STATE OF MICHIGAN
IN THE SUPREME COURT

In re RELIABILITY PLANS OF ELECTRIC UTILITIES FOR 2017-2021.

CONSUMERS ENERGY COMPANY, Appellant, v	Supreme Court No. 158305 Court of Appeals No. 340600
ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY, Appellee.	MPSC Case No. U-18197
CONSUMERS ENERGY COMPANY, Appellant, v	Supreme Court No. 158306 Court of Appeals No. 340607
ENERGY MICHIGAN, INC., Appellee.	MPSC Case No. U-18197

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY'S RESPONSE TO THE SUPPLEMENTAL BRIEF OF CONSUMERS ENERGY COMPANY

CLARK HILL PLC
Robert A. W. Strong (P27724)
Michael J. Pattwell (P72419)
Attorneys for Appellant Association of Businesses Advocating Tariff Equity
212 East Cesar E. Chavez Avenue
Lansing, MI 48906
(517) 318-3100
rstrong@clarkhill.com
mpattwell@clarkhill.com

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF JURISDICTION

Appellee, the Association of Businesses Advocating Tariff Equity ("ABATE"),[1] agrees with Appellant, Consumers Energy Company ("CECo"), that this Court has discretionary jurisdiction under Const 1963, art 6, § 4 and MCR 7.303(B)(1) to review the Court of Appeals' July 12, 2018 unanimous and published opinion reversing the Michigan Public Service Commission's ("PSC's") September 15, 2017 Order in Case No U-18197. *In re Reliability Plans of Electric Utilities for 2017-2021 (In re Reliability Plans)*, 325 Mich App 207; 926 NW2d 584 (2018) (Meter, P.J., and Gadola and Tukel, JJ.).

[1] ABATE's membership is comprised of Michigan's largest industrial and business concerns whose competitiveness is impacted by energy prices and terms of service. Collectively, ABATE's members employ almost 100,000 Michiganders and spend approximately $1.5 billion on energy related services in Michigan each year. They presently include: AK Steel Corporation; Cargill, Inc.; The Dow Chemical Company; DW-National Standard-Niles LLC; Eastman Chemical Company; Eaton Corporation; Edw. C. Levy Co.; Enbridge Energy, Limited Partnership; FCA US LLC; General Motors LLC; Gerdau MacSteel INC.; Graphic Packaging International, Inc.; Hemlock Semiconductor Operations LLC; J. Rettenmaier USA LP; Marathon Petroleum Corporation; Martin Marietta Magnesia Specialties LLC; Metal Technologies, Inc.; MPI Research; Occidental Chemical Corporation; OX Paperboard Michigan, LLC; Pfizer Inc.; Praxair, Inc.; United States Gypsum Corporation; United States Steel Corporation; WestRock California, Inc.; and Zoetis LLC.

COUNTERSTATEMENT OF QUESTION INVOLVED

I. Did the Court of Appeals correctly determine that the PSC lacks authority under Section 6w of Act 341 to impose a local clearing requirement on individual alternative electric suppliers?

The Court of Appeals would answer:	"Yes."
Appellee ABATE answers:	"Yes."
Appellee Energy Michigan answers:	"Yes."
Appellant PSC answers:	"No."
Appellant CECo answers:	"No."

INTRODUCTION

This case involves a relatively straight-forward issue of statutory construction. It asks whether, pursuant to 2016 PA 341 ("Act 341"), the PSC has the authority to impose upon individual Alternative Electric Suppliers ("AESs") a novel four-year forward locational capacity obligation, known as a Local Clearing Requirement ("LCR").[2] By way of a unanimous and published opinion, the Court of Appeals (Meter, P.J., and Gadola and Tukel, JJ.) held that Act 341 does not, by clear and unmistakable language, or necessary inference, authorize the PSC to impose an LCR on individual AESs.

The Court of Appeals afforded the PSC's interpretation of the new energy law the most respectful consideration but ultimately identified several cogent reasons why PSC's interpretation was erroneous including that: (i) there exists no *express* language in Act 341 authorizing the imposition of an LCR on individual AESs; (ii) the authority to *impose* a share of the LCR on individual AESs is not necessarily inferred from the language in Act 341 authorizing the PSC to *set* the overall LCR; and (iii) multiple provisions in Act 341 demonstrate a specific intent by the Legislature to spare AESs, in particular, from having to satisfy an individual LCR.

Although it did not ultimately rely on its view of the legislative history, the Court of Appeals following this Court's decision in *Bush v Shabahang*, 484 Mich 156, 173-174; 772 NW2d 272 (2009), found persuasive that specific provisions exempting AESs from the LCR were added to the final version of the bill at the same time specific language authorizing the PSC to impose a share of the LCR on individual AESs was deliberately removed from the final bill.

