for taking the initiative to ensure long-term reliability objectives are met through resource adequacy requirements. Many of these requirements, including provisions requiring each electric utility or alternative electric supplier to demonstrate that it has sufficient capacity, are similar to those contained in MISO's filing of its Competitive Retail Solution. These provisions will help the State of Michigan ensure that resource adequacy needs are met across various time horizons. [See Appendix E, pages 113a through 114a, emphasis added.]

MISO's strong support for the MPSC, stated publicly in the docket, after the Commission had stated its authority to implement an LCR as part of individual electric providers' capacity obligations, refutes the Court of Appeals' finding that the Commission's authority would be inconsistent with MISO's rules. The Court of Appeals did not mention or address MISO's position in its July 12 Opinion.

The MPSC has expertise with the MISO tariff, and correctly concluded that its implementation of an LCR on individual electric providers is consistent with, and complementary to, the MISO tariff and practices. The Court of Appeals' conclusion regarding the MISO tariff is clearly erroneous, and unsupported by the findings of the Michigan administrative agency charged with understanding industry practice under that tariff, as well as MISO itself.

MISO was an active participant in these proceedings, and was therefore well-aware of the Commission's June 15, 2017 finding of its authority to implement an LCR as part of individual electric providers' capacity obligations. MISO strongly supported the actions of the Legislature and the Commission to implement the SRM to help ensure long-term reliability of the state's electric grid. The Court of Appeals' finding of an inconsistency with MISO's rules is contradicted by MISO's own statements.

The importance of a locational requirement for ensuring electric grid reliability has not

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diminished since the issuance of the July 12 Opinion. MISO's June 2019 regional resource assessment stated that while the MISO region has sufficient generation resources to meet the PRMR for 2020, "continued action will be needed to ensure sufficient resources are available going forward," with risk present in Zones 4, 6, and 7. See 2019 OMS MISO Survey Results at https://cdn.misoenergy.org/20190614%20OMS%20MISO%202019%20Executive%20Summary354508.pdf and attached as Appendix M, pages 315a through 328a. Page 321a of Appendix M shows Zones 2 and 7 (both in Michigan) as projected to barely meet their respective LCRs for 2020 and projected for 2024. MISO's report indicates that meeting those requirements hinges on potential capacity, and behind-the-meter customer actions involving demand response and customer generation. In contrast, other Zones in MISO's footprint are projected to well-exceed their respective zonal LCRs. MISO does not plan or impose resource adequacy requirements beyond the current Planning Year. To carry out the Legislature's requirement for the MPSC to ensure longer-term resource adequacy for Michigan, the MPSC must be allowed to determine *and* implement the state's long-term capacity obligations under Section 6w.

6. The July 12 Opinion's Analysis Is Inconsistent with Another Court of Appeals Panel's Analysis of the MPSC's Authority to Implement Section 6w

The July 12 Opinion's analysis is at odds with the analysis of the MPSC's authority to implement Section 6w as articulated by another panel of the Court of Appeals in the *Cloverland* case in an opinion issued on July 23, 2019 and designated for publication.[18] See Appendix D, pages 99a through 110a. In the *Cloverland* case, the Court of Appeals held the MPSC has authority under MCL 460.6w to set an SRM capacity charge for full-service customers of a member-regulated electric cooperative, despite Public Act 167 of 2008's ("Act 167") generally

[18] The *Cloverland* case was decided by Court of Appeals Judges O'Brien, P.J., Fort Hood and Cameron.

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stated authority for member-governed electric cooperatives to set their own rates. The *Cloverland* court found that Section 6w(3) authorizes the MPSC to set an SRM charge for the cooperative's full-service customers, as well as for AES customers in the cooperative's service territory who become subject to the charge. The *Cloverland* court found that "[a]ny other interpretation would render nugatory the statutory language requiring the PSC to use a specific formula and to 'ensure that the resulting capacity charge does not differ for full service load and alternative electric supplier load[.]'" *Cloverland*, Slip Opinion at page 10; see Appendix D, page 108a. The *Cloverland* court upheld the MPSC's conclusion that the cooperative utility's full-service customers must pay the SRM charge despite the AES serving a single customer in the cooperative utility's service territory having satisfactorily met its capacity demonstration requirements, finding that MCL 460.6w(3) requires the Commission to impose an SRM charge each year, with no triggering mechanism that must be met before an SRM charge is imposed on full-service customers. *Id.* at page 11.

The *Cloverland* court relied on the language of Section 6w to effect its purpose harmoniously with Act 167. Section 6w(3) requires the Commission to determine, annually, a capacity charge to apply to AES customers who are provided capacity service by a utility when their AES fails to demonstrate compliance with the Section 6w capacity obligations. Section 6w(3) also provides that the MPSC must "ensure that the resulting capacity charge does not differ for full service load and alternative electric supplier load." MCL 460.6w(3). The *Cloverland* court found that the MPSC may determine and implement the capacity charge for the cooperative utility's full-service load to give effect to the requirement that the capacity charge for full-service and for AES load "does not differ." The statutory language granting the MPSC authority to implement the LCR component of capacity obligations on individual AESs is even

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more direct and clear than the language at issue in the *Cloverland* case (regarding the MPSC's authority to set capacity charges for member-regulated electric cooperatives).

