

IN THE MICHIGAN SUPREME COURT
APPEAL FROM THE STATE OF MICHIGAN COURT OF APPEALS

In re RELIABILITY PLANS OF ELECTRIC
UTILITIES FOR 2017-2021

MSC No. 158305, 158306,
158307, 158308
COA No. 340600
Trial Ct No. 00-018197

AMICUS CURIAE BRIEF OF
THE MICHIGAN CHAMBER OF COMMERCE

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INVITED AMICUS BRIEF

This brief of the Michigan Chamber of Commerce, as amicus curiae, is filed in response to the invitation of this Court in its order of June 21, 2019.

STATEMENT OF BASIS OF JURISDICTION

The Michigan Chamber of Commerce, as amicus curiae, adopts by reference the Statement of Basis of Jurisdiction contained in the brief of Appellant Michigan Public Service Commission.

QUESTION PRESENTED FOR REVIEW

Did the lower court err in finding that the federal government, not the State, has primary authority and responsibility to ensure Michigan's supply of electricity can meet its demand, and did this error cause it to read the statute to constrain state action when the statute in fact empowers such action?

ANSWER: Yes.

The Chamber does not take a position on the other issues before this Court.

STATEMENT OF INTEREST FOR AMICUS CURIAE
THE MICHIGAN CHAMBER OF COMMERCE

The Michigan Chamber of Commerce (the “Chamber”) is a nonprofit corporation dedicated to statewide business advocacy, and representing more than 6,000 members, all of whom are private enterprises engaged in an array of civic, professional, commercial, industrial, and agricultural activity in Michigan. The Chamber seeks to engage decision-makers at all levels of government to assist with the continual development of law and public policy to keep Michigan economically competitive and make the State attractive as a place to live and work. With this goal in mind, the Chamber has participated in lawsuits to ensure that courts are aware of the impact court decisions have on Michigan’s business operations and economic development.¹

INTRODUCTION

The reliability of our electrical system is of great importance to Michigan’s businesses, especially given the importance of manufacturing to our state’s economy as a whole. A ten minute outage that interrupts a manufacturing process can easily cause the loss of millions of dollars.² Kirby and Hirst, *Reliability Management and Oversight*, B-3, National Transmission Grid Study Issue Papers, U.S. Department of Energy, May 2002.

¹ Rivenoak Law Group, P.C. authored the brief in whole, and did not make a monetary contribution intended to fund the preparation or submission of the brief. No monetary contributions intended to fund the preparation or submission of the brief were made by any parties required to be identified under Michigan Court Rule 7.212(H)(2). For the purpose of clarity, funds were provided through the Michigan Chamber Litigation Center, a 501(c)(6) organization dedicated to participating in precedent-setting cases; no member of the Michigan Chamber of Commerce (including but not limited to Consumers Energy or DTE Energy) made a monetary contribution specifically intended to fund the preparation or submission of this brief.

² Astrape Consulting for EISPC and NARUC, *The Economic Ramifications of Resource Adequacy White Paper* (January, 2013) <<https://pubs.naruc.org/pub.cfm?id=536DBE4A-2354-D714-5153-70FEAB9E1A87>>(accessed July 22, 2019).

<<https://emp.lbl.gov/sites/default/files/doe-natl-trans-grid-papers.pdf>> (accessed August 4, 2019).

Reflecting this reality, the Chamber has reliability as a major focus on its energy policy. The policy was updated in April of 2015 to help the Chamber be an effective participant in the legislative process that resulted in PA 341 and 342 of 2016, as is attached in its entirety as Exhibit A.

Resource adequacy is a foundational need for reliability of the electrical grid. “Resource adequacy is the availability of an adequate supply of generation or demand responsive resources to support safe and reliable operation of the transmission grid.” *Sacramento Mun Util Dist v FERC*, 616 F3d 520, 526 (DC Cir 2010). When supply in an area is inadequate to meet demand, a “cascading failure”³ occurs, like the one that caused a multi-day blackout for 50 million people (including most Michigan residents), contributing to at least 11 deaths and costing the economy billions.⁴ See, e.g., Minkel, *The 2003 Northeast Blackout – Five Years Later* Scientific American, (August 13, 2008) <<https://www.scientificamerican.com/article/2003-blackout-five-years-later/>> (accessed August 4, 2019). In order to prevent cascading failures, the electric system must always have enough resources generating power, and the ability to transmit that

³ “Cascading results in widespread electric service interruption that cannot be restrained from sequentially spreading beyond an area predetermined by studies.” North American Electric Reliability Corporation, *Glossary of Terms Used in NERC Reliability Standards*, updated May 13, 2019 < https://www.nerc.com/files/glossary_of_terms.pdf> (accessed August 4, 2019).