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[2] The PSC's imposition of the LCR functions as a buy-local mandate compelling AESs to purchase electric generation resources located in Michigan. CECo and the other incumbent utilities own most of those local resources and are awarded a handsome rate of return for constructing new local resources to serve their captive customers. Such a *de facto* embargo on out-of-state resources could have disastrous impacts on Michigan's competitive electric choice market which has historically relied on lower-cost out-of-state resources.

As explained below and in ABATE's Response to the PSC's Supplemental Brief, the Court of Appeals' unanimous and published decision is correct. Act 341 does not empower the PSC to impose the LCR on individual AESs and CECo's arguments to the contrary are unavailing. Accordingly, ABATE respectfully requests that this Court enter an order either denying CECo's Application for Leave to Appeal or affirming the Court of Appeals decision.

COUNTERSTATEMENT OF FACTS AND PROCEEDINGS

To avoid redundancy, ABATE incorporates the Counterstatement of Facts and Proceedings set forth in its Response to the PSC's Supplemental Brief. (ABATE Resp to PSC Suppl Br at 2-24.) ABATE, however, is constrained to rebut the following five (5) purported statements of fact contained in CECo's Supplemental Brief.

First, CECo represents that the Midcontinent Independent System Operator ("MISO") is purportedly a "federal regulator" or "federal electric regulator." (CECo Suppl Br at 1-2.) MISO is not a federal regulator. MISO is a private association of transmission owners heavily regulated by the Federal Energy Regulatory Commission ("FERC").[3] The Federal Power Act ("FPA") authorizes FERC, not MISO, to regulate "the sale of electric energy at wholesale in interstate commerce." 16 USC §§ 824(b), 824d(a), 824e(a). FERC authorized the formation of regional transmission organizations, such as MISO, to operate regional electric transmission grids and administer the wholesale markets in which electricity and capacity resources are bought and sold through competitive auctions. And while FERC requires MISO to be independent of participants

[3] *See, e.g., MISO Transm'n Owners v FERC*, 860 F3d 837, 839 (6th Cir 2017) ("MISO is a regional association of utilities that own electrical transmission lines interconnected to form a regional grid and that agree to delegate operational control of the grid to the association"); *North Dakota v Heydinger,* 15 F Supp 3d 891, 896 (D Minn 2014) ("MISO is an independent, non-profit organization whose members include transmission owners, investor-owned utilities, public power utilities, independent power producers, and cooperatives").

in these wholesale electric and capacity markets, MISO nevertheless maintains a fiduciary duty to maximize the revenues of its transmission owning members.[4]

Second, CECo argues in its statement of facts, without specification, that the Court of Appeals decision somehow contradicted MISO's August 15, 2017 and August 30, 2017 comments in U-18197. (CECo Suppl Br at 8-9.) A careful review of MISO's comments, however, reveals that those comments had nothing to do with the PSC's imposition of an LCR on individual AESs. Moreover, it would make little sense for MISO to sanction the PSC's imposition of an LCR on individual LSEs when MISO, itself, does not impose an LCR on individual LSEs.

Third, CECo argues that during an April 2016 presentation apparently made by MISO to the Michigan Senate Energy and Technology Committee, MISO claimed that its short-term resource adequacy construct was insufficient to meet long-term resource adequacy needs. (CECo Suppl Br at 9.)[5] Remarkably, the presentation does not state that MISO's current resource adequacy construct is insufficient. But even if MISO did make such a statement at the hearing, MISO's own filings at FERC show that MISO believes its existing resource adequacy construct to be sufficient to ensure long-term resource adequacy. In February 2018, FERC found, based on MISO's representations, that MISO's existing resource adequacy construct "is sufficient to ensure resource adequacy over the long-term," and has, without fail, resulted in a capacity surplus. *Midcontinent Indep Sys Operator, Inc*, 162 FERC ¶ 61176 (Feb 28, 2018); see also

[4] *Midwest Indep Transm'n Sys Operator, Inc*, 84 FERC ¶ 61,231, 62,138-40 (Sept 16, 1998) (MISO has "a custodial trust relationship" to its members that, *inter alia*, includes "a duty to maximize transmission service revenues").

[5] Although elsewhere in its Brief CECo argues that Court of Appeals erred by looking at highly reliable legislative history (*i.e.*, actual text added to and removed from the final bill that became Act 341), CECo nevertheless urges this Court to consider extrinsic evidence as hollow an unverified power-point presentation made by a private party during a legislative hearing. CECo cannot have it both ways.

Consumers Energy Co, 155 FERC ¶ 61036 (Apr 15, 2016) (explaining that Michigan Zone 7 does not have any reliability concerns).