7. Act 341's Modification to Language of Senate Bill 437 (S-7) of 2016 Regarding LCR Does Not Diminish the Commission's Statutory Authority to Implement an LCR on Electric Providers' Capacity Demonstrations Pursuant to Section 6w

The Court of Appeals supported its erroneous statutory interpretation by citing legislative history indicating that Act 341 modified a prior legislative proposal which would have required a specific LCR percentage for electric providers to meet as part of their capacity obligations. 325 Mich App at 228-232. The Court of Appeals noted that Senate Bill 437 (S-7), which would have required alternative electric providers to meet 90% of their proportional share of the Zone's LCR, was modified by House Substitute 4 (H-4) by removing the mandatory specified LCR percentage for electric providers. This change, however, did not eliminate the express requirement for the MPSC to implement an LCR as part of individual electric providers' (including AESs) capacity obligations. The actual language of enacted Act 341 still authorizes the Commission to determine and implement an LCR as part of all individual electric providers' capacity obligations. That the Legislature decided to modify a prescriptive LCR percentage in favor of authorizing the MPSC to, in consultation with MISO, determine an appropriate LCR percentage to apply for electric providers, does not diminish the MPSC's authority to perform the latter statutorily authorized function.[19] The Commission appropriately noted this in the

[19] In a June 28, 2018 Order issued in Case No. U-18444, the Commission approved an LCR to apply on an extremely incremental, gradual basis. The LCR which would apply for AESs under the Case No. U-18444 approach would be 2.7% of their load-ratio shares of the MISO Zone 7 LCR for Planning Year 2022, and 5.3% for Planning Year 2023, compared to the 90% load ratio share which would have applied for individual AESs under the prescriptive formula which was specified in Senate Bill 437 (S-7). See the Staff Memorandum filed on August 1, 2018 in Case No. U-18444 (https://mi-psc.force.com/s/filing/a00t0000007Bl9BAAS/u184440142), attached as Appendix N, pages 330a through 347a (see pages 330a through 333a).

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September 15 Order, stating:

> The Commission acknowledges that previous versions of the legislation included a detailed methodology relative to determining the share of a forward locational requirement each provider would have to demonstrate. What changed . . . is not that a locational requirement went away entirely, but that an explicit methodology was removed and replaced with provisions that leave decisions on the methodology of how to establish the locational requirement up to the Commission . . . [T]he statute gives the Commission flexibility to determine how best to establish a forward locational requirement and the resources that qualify to meet that requirement. [September 15 Order, page 36; Appendix C, page 72a.]

The Court of Appeals' reliance on the change from House Substitute 4 (H-4) to the language of Act 341 violates well-established rules of statutory construction which govern the Court's consideration of this case. A fundamental principle of statutory construction is that an unambiguous statute leaves no room for judicial construction or interpretation. *In re Certified Question from US Court of Appeals for Sixth Circuit*, 468 Mich 109, 113; 659 NW2d 597 (2003). When the Legislature has conveyed its intent in the words of a statute, the Court's role is to apply its terms. *Id.*, citing *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995). When the Legislature's language is clear, the Courts are bound to follow its plain meaning. *People v Gardner*, 482 Mich 41, 58-60; 753 NW2d 78 (2008). It is inappropriate to substitute suggestions of what allegedly constituted the Legislature's "true intent" for applying the law the Legislature enacted. *Mayor of City of Lansing v Pub Serv Comm*, 470 Mich 154, 164; 680 NW2d 840, (2004). Section 6w authorizes the Commission to determine an LCR as part of individual electric providers' capacity obligations, including those of AESs. No further inquiry into legislative intent is necessary or appropriate. In any event, the text of Act 341, and the express purpose of the SRM (to ensure the long-term reliability of the electric grid in

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Michigan), establish that the Legislature intended to authorize the Commission to determine, and to implement, an LCR as part of individual AESs' capacity obligations under the SRM.

IV. REQUEST FOR RELIEF

For these reasons, Consumers Energy Company requests the Michigan Supreme Court to grant leave to appeal the Court of Appeals' July 12, 2018 Opinion in consolidated Docket Nos. 340600 and 340607, reverse that decision, and find that the Michigan Public Service Commission has authority to determine and implement a local clearing requirement as part of individual alternative electric providers' capacity obligations pursuant to Section 6w of Public Act 341 of 2016.

Respectfully submitted,

CONSUMERS ENERGY COMPANY

Dated: August 2, 2019

By: Kelly M. Hall Digitally signed by Kelly M. Hall Date: 2019.08.02 16:41:04 -04'00'

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