⁴ This can sometimes be prevented through a system of rolling blackouts, in which power is curtailed or cut off in certain areas to prevent the blackout spreading, as occurred in Hawaii this summer and in Texas in 2011 and 2014. See Walton, *Island-wide outage on Kaua'i: Clouds block solar recovery after generator's cable failure* Utility Dive, (July 23, 2019) <https://www.utilitydive.com/news/island-wide-outage-on-kauai-clouds-block-solar-recovery-after-generators/559289/> (accessed September 2, 2019); Buchele, *Rolling Blackouts Highlight Troubles with Electric Grid in Rio Grande Valley* National Public Radio State Impact, (October 10, 2014) <<https://stateimpact.npr.org/texas/2014/10/10/rolling-blackouts-highlight-troubles-with-electric-grid-in-rio-grande-valley/>> (accessed September 2, 2019).

power, to meet 100 percent of consumer demand. See, e.g., Hirst, *Consulting in Electric Industry Restructuring* (January 2003) <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.446.1348&rep=rep1&type=pdf>> (accessed August 4, 2019).

The generation portion of that vital combination is sometimes referred to as “capacity” as well as “resource adequacy.”⁵ The Chamber’s position is that “Michigan’s energy policy should sustain retail open access programs while guaranteeing sufficient capacity to serve all customers.” Exhibit A, page 1. The Chamber read and understood section 6(w) of 2016 PA 341 to fulfill that goal, and supported the legislation accordingly. As interpreted by the lower court, MCL 460.6w would not meet this important element of the Chamber’s policy. Thus the Chamber comes to this Court to explain where, as an active participant in the legislative process, it believes the lower court erred in its interpretation of that section.

As explained further below, it is the Chamber’s position that MCL 460.6w is properly read to empower the Michigan Public Service Commission (the “Commission”) to set a Local Clearing Requirement (“LCR”), and to require participation by all load serving entities in meeting that requirement.⁶

ARGUMENT

I. Michigan Has Primary Responsibility for Capacity Resource Planning

As explained above, in order to have a reliable electric system, we need both adequate generating resources and sufficient ability to transmit that power. Under the Federal Power Act, responsibility for regulating energy is divided between the states and the federal government. States have exclusive jurisdiction over the retail market and “over facilities used for the

⁶ This brief is not intended to take a position regarding the particular method the Commission used in setting the LCR or its precise allocation of those requirements, but simply to support the power of the Commission to set an LCR and apply it to all load serving entities.

generation of electric energy.” 16 USC § 824(b)(1). The federal government has exclusive jurisdiction over the wholesale markets and thus primary responsibility for the transmission of power. *Id.* “The [Federal Power] Act makes federal and state powers “complementary” and “comprehensive,” so that “there [will] be no ‘gaps’ for private interests to subvert the public welfare.” *Fed Power Comm v Louisiana Power & Light Co*, 406 US 621, 631; 92 S Ct 1827, 1833; 32 L Ed 2d 369 (1972) quoted by *FERC v Elec Power Supply Ass’n*, 136 S Ct 760, 780; 193 L Ed 2d 661 (2016), as revised (Jan. 28, 2016) (“*FERC v. EPSA*”). In other words, the federal and state governments must work cooperatively for the reliability puzzle to be solved, but each has their own important piece to implement.

In order to help meet the federal portion of the reliability puzzle and operate the interstate electric grid reliably and efficiently, the Federal Energy Regulatory Commission (“FERC”) provided for the creation of Regional Transmission Organizations. *See* 18 CFR § 35.34. The Regional Transmission Organization that operates most of Michigan’s electric grid is the Midcontinent Independent System Operator (MISO). MISO’s actions are governed by rules that must be approved by FERC before they can be implemented. 18 CFR § 35.46.