Drawing on forewarnings of a looming reliability crisis in an attempt to achieve some legislative, administrative, or judicial advantage is not a stratagem with which Michigan's incumbent utilities are unfamiliar.[6] Yet, over the years no such crisis has ever materialized. (ABATE Resp to PSC Suppl Br at 44-46.) Equally without merit is CECo's extrinsic reference to MISO's June 2019 Regional Source Assessment which CECo cites in support of its policy argument that an LCR on individual AESs is needed to ensure grid reliability. A review of that assessment reveals that the purported local capacity shortfalls are based on projections using worst-case assumptions that are easily avoidable. It should come as no surprise that just days ago the PSC entered an order in U-20154 confirming that MISO Zone 7 "will have sufficient resources to meet its LCR for the prompt PY (2019/2020), and that [Zone] 7 is projected to exceed its LCR by more than 1,300 megawatts (MW) in PY 2022/2023." (U-20154, Doc No 86.) There is no reliability concern at issue here and, even if there was, it is the prerogative of the legislature, not the judiciary, to address such a legislative football.

Fourth, in an effort to paint Michigan's limited electric choice market as unstable, CECo would have this Court believe that FERC rejected MISO's proposal for a three-year forward resource adequacy because it "bifurcated (regulated and unregulated) electric generation market[s] . . . much like the hybrid retail electric market in Michigan." (CECo Suppl Br at 11.)

[6] By way of Senate Bill 1332 (2004) and Senate Bill 947 (2007), the utility lobby (*i.e.*, the CLEAR Coalition) urged the Legislature to impose upon AESs "electric supply reliability and delivery standards" similar to those established by Act 341. Like it did in 2016, the utility lobby, spread alarm that if the electric choice market was not more heavily regulated "Michigan could experience an energy crisis . . . and reliability problems." See Proposed Changes to Michigan's Electric Restructuring Law, Senate Fiscal Analysis (2004). But both Bills flopped and no reliability crisis ensued.

Not true. FERC's order makes perfectly clear that its concern was with the *temporal* bifurcation of the market, *i.e.*, having both a short-term and a long-term market like that created by Act 341:

> MISO's proposal bifurcates the MISO capacity market into two distinct market clearing mechanisms held at different points in time. Market-wide clearing processes are typically more efficient than bifurcated clearing processes.
>
> * * *
>
> Due to the bifurcated structure, which requires owners of these supply resources to decide whether to offer into the Forward Auction more than three years prior to the Prompt Auction for the same Planning Year, it is not clear the extent to which these supply resources will offer into the Forward Auction or how this uncertainty will impact clearing prices in the Forward and the Prompt Auction. Such unpredictable and variable supply participation could result in significant and unnecessary price volatility in both the Forward and the Prompt Auction.
>
> * * *
>
> Because the Forward Auction and the Prompt Auction occur at different times, the prices in those two auctions could diverge based on supply participant behavior, even when such divergence is not supported by underlying supply and demand fundamentals. [*Midcontinent Indep Sys Operator, Inc*, 158 FERC ¶ 61128 (Feb 2, 2017).]

Fifth, in support of its argument that the LCR imposed on individual AESs would only increase gradually, if this Court reverses the Court of Appeals, CECo states that under the PSC's Order in U-18444, the share of the LCR imposed on AESs will only increase to the extent that there is a need for new generation, *i.e.*, a projected capacity shortfall. (CECo Suppl Br at 21.) This statement is only half true. ABATE believes that the PSC's method for calculating whether there is a capacity shortfall (*i.e.*, the trigger for raising the LCR on AESs), assures a swift progression to a load-ratio allocation of the LCR on AESs. When determining whether there exists an incremental need for local capacity, the PSC subtracts all planned retirements of old generation resources but does not add any planned additions of new generation resources. From ABATE's viewpoint, this calculation method leads to a manufactured or fake shortfall of local capacity designed to incrementally increase the LCR to the max.

ARGUMENT

A. The Court of Appeals applied the correct standard of review.

For the reasons discussed in ABATE's Response to the PSC's Supplemental Brief, the Court of Appeals applied the appropriate standard of review by giving respectful consideration (but not deference) to the PSC's interpretation of Act 341. (ABATE Resp to PSC Suppl Br at 24-29.) CECo contends, however, that the PSC's statutory interpretations are "presumed" to be lawful and reasonable and, in order to rebut this alleged presumption, an aggrieved party such as ABATE must meet the "heavy statutory burden" of demonstrating by "clear and satisfactory evidence" that the PSC's statutory determination is unlawful. (CECo Suppl Br at 23-25 (citing MCL 462.26(8).)

CECo's argument tangles the standard of review applicable to agency fact-finding functions (not at issue here) with the standard of review applicable to agency statutory interpretations (at issue here). See *In re Compl of Rovas*, 482 Mich 90, 97-103; 754 NW2d 259 (2008). The *Rovas Court*, citing MCL 462.26(8), acknowledged that "administrative fact-finding exercises are entitled to a degree of deference defined by statute," but then immediately clarified that "fact-finding in an administrative contested case . . . is a far different endeavor than construing a statute." *Id.* at 99. The Court continued explaining that "statutory interpretation is a question of law that this Court reviews de novo" and "concepts such as 'abuse of discretion' or 'clear error,' which are similar to the standards of review applicable to other agency functions, simply do not apply to a court's review of an agency's construction of a statute." *Id.* at 102. The Court then expressly disavowed the clear and convincing evidence burden when interpreting a statute. *Id.* at 107 (citation omitted). Thus, CECo's argument was rejected by this Court in *Rovas*.