Under the Federal Power Act, the state’s portion of the reliability puzzle is to ensure resource adequacy or capacity. 16 USC § 824(b)(1). Capacity resources are made up of facilities used for the generation of electric energy or those that reduce electric demand.⁷ While the federal and state systems must work cooperatively for the reliability puzzle to be solved, MISO’s own statements made in the months just prior to the passage of MCL 460.6w are instructive

⁷Programs to pay users to reduce their load at key moments are known as “demand response” programs. In 2016, the U.S. Supreme Court determined that these programs, in which retail customers are paid to reduce their usage in lieu of paying a power plant to generate more power, are permissibly implemented by Regional Transmission Organizations as a “program of cooperative federalism, in which the States retain the last word.” *FERC v EPSA*, 136 S Ct at 780.

regarding the responsibilities of the States: “In the MISO region, load serving entities, with oversight by the states as applicable by jurisdiction, are responsible for resource adequacy.” MISO, *Reserves Tighten in the MISO Region; Timely actions needed for continued resource adequacy* (June 10, 2016) < <https://www.prnewswire.com/news-releases/reserves-tighten-in-the-miso-region-300282963.html>> (accessed August 4, 2019).

In order to understand the construction of MCL 460.6w, it is important to understand the rapidly-evolving legal context surrounding the role of states and the federal government regarding resource adequacy during the time period in which the legislation was being considered. In 2016, at the time the legislature was considering the new energy law, the U.S. Supreme Court issued not one but two opinions on the question of how the state and federal systems could interact on the issue of resource adequacy. In order to properly interpret the statutory language of MCL 460.6w and its legislative history, it is necessary to understand the peculiar complications Michigan’s system presents when it comes to these jurisdictional lines and to understand the potential complications for implementation of any system that these changes represented.

II. Contemporaneous U.S. Supreme Court Decisions Provide Key Context for the Construction of MCL 460.6w.

Senate Bill 437, which eventually was enacted into law as 2016 PA 341, was introduced on July 1, 2015. 2015 was also the year the U.S. Supreme Court decided to hear not one, but two cases regarding the interaction of federal wholesale market jurisdiction and state resource adequacy jurisdiction. Both opinions were issued during the Senate’s deliberations on its bills addressing the same topic, and each opinion predated a major revision to the legislation’s resource adequacy construct by approximately four months.

Anytime new interpretations of federal law are due to be made on an issue the state legislature is actively considering, it is appropriate for a court interpreting that law to take into account the legal context. It is vital in this case, because when it comes to determining precise questions of jurisdiction regarding resource adequacy and overall reliability of the electrical system, Michigan's electrical laws place it in a less-explored area of this particular jurisdictional landscape.

With the notable exceptions of Michigan and Illinois, the vast majority of states where MISO operates have traditionally regulated utility systems, in which there are monopoly providers whose rates are regulated by a state commission. Michigan operated entirely under this system until 2000. When states choose to have their utilities operate under a traditional monopoly regulatory system, as Michigan did until 2000, there is little question that states, not the federal government, have the regulatory power and responsibility to ensure the first half of the reliability equation: adequate generating resources. See, e.g. *Pac Gas & Elec Co v State Energy Res Conservation & Dev Com'n*, 461 US 190, 205; 103 S Ct 1713, 1723; 75 L Ed 2d 752 (1983) (“Need for new power facilities [is an area] characteristically governed by the States.”), cited for this proposition by *Hughes v Talen Energy Mktg, LLC*, ___ US ___; 136 S Ct 1288, 1292; 194 L Ed 2d 414 (2016).