B. Act 341 does not expressly or impliedly authorize the PSC to impose an LCR on individual AESs.

For the reasons set out in ABATE's Response to the PSC's Supplemental Brief, and as held by the Court of Appeals, Act 341 does not, by clear and unmistakable language, or necessary inference, authorize the PSC to impose a share of the LCR on individual AESs. (ABATE Resp to PSC Suppl Br at 29-43.) No matter how strenuously CECo argues to the contrary, CECo still cannot identify a single provision in Act 341 which expressly grants to the PSC the power to impose the LCR on individual AESs. (CECo Suppl Br at 26-40.) Rather, CECo inharmoniously *infers* that such authority exists by selectively piecing together various provisions of the Act that suit its objective while excluding other provisions of the Act that do not. (*Id.*) But again, none of CECo's inferences are necessary[7] to effectuate a power expressly granted by Act 341. (ABATE Resp to PSC Suppl Br at 29-43.)

CECo also cannot square its statutory inferences with the fact that (i) the term "capacity obligation" is undefined; (ii) Section 6w(8)(c) requires that any determination of capacity obligations be consistent with MISO's Tariff; (iii) the MISO Tariff does not impose an LCR on individual LSEs; (iv) Section 6w(12)(d)'s definition of LCR, itself, contemplates a zonal application, like MISO, as opposed to the individual application sought by CECo; (v) Section 6w(6) expressly permits AESs, alone, to meet Act 341's capacity obligations with any resource that may be used to meet MISO's capacity obligations; (vi) MISO does not impose geographical

[7] CECo misunderstands the meaning of the word "necessary." *Herrick Dist Library v Library of Mich,* 293 Mich App 571, 583; 810 NW2d 110 (2011); see also *People v Buie*, 491 Mich 294, 319; 817 NW2d 33 (2012) (explaining that "good cause" simply means a "satisfactory," "sound or valid" "reason," whereas "necessary" means "essential" or "indispensible") (citation omitted). Imposing a share of the LCR on individual AESs is not essential or indispensible to (i) setting the overall LCR or individual PRMRs; (ii) allocating a share of the LCR to incumbent utilities, Co-ops, or Munis; (iii) requiring LSEs to demonstrate satisfaction of their PRMRs; or even (iv) ensuring reliability. With respect to this last point, the PSC's own Staff has adamantly explained that imposition of "an individual LCR is unnecessary purely to maintain reliability." (U-18444 Doc No 117 at 11-14, 37, 42.)

restrictions on the resources individual LSEs may use to meet MISO's capacity obligations; and (vii) the Act 341's definition and usage of the term "electric provider" shows that it does not, in many instances, include AESs.[8] (ABATE Resp to PSC Suppl Br at 29-43.)

Nor does the PSC's lack of authority to impose a share of the LCR on individual AESs render the Act meaningless or render the PSC's power to set the overall zonal LCR nugatory. (CECo Suppl Br at 26-40.) This misanthropic argument falls short when reading the statute as a whole. For example, because Section 6w(8)(b) expressly imposes the LCR on Co-ops and Munis when they aggregate resources, a point conceded by CECo, the LCR must be set. MCL 460.6w(8)(b). By way of further example, because Sections 6w(8)(a) and 6t permit the PSC to impose the LCR on incumbent utilities, a point CECo also concedes, the LCR must be set. MCL 460.6t(1)(e-f), (3), (6), (8)(a)(i).

Furthermore, standing alone, it must be recognized that determination of a forward LCR, as opposed to MISO's prompt LCR, assists the PSC with its regulation of incumbent utilities in a variety of ways including: (i) supervision of utility mergers, MCL 460.6q; (ii) approval of certificates of necessity, MCL 460.6s; (iii) evaluation of performance based regulations, MCL 460.6u; and (iv) deciding utility abandonment petitions, MCL 460.6z. All functions of which are underscored by the "regulatory compact," codified by statute and unique to the utility sector, whereby incumbent utilities have monopoly supplier status to serve and, in exchange, are

[8] Because the term "electric provider" is defined to mean "any of the following" enumerated categories of providers, including regulated utilities, Co-ops, Munis, and AESs, the Act's usage of the term "electric provider" does not, in all instances, include AESs. MCL 460.6w(12)(c) (emphasis added); see also *Gentry v Long-Bell Lumber Co*, 321 Mo 461, 498; 12 SW2d 64 (1928) (interpreting the phrase "any of the following" to mean "any one or more of the following"); Random House College Dictionary 61 (1st ed 1980) ("Any" may refer to "one, a, an, or some," or "one or more without specification or identification"). Bolstering this reading are the references in Section 6w(7) to "electric provider" and "electric provider's service territory" which, in context of the sentence, do not include AESs. MCL 460.6w(7).

required to provide safe, reliable service at just and reasonable rates. See, e.g., *Lansing v Mich Power Co*, 183 Mich 400; 150 NW 250 (1914); *Mich Consol Gas Co v Austin, Millbrook and Hinton Tps,* 373 Mich 123; 128 NW2d 491 (1964).

No matter how many times CECo repeats its supposedly textual argument, CECo cannot avoid the fact that while Section 6w(8)(b) effectively authorizes the imposition of the LCR on Co-Ops and Munis, MCL 460.6w(8)(c), and while Sections 6w(8)(a) and 6t effectively authorize the imposition of the LCR on incumbent utilities, MCL 460.6t(1)(e-f), (3), (6), (8)(a)(i), there exists no provision in Act 341 that explicitly or by necessary inference authorizes the imposition of an LCR on individual AESs. The PSC and the PSC's Staff have repeatedly acknowledged that Act 341 is "silent about the [PSC's] authority to impose the [LCR] on [AESs]," (PSC App at 40, 46-47), and "silent on the allocation of LCR," (U-18444 Doc No 117 at 36-37).

Accordingly, and for these reasons expounded upon in ABATE's Response to the PSC's Supplemental Brief, the Court of Appeals was correct to reject CECo's inferenced-based reading of the Act. See *AG v PSC*, 269 Mich App 473, 480-82; 713 NW2d 290 (2005), *lv den,* 475 Mich 883, 715 NW2d 821 (2006) (holding that it could not be inferred from the PSC's express statutory authority to *establish and promote* a renewable energy program and to *set rates* facilitating the development of new energy technologies that the PSC also possessed the implied authority *impose* a five-cent charge on customers to accomplish those objectives).

C. The special aggregation provision for Co-ops and Munis in Section 6w(8)(b) does not empower the PSC to impose a share of the LCR on individual AESs.

CECo infers that because Section 6w(8)(b) expressly permits the PSC to impose the LCR on Co-ops and Munis (when aggregating resources), the Legislature must have intended to authorize the PSC to go a step further and impose the LCR on AESs. (CECo Suppl Br at 38-39.) As explained in ABATE's Response to the PSC's Supplemental Brief, CECo's inference-based

argument is belied by the text of the Act, contrary to proper rules of statutory construction, and based on its perception of what would be equitable. (ABATE Resp to PSC Suppl Br at 38-40.)

Additionally, CECo fails to read 6w(6) together with (8)(b) as it must. *Detroit Pub Schs v Connecticut*, 308 Mich App 234, 247-48; 863 NW2d 373 (2014). In Section 6w(6), the Legislature expressly permitted AESs to use "any resource" that MISO allows to meet the capacity obligations (*i.e.,* PRMR) of AESs, while in Section 6w(8)(b), the Legislature only permitted Co-ops and Munis to use resources MISO allows to meet the LCR. MCL 460.6w(6), (8)(b). This holistic reading shows that the Legislature knew how to impose the LCR on Co-ops and Munis but chose not to do so with respect to AESs. If the Legislature had intended the same meaning in both statutory provisions, it would have used the same language. *People v Barrera,* 278 Mich App 730, 741; 752 NW2d 485 (2008). Moreover, to the extent there is any conflict, the most specific provision regarding what resources AESs may use to meet capacity obligations (*i.e.*, Section 6w(6)), would control over the more general provisions in Section 6w(8)(b). *Slater v Ann Arbor Pub Sch Bd*, 250 Mich App 419, 434-35; 648 NW2d 205 (2002).

D. CECo incorrectly infers that because Act 341 allows the PSC to impose an LCR on incumbent utilities the PSC may impose an LCR on AESs.

Similar to its argument regarding Munis and Co-ops, CECo argues, for the first time on appeal, that because Sections 6w and 6t, when read together, allow the PSC to impose the LCR on incumbent utilities, it must follow that the PSC may also impose the LCR on AESs. (CECo Suppl Br at 39-41.) No such inference may be drawn from statutory language that, on its face, applies to incumbent utilities but does not mention AESs. *Herrick*, 293 Mich App at 583. No matter how many times CECo claims to the contrary, 2+1 will not equal 4.

As the leading scholar on administrative law in Michigan explained, "a specific grant of statutory authority allowing an agency to act in one circumstance does not authorize it to do so in

another." LeDuc, Mich Admin Law § 1:2 (2013 Edition) (citations omitted). Accordingly, similar to *In re DTE App*, 296 Mich App 101, 108–10; 817 NW2d 630 (2012), where a statute authorizing the PSC to direct a *gas utility* to use a revenue decoupling mechanism could not be expanded so as to authorize the PSC to direct an *electric utility* to use a revenue decoupling mechanism, the statute here authorizing the PSC to impose an LCR on *incumbent utilities* cannot be expanded so as to authorize the PSC to impose an LCR on *AESs*.