With the intention of lowering costs through competition, some states have restructured their electricity markets to allow retail customers “open access” – the ability to choose the company responsible for supplying their energy, as Michigan did from 2000-2008. 2000 PA 141 and 142; see also *Detroit Edison Co v Michigan Pub Serv Comm*, 264 Mich App 462, 464; 691 NW2d 61, 64 (2004). FERC has asserted greater jurisdiction over resource adequacy for those states that have a “retail open access program.” See, e.g., *Legal Analysis of Commission*

Jurisdiction Over the Rates, Terms and Conditions of Unbundled Retail Transmission In Interstate Commerce (Appendix G), FERC Stats & Regs ¶ 31,036, 31,635-36 (1996) (Order No. 888), fn 1., available at <<https://www.ferc.gov/legal/maj-ord-reg/land-docs/rm95-8-0ad.txt?csrt=15395056612474611240>> (accessed on August 4, 2019). That is because unlike in a traditionally regulated system, where utilities have a financial incentive to build new power plants, in a restructured market the developer of a power plant does not first receive an assurance from the state government that there will be adequate revenue to support it. Therefore, the compensation of these plants through the federal systems has a much greater impact on resource adequacy than in traditionally regulated markets, where the state compensation system is more decisive. That said, even states with retail access programs retain jurisdiction to achieve resource adequacy goals,⁸ as long as they do so through “regulatory means that [do not] intrude on FERC’s authority of interstate wholesale rates.” *Hughes*, 136 S Ct at 1298.

In 2008, Michigan chose to impose a hybrid of these two systems, with traditionally regulated monopoly utilities supplying a minimum of 90 percent of customers and up to 10 percent of customers able to select an alternative provider of electricity (a “retail open access” program). MCL 460.10a. The 2016 energy laws, consistent with the Chamber’s energy policy, preserved that split.⁹ In other words, Michigan is neither a retail open access state nor a

⁸ Since the passage of 2016 PA 341, there have been two cases regarding challenges to New York’s and Illinois’ recently-passed state laws creating monetary benefits to certain types of electric generation facilities that participate in the wholesale market in restructured states. In each case, the argument was that the state’s legislation was in conflict with the federal system, as in *Hughes*. Both the Second and Seventh Circuits upheld the State statutes as proper exercises of state jurisdiction. *Coal for Competitive Elec, Dynergy Inc v Zibelman*, 906 F3d 41 (CA 2, 2018), *cert denied sub nom Elec Power Supply Ass’n v Rhodes*, 139 S Ct 1547, 203 L Ed 2d 712 (2019); *Elec Power Supply Assn v Star*, 904 F3d 518 (CA 7, 2018), reh’g denied (Oct. 9, 2018).

⁹ At each point in the evolution of Michigan’s energy law, the Chamber’s energy position was largely congruent with the eventual legislation. The Chamber’s energy policy describes the

traditionally regulated state, but something in between. Michigan's structure does not fit neatly into either paradigm, and thus the precise contours of Michigan's jurisdiction are even less clear than for other states.

Leading into 2015, the general rule for evaluating possible conflicts between federal and state jurisdictions under the Federal Power Act was to avoid a "diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Nw Cent Pipeline Corp v State Corp Comm of Kansas*, 489 US 493, 515; 109 S Ct 1262, 1277; 103 L Ed 2d 509 (1989). In May of 2015, just two months before the first version of SB 437 was introduced, the Supreme Court agreed to hear *FERC v. EPSA*, 92 S Ct 1827. In that case, the petitioners were arguing that the state's role over generating resources prohibited the federal government from allowing certain resources to participate in the wholesale market. *Id.* In October of 2015, after the bill that later became PA 341 had been introduced, but before any formal action had been taken on it by the Senate, the Supreme Court announced it would also hear the case of *Hughes v Talen Energy Mktg, LLC*, 136 S Ct 1288. *Hughes* dealt with the State of Maryland's attempt to encourage more generating resources to be built in its borders, and involved a challenge from those who said Maryland's statute could not be put into effect because it impermissibly interfered with the federal wholesale markets. Thus, just as the Michigan Senate was taking up legislation that would expand the exercise of Michigan's resource adequacy jurisdiction, it was

evolution of its position as follows: "In 1999 the Michigan Chamber Board adopted an energy policy that supported deregulation of Michigan's electric markets. That position went unchanged until the 2008 energy debate that resulted in the restoration of regulation of 90 percent of electric customers and the creation of the ten percent retail open access cap. The Chamber worked to pass a legislative compromise to protect members that wanted to access alternative energy suppliers through the creation of an electric choice grandfather clause along with a ten percent choice cap. When the 2008 energy law was signed, only 3% of customers received service from alternative electric suppliers. As we began energy policy discussions[], the starting point was to work from the compromise that was reached in 2008." Exhibit A, p. 3.

clear that the U.S. Supreme Court intended to clarify the scope of federal and state authorities under the Federal Power Act, specifically around the issue of resource adequacy.

In January of 2016, the U.S. Supreme Court issued its opinion in *FERC v. EPSA*, which seemed to affirm a strong jurisdictional role for states over resources on the retail side. That case, which took up a question of what kind of resources the federal government could allow to participate in the federal auction system, affirmed the inclusion of certain resources in federal markets in part because of the federal government’s “notable solicitude toward the States” – notably, that states could prohibit those resources from participating in the federal system. 136 S Ct at 779. Therefore, at the start of 2016, the Court appeared to be endorsing a strong role for states to control the functional equivalent of generating resources vis a vis the federal wholesale markets.

In April of 2016, the U.S. Supreme Court issued its decision in *Hughes*. 136 S Ct 1288 (2016). That decision simultaneously affirmed Maryland’s continuing jurisdiction over resource adequacy and struck down a state law that incentivized locally-sited generation, because the Court found the state’s financial incentive mechanism conflicted with the federal jurisdictional authority over wholesale markets. Specifically, the opinion made clear there was a new potential limit for states in the exercise of their jurisdiction over resource adequacy (at least for states with a restructured system): if a state’s statute essentially adjusted the wholesale price for generation set by Regional Transmission Organizations, it would impermissibly infringe on federal jurisdiction and thus could not be enforced. *Id.* at 1297.

Therefore, just at the time that Michigan’s legislature was considering bills regarding these questions, new opinions issued from the Supreme Court that addressed the potential interaction between state laws involving resource adequacy and the federal systems administered

by entities like MISO. Given that Michigan's electric structure would require the application of these precedents to an unusual state system, these decisions offered a clear warning and opportunity: the state still had a clear and strong role to play in resource adequacy and cooperative state/federal regimes were likely to be favored, but there were some new types of interaction between federal and state systems that could render a state statute unenforceable.

Approximately four months after the Supreme Court issued *Hughes*, Governor Snyder announced that Michigan and MISO had developed a proposed framework for handling resource adequacy, describing a cooperative way in which both entities would exercise their respective jurisdictions to avoid any conflicts. MISO indicated its intent to submit that proposal to FERC for approval in November of 2016, which it subsequently did. Michigan Agency for Energy, *Michigan and MISO develop solution to electric capacity* (September 19, 2016)

<https://www.michigan.gov/formergovernors/0,4584,7-212-90815_57657-393462--,00.html>
(accessed on August 4, 2019).

Under the proposal, MISO would have chosen to create a market and requirements to buy capacity three years in advance. When it created that forward capacity market, Michigan would have had an option to elect to move forward under a "State Compensation Mechanism" for procuring electrical resources. Under that mechanism, MISO would have set requirements for companies supplying retail customers with electricity (called "load serving entities") to procure their share of both local and overall capacity necessary for reliable operation of the electric grid. *Id.* The State would have cooperatively exercised its jurisdiction to set a requirement to allow the use of local resources owned by traditionally regulated utilities by alternative electric providers, so that alternative electric providers would have access to facilities to meet their federally-set requirements, for a fee set by the Commission. The Commission would also be able

to use its power to approve capacity plans to ensure that there were enough generating resources to serve all customers, regardless of their provider. In short, the State Compensation Mechanism proposal to FERC laid out a plan for a cooperative exercise of State and federal jurisdictions to ensure resource adequacy that worked with Michigan's unique electric structure. This plan was pending before the FERC, with an unknown decision date, for the remainder of 2016.