E. The Court of Appeals properly found that imposing an LCR on individual AESs would conflict with the MISO Tariff.

As explained at length in ABATE's Response to the PSC's Supplemental Brief, the MISO Tariff does not require individual LSEs to use local resources to meet MISO's capacity obligations. (ABATE Resp to PSC Suppl Br at 3-5, 16-19, 34-35, 40-41.) While MISO requires individual LSEs to meet MISO's PRMR, MISO does not impose any geographical restriction on the resources LSEs may use to satisfy MISO's PRMR.[9] Moreover, and importantly here, while there exist geographical restrictions on what resources, in the aggregate, are deemed to satisfy MISO's LCR, MISO does not require individual LSEs to meet its LCR at all. The MISO LCR is applied on a zonal basis only.[10]

With this in mind, the Legislature removed language from Act 341 that would have authorized the PSC to impose a share of Act 341's LCR on individual AESs and added language making clear that AESs, in particular, be permitted to meet Act's 341's capacity obligation with any resource MISO allows AESs to use to meet MISO's capacity obligations. (ABATE Resp to

[9] The only exception is where an LSE opts to meet its PRMR through a Fixed Resource Adequacy Plan ("FRAP"). However, whether an LSE elects to meet its PRMR through a FRAP is completely voluntary and therefore not relevant here. (MISO Tariff §§ 68A.7; 69A; 69A.7.1.)

[10] Furthermore, at the time of Act 341's passage, MISO's Tariff also allowed capacity resources located external to MISO to count toward meeting the importing MISO Zone's LCR if adequate firm transmission service is obtained from the external capacity resource to the border of the importing MISO Zone. (*Id.* §§ 69A.3.1.c; 69A.3.1.g; 69A.7.1.)

PSC Suppl Br at 8-11, 46-47.) The Legislature's final product, read as a whole, now shows that, just like under MISO's Tariff, Act 341 does not impose its LCR on individual AESs.

To start, Section 6w(8)(c) mandates that the PSC "set any required [LCR] and [PRMR], consistent with federal reliability requirements." MCL 460.6w(8)(c). Next, Section 6w(12)(d) defines the industry or technical term "LCR" in a way that contemplates a zonal application just like MISO. MCL 460.6w(12)(d) (defining LCR as "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 . . . ."). [11] Finally, Section 6w(6) provides that the PSC must permit AESs, alone, to meet Act 341's capacity obligations through "any resource that [MISO] allows to meet the capacity obligation," and then reinforces that such resource determinations "shall not be applied in any way that conflicts with a federal resource adequacy tariff, when applicable." MCL 460.6w(6).

CECo now argues that for the PSC's application of the LCR to be "consistent with federal reliability requirements," as 6w(8)(c) demands, and "not be applied in any way that conflicts with federal reliability requirements," as Section 6w(6) demands, it need only "compliment" MISO's resource adequacy construct. (CECo Suppl Br at 41-46.) This argument is nearly indistinguishable from the PSC's compatibility argument and therefore fails for the same reasons set forth in ABATE's Response to the PSC's Supplemental Brief. (ABATE Resp to PSC Suppl Br at 33-35, 42-43.)

Despite the fact that out-of-zone resources satisfy MISO's capacity obligations and despite the fact that Section 6w(6) plainly allows AESs to use those same out-of-zone resources

[11] Because the technical or industry meaning of a LCR connotes application on a zonal as opposed to an individual basis, it cannot be fairly assumed or implied that an individual application was intended by Act 341's mere use of the term. MCL 8.3a.

to satisfy Act 341's capacity obligations, CECo now, for the first time on appeal, argues that AESs may not use out-of-zone resources to meet Act 341's capacity obligations. (CECo Suppl Br at 41-46.) Attempting to seize upon the temporal difference between the state and federal capacity demonstration processes, CECo reasons that the resources MISO allows to meet its *prompt*-capacity obligations are somehow different from the resources that may be used to meet Act 341's *forward*-capacity obligations. (*Id.*) Because the resources are purportedly different, CECo concludes that the resources MISO allows to meet its *prompt*-capacity obligations are not capable of being used to meet Act 341's *forward*-capacity obligations. (*Id.*) CECo's argument fails for several reasons.

First, even if this temporal distinction is of import to the reading of 6w(6), it is not, CECo's interpretation still rests on a distortion of the provision's plain language and structure. Based solely on its extrinsic and erroneous premise, (*i.e.*, resources capable of meeting MISO's capacity obligations are not capable of meeting Act 341's capacity obligations), CECo would rewrite 6w(6) to provide that AESs may *not* meet Act 341's *forward*-capacity obligations through resources MISO allows to meet MISO's *prompt*-capacity obligations. However, when read in context of the temporal differences between the two capacity demonstration processes, as CECo suggests, the plain text of 6w(6) provides that AESs may meet Act 341's *forward*-capacity obligations through any resource MISO allows to meet MISO's *prompt*-capacity obligations.[12]

[12] If the temporal differences between the two capacity demonstration processes are truly germane to the meaning of 6w(6), as CECo claims, the more logical understanding of 6w(6) would be that it operates as a complete exemption to the forward nature of Act 341's capacity obligations. For illustrative purposes only, this reading is bolstered by 6w(6)'s specification that "[a] capacity charge shall not be assessed for any portion of capacity obligations for each planning year for which an [AES] can demonstrate that it can meet its capacity obligations through . . . any resource that [MISO] allows to meet the capacity obligation of the electric provider." MCL 460.6w(6).

Second, the *time* at which the state and federal capacity demonstration processes occur is not germane to a reading of Section 6w(6) which is focused on the *type* and *location* of the resources that may be used to meet the respective capacity obligations. Section 6w(6) expressly speaks to the "resources" that may be used to meet "capacity obligations," not the "timing" of the overall capacity demonstration processes as CECo would have this Court believe. Although Act 341 does not define the term "resource," the term is best understood to mean "capacity resource" as defined by MISO. Notably, MISO defines "capacity resource," not in a temporal sense, but rather in a qualitative and locational sense.[13]

For example, MISO defines "capacity resources" to include a wide array of different resources, the most prominent of which are "generation resources." Dispositively here, MISO's definition of "generation resource" is decidedly locational:

> A Generation Resource is a Generator within the MISO Balancing Authority Area or an External Resource that is Pseudo-tied into the MISO Balancing Authority Area and that (i) is registered to participate in the Energy and Operating Reserve Markets, (ii) is capable of supplying Energy, Capacity, Operating Reserve, Up Ramp Capability and/or Down Ramp Capability, (iii) is capable of complying with the Transmission Provider's Setpoint Instructions and (iv) has the appropriate metering equipment installed.

Thus, CECo's attempt to graft a temporal meaning into 6w(6)'s use of the pivotal phrase "any resource [MISO] allows to meet capacity obligations," runs contrary to the plain import of the phrase which governs the type and location of the resources that may be used to meet the capacity obligations.

Third, CECo's interpretation renders Section 6w(6) meaningless. If none of the resources MISO allows to meet its capacity obligations may be used to meet Act 341's capacity obligations, as CECo urges, there would have been no reason for the Legislature to reference MISO's Tariff as the benchmark by which to determine what resources AESs may use to meet

[13] https://cdn.misoenergy.org/Module%20A108022.pdf

Act 341's capacity obligations. The better reading of 6w(6), when viewing the Act as whole, is that this AES-specific provision was designed to expand the possible resources available to AESs in meeting Act 341's capacity obligations not abridge them entirely. And, of course, the legislative history accompanying the insertion of this language in House Version 4 of Senate Bill 437 reinforces that understanding.[14]

F. The *Cloverland* decision is inapplicable to this proceeding.

CECo reads *In the matter of Cloverland Electric Cooperative*, __ Mich App ___ No 342552 (2019), as somehow supporting its position. (CECo Suppl Br at 46-47.) Not so. As explained in ABATE's Response to the PSC's Supplemental Brief, that decision had nothing to do with an LCR, positively referenced the decision being challenged here, and merely clarified the process for setting and applying a capacity charge under Section 6w(3), (6), (7), and (8). (ABATE Resp to PSC Suppl Br at 39-40.) ABATE has never argued, and the Court of Appeals below did not hold, that AESs are immune from all capacity obligations or that if AESs fail to meet their capacity obligations, AESs customers are immune from paying a capacity charge to the incumbent utility. The question at hand is much more narrow and entails only whether the PSC may require individual AESs to meet their capacity obligations with *local* resources. The *Cloverland* decision is therefore inapposite.

[14] Moreover, Section 6w(6)'s reference to the phrase "any resources any resource that [MISO] allows to meet the capacity obligation," does not, as CECo contends, exclusively mean MISO's rejected three-year forward "capacity forward auction." The Legislature knew well how to authorize the use of the "capacity forward auction" to meet Act 341's capacity obligations as it did just that with respect to Co-ops and Munis. See MCL 460.6w(8)(b) ("A [Co-op or Munis] may meet the requirements of this subdivision through any resource, including a resource acquired through a capacity forward auction, that [MISO] allows to qualify for meeting the [LCR]"). Consequently, it must be presumed that since the Legislature used different terminology with different meanings in separate sections of the Act dealing with distinct types of electric providers, the Legislature intend different outcomes. *French v Mitchell*, 377 Mich 364, 384; 140 NW2d 426 (1966) ("[W]hen the legislature has used certain language in one instance and different language in another, the indication is that different results were intended....").