In December of 2016, when the legislature passed PA 341, the structure of 460.6w reflected the clear intent by the State to cooperate with the federal government to achieve reliability, in line with the Chamber's energy policy. See Exhibit A. Under 460.6w(1), if FERC approved the proposal that included the State Compensation Mechanism, Michigan and MISO would proceed as described, with each exercising their jurisdiction and an end result that there would be a requirement and mechanism for each load serving entity to procure its share of local resources. There were also instructions about what to do if FERC approved a forward market in MISO without the State Compensation mechanism, and what to do if FERC approved neither the forward market nor the State Compensation mechanism - the world in which we now find ourselves. 460.6w(1) and (2). In each of those scenarios, the plan provided for cooperative exercises of jurisdiction and powers by the Commission and MISO. The legislation is properly understood as a way to achieve the same end result in any scenario, necessitating a stronger exercise of state jurisdiction when the role of the federal system is narrower than it would have been in the other possible scenarios.

III. The Lower Court Error Regarding the Jurisdictional Realm of the Midcontinent Independent System Operator Led It to Misinterpret MCL 460.6w.

In its "background and facts" section of its opinion in this case, the lower court stated "MISO's functions include capacity resource planning." *In re Reliability Plans of Elec Utilities*

for 2017-2021, 325 Mich App 207, 211; 926 NW2d 584, 588 (2018). As described above, this is an error. MISO itself notes that resource adequacy planning is a function of the states. “MISO recognizes and supports the independent authority of state regulators over generation resource investment and long-term resource adequacy. This longstanding recognition is 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.” MISO Comments, Case No. U-18197, Letter from Melissa Seymour to Mary Jo Kunkle, August 15, 2017, at 1-2, available at <<https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t0000001UVSAAA4>> (accessed August 4, 2019).

Unfortunately, this error underpins the lower court’s statutory analysis and its review of the legislative history. Simply put, the lower court appears to read MCL 460.6w as inserting state action into an existing and ongoing federal role and responsibility. Instead, the opposite is true: under longstanding federal law and recent U.S. Supreme Court precedent, Michigan has the primary responsibility to ensure resource adequacy, and its law should be read through that lens. In other words, the lower court erred when read the Michigan statute as laying out a path to complement whatever actions the federal government would take on an area of federal responsibility, instead of properly understanding it as an attempt by Michigan to fulfill its own responsibility in a way that would not interfere with the federal government’s attempts to meet its complimentary but distinct responsibilities. 460.6w’s construction shows an attempt to meet these goals without the benefit of knowing what method the federal government would choose to pursue.

The lower court’s misunderstanding of the jurisdictional lines is directly related to its interpretation of the statute. It notes that the statute as a whole has a preference for an

application consistent with MISO's rules. This is true, but the court's error is to assume that the codification of that consistency and a cooperative federalism approach in 460.6w was intended as a limitation of the state's authority -- instead of properly understanding it was intended to maximize the Commission's exercise of the state's authority. In *Hughes*, the Supreme Court had made clear that state exercises of jurisdiction in this area were at risk of being prevented when they were found to interfere with the federal system. 460.6w's instructions to carry out the state's jurisdiction in a manner consistent with the federal tariff are thus best understood as akin to a savings clause. Specifically, if the precise way the Commission exercised its jurisdiction was found to conflict with the federal system, then the way forward would be to find another way to reach the statute's aims within the state's jurisdiction, instead of risking a wholesale pre-emption of the statute as Maryland had suffered in *Hughes*. Such instructions also would preserve the Commission's ability to exercise its jurisdiction by altering its manner of implementation in the event that MISO rules changed.

The lower court's statement that "reaching this conclusion requires the inference that section 6w permits the MPSC to establish a capacity obligation that includes a local clearing requirement *contrary to that imposed by MISO*," mischaracterizes the absence of a federal rule as a bar to state action, instead of properly recognizing this as a gap which the State has the primary responsibility to fill. *In re Reliability*, 325 Mich App 207 at 228 slip op at 8 (emphasis added). What the statute is better understood to permit, and in fact encourage and authorize, is the imposition of additional obligations in order to exercise the state's jurisdiction, so long as they do not impermissibly interfere with the operation of the federal system.