G. CECo's interpretation of Act 341 renders it at odds with Michigan's Customer Choice Act.

It's also important to note, as set forth in ABATE's Response to the PSC's Supplemental Brief, that Michigan's Customer Choice and Electric Reliability Act, 2000 PA 141 and 142, MCL 460.10 *et seq*., was designed to further the deregulation of the electric utility industry by permitting up to 10% of customers to buy electricity from AESs instead of being constrained to purchase that electricity from incumbent utilities. Among the Act's purposes is "[t]o provide this state's electric suppliers and generators an opportunity to access regional sources of generation and wholesale power markets and to ensure a reliable supply of electricity in this state." MCL 460.10(c) (emphasis added).

By inferring that Act 341 grants the PSC the power to prohibit AESs from accessing out-of-state resources, including those available in wholesale power markets such as the MISO PRA, CECo's interpretation renders Act 341 at odds with the Customer Choice Act. The PSC's reading is therefore improper where "the Legislature is presumed to know of and legislate in harmony with existing laws." *Herrick*, 293 Mich App at 592 n. 13 (quotation and citation omitted). The PSC's reading also conflicts with a floor statement made by Senator Mike Nofs, the primary sponsor of the legislation, who just prior to the initial vote in the Senate represented that: "[M]y bill maintains the 10% choice program and even allows it to expand." (Vol II App D at 381b.) For these reasons, it cannot be presumed that the Legislature intended to authorize the PSC to impair the economic viability of the choice market by banning out-of-state capacity resources.

H. Legislative history of the highest value shows that Act 341 does not empower the PSC to impose an LCR on individual AESs.

Despite spending the prior 26 pages of its elaborately-weaved, inference-based argument returning time and again to deciphering the "purpose" of the statute as a means of elucidating the

authority it provides the PSC, CECo claims that the Court of Appeals erred by looking to Act 341's legislative history to ascertain legislative intent. (CECo Suppl Br at 26, 30, 31, 33, 35, 49.) CECo nevertheless proceeds to argue that by removing contentious language from the Act that expressly authorized the PSC to impose a specific percentage of the LCR on individual AESs, the Legislature actually intended to invest the PSC with a broader level of discretion to impose the LCR on individual AESs in whatever amount it saw fit. (*Id.* at 47-49.) Both arguments fail.

First, the Court of Appeals' holding is based on a plain reading of the statute not on its view of the legislative history. While the Court of Appeals discussed the legislative history, it did so at the prompting of the PSC, and only after having found that the unambiguous language of Act 341 does not empower the PSC to impose the LCR on individual AESs. (COA Op at 12-14.)

Second, it is illogical to assume, as CECo does, that by removing language authorizing the PSC to impose a share of the LCR on AESs, the Legislature actually intended to grant the PSC a greater degree of authority to do just that. *Bush*, 484 Mich at 173-174. CECo's erroneous supposition of legislative intent is further undercut by the fact that House Version 4 of Senate Bill 437 not only removed language authorizing the PSC to require AESs to meet a percentage of their proportional share of the LCR, but also added language to clarifying that AESs could meet their overall capacity obligation with any resource that MISO allows to meet the capacity obligation. The final amendment's addition of language exempting AESs, in particular, from the LCR, shows that the final amendment's removal of the PSC's authority to impose the LCR on AESs was a restriction of PSC authority not an expansion of it.[15]

[15] Although this Court need not rely on it, the letter filed with the PSC by the Sponsor of H-4 (Rep. Afendoulis) further shows that H-4 was the result of a "compromise" to "deliberately remove" the "contentious language" in S-7 that imposed upon AESs "a supplier-specific LCR obligation." (U-18197 Doc No 97 at 10, 26-27.)

Because CECo declined to squarely address this near dispositive form of legislative history, CECo has failed to provide the "clear and cogent reason" needed to overcome the settled rule that "statutory language should not be held to explicitly authorize what the Legislature explicitly rejected." Compare *In re MCI Telecomm Compl*, 460 Mich 396, 415; 596 NW2d 164 (1999), with *People v Adamowski*, 340 Mich 422, 429; 65 NW2d 753 (1954).

I. CECo's expansive view of the Act renders it unconstitutional in violation of the nondelegation doctrine.

For the reasons stated in ABATE's Response to the PSC's Supplemental Brief, by interpreting Act 341's silence as granting the PSC unconstrained discretion to allocate the burden of the LCR amongst LSEs in whatever manner the PSC deems fit, CECo reads the Act in violation of the non-delegation doctrine. (ABATE Resp to PSC Suppl Br at 47-50.)

REQUEST FOR RELIEF

WHEREFORE, ABATE respectfully requests that the Michigan Supreme Court enter an order either denying CECo's Application for Leave to Appeal or affirming the unanimous and published decision of the Court of Appeals for reason that Act 341 does not empower the PSC to impose the LCR on individual AESs.

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Respectfully submitted,

CLARK HILL PLC

By: /s/ Michael J. Pattwell
Robert A. W. Strong (P27724)
Michael J. Pattwell (P72419)
Attorneys for ABATE
212 East Cesar E. Chavez Avenue
Lansing, MI 48906
(517) 318-3100
rstrong@clarkhill.com
mpattwell@clarkhill.com