Similarly, the evolving legal context illuminates the legislative history as well. The court reads the removal of particular language requiring a percentage of the local clearing requirement

as an intent to remove any such requirement in any future draft. Instead, it is better understood to reflect a reaction to the *Hughes* language, replacing an inflexible single requirement that could not be adjusted with language endorsing a more flexible, cooperative exercise of jurisdiction with the federal government. The change in language is entirely consistent with a desire to preserve the state's ability to create such a requirement following *Hughes*, with its emphasis on particular details of the state's plan that rendered it unenforceable. Moreover, understanding that context makes more sense in reading the statute as a whole: if the state legislature wished to support and facilitate the requirement for all companies to procure local resources when the federal government would do it, why would it stop those attempts just when the federal government presented the least possible impediment to the State's action?

Read as a whole, with the correct jurisdictional lens and broader legal context, the legislative history and the statutory language are properly read to support the MPSC's ability to set a local clearing requirement beyond those the federal government has done, as long as those requirements are not directly in conflict with federal rules regarding wholesale markets.

CONCLUSION

Recognizing the need for the federal and state governments to work cooperatively in this area, Exhibit A states: "Michigan needs a supply adequacy plan, coordinated with electric regional transmission organizations, to prevent energy capacity shortages that could create reliability issues. Such a plan should include uniform standards over a multi-year period required of all energy providers. Planning and financial requirements should not be costly or burdensome." Exhibit A at 3. The Chamber believes the law that resulted from the process, 460.6w, met these objectives. As interpreted by the Appeals Court, however, it would not.

On the fundamental question of whether the Michigan Legislature intended to require all providers to procure local resources if needed to assure reliability, the Chamber believes the answer is yes.¹⁰ 2016 PA 341 is best understood as attempting to ensure state and federal exercises of jurisdiction resulted in that outcome regardless of what course of action the federal government chose to pursue.

Respectfully submitted,

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¹⁰ This brief should not be read endorse any particular application the MPSC has made of its powers under 2016 PA 341 or endorse the position of any party regarding the proper methodology, process, or specific requirements the Commission has utilized.

EXHIBIT A

Michigan Chamber of Commerce
Official Policy Relating to Energy

**MICHIGAN CHAMBER OF COMMERCE
OFFICIAL POLICY
RELATING TO
ENERGY
APPROVED BY
BOARD OF DIRECTORS
APRIL 28, 2015**

THE MICHIGAN CHAMBER OF COMMERCE ADVOCATES FOR AN ENERGY POLICY THAT PROVIDES COST-BASED RATES ALLOWING MEMBER BUSINESSES TO COMPETE WITHIN THE GREAT LAKES REGION.

SPECIFICALLY, MICHIGAN'S ENERGY POLICY SHOULD SUPPORT INFRASTRUCTURE INVESTMENT TO BUILD AND MAINTAIN A RELIABLE GENERATION, TRANSMISSION AND DISTRIBUTION SYSTEM. IT MUST SUPPORT RESPONSIBLE EXPLORATION FOR ENERGY FUEL SOURCES, REASONABLE INVESTMENTS IN CLEAN ENERGY AND ENERGY EFFICIENCY PROGRAMS TO HELP ELIMINATE ENERGY WASTE AND REDUCE EMISSIONS. MICHIGAN'S ENERGY POLICY SHOULD SUSTAIN RETAIL OPEN ACCESS PROGRAMS WHILE GUARANTEEING SUFFICIENT CAPACITY TO SERVE ALL CUSTOMERS. FINALLY, THE ENERGY REGULATORY PROCESS MUST BE TRANSPARENT, PROVIDE NECESSARY OVERSIGHT, UTILIZE AN INTEGRATED RESOURCE PLANNING PROCESS, AND ALLOW BUSINESSES TO PARTICIPATE IN A MEANINGFUL WAY.

THE MICHIGAN CHAMBER SUPPORTS LEGISLATION TO ENSURE OR PROVIDE:

- ACCESS TO RATES THAT ALLOW MICHIGAN BUSINESSES TO COMPETE
- RATES BASED ON THE COST TO SERVE THE CUSTOMER; WITHOUT SPECIAL RATES OR SUBSIDIES
- ELECTRIC RETAIL OPEN ACCESS PROGRAMS ARE SUSTAINED
- REASONABLE MULTI-YEAR SUPPLY ADEQUACY PLANNING TO PREVENT CAPACITY SHORTAGES
- THE CONSTRUCTION AND MAINTENANCE OF A TRANSMISSION AND DISTRIBUTION SYSTEM THAT MINIMIZES OUTAGES AND PROVIDES CUSTOMERS WITH THE MOST BENEFIT FOR THE COST
- INFRASTRUCTURE INVESTMENT POLICIES THAT PROVIDE RATEPAYERS WITH RELIABLE, LOW-COST ENERGY
- CONTINUED ABILITY TO RESPONSIBLY EXPLORE FOR OIL AND GAS RESOURCES
- A REGULATORY PROCESS THAT IS TRANSPARENT
- RETENTION OF A CERTIFICATE OF NECESSITY PROCESS
- THE MICHIGAN PUBLIC SERVICE COMMISSION MAKES THE FINAL DECISION ON ALL RATE CASES
- CLEAN ENERGY INVESTMENTS THAT PROVIDE ENERGY COMBINED WITH CAPACITY AND IMPROVED ENVIRONMENTAL BENEFITS FOR THE SHORT AND LONG TERM AT COMPARABLE COSTS TO TRADITIONAL PRODUCTION METHODS
- EFFICIENCY PROGRAMS THAT ARE NEITHER BURDENSOME OR COSTLY THAT PROVIDE INVESTMENT OPPORTUNITIES AND FLEXIBLE PROGRAM REQUIREMENTS
- AN INTEGRATED RESOURCE PLANNING PROCESS THAT COST EFFECTIVELY

**INCORPORATES SUPPLY SIDE AND DEMAND SIDE RESOURCES WHILE MEETING
APPLICABLE RELIABILITY AND ENVIRONMENTAL LAWS**

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BACKGROUND

The Energy & Environment committee met on Wednesday, April 15th and voted to unanimously recommend the energy policy proposal by the energy workgroup to the Chamber's board of directors.

ENERGY POLICY WORKGROUP AND COMMITTEE REVIEW

The Michigan Chamber's Energy & Environment committee formed an energy policy workgroup in mid-February. All committee members were invited to participate in the workgroup. A total of thirty members volunteered to participate in the workgroup. That list of volunteers included manufacturers of all sizes, retail and commercial businesses, consultants, attorneys, gas and electric utilities of all sizes, and transmission companies. The workgroup met a total of five times and many members met with chamber staff individually. The workgroup identified the key issues for discussion and a policy outline was created from that list. We proceeded to cover each issue subject separately and then generated a policy statement based on the discussion. We collected all of those issues into a comprehensive energy policy guide to base our formal board policy on. You will find that document below. The workgroup approved the board policy along with the policy guide and sent it to the Energy & Environment committee for approval. The Michigan Chamber's Energy & Environment committee met on Wednesday, April 15th and voted to unanimously recommend the energy policy proposal developed by the energy workgroup to the Chamber's board of directors.

ENERGY WORKGROUP NOTES

**APRIL
2015**

COMPETITIVE ENERGY RATES

Michigan's energy policy must ensure access to rates that provide Michigan businesses the ability to compete in the Great Lakes Region. Chamber members want competitive energy rates that allow them to grow and prosper here in Michigan.

COST OF SERVICE-BASED ENERGY RATES

Michigan's energy rates should be based on the utility's cost to serve each customer and class.

Cost of service electric rates offer equity to assure all customers are paying their fair share. Subsidies should be avoided in a cost-of-service-based system.

PLANNING FOR THE CAPACITY TO SERVE ENERGY CUSTOMERS

Michigan needs a supply adequacy plan, coordinated with electric regional transmission organizations, to prevent energy capacity shortages that could create reliability issues. Such a plan should include uniform standards over a multi-year period required of all energy providers. Planning and financial requirements should not be costly or burdensome. A supply adequacy plan should be part of an integrated resource plan.

ENERGY INFRASTRUCTURE INVESTMENT

Investment in our electric and gas infrastructure is a key component to maintaining energy reliability. We must weigh carefully the costs and economic impact of these investments. Clearly, the right infrastructure investments can offer tremendous benefits by creating efficiency and ensuring reliability. We need to build and maintain a strong transmission and distribution system that minimizes outages and provides customers with the most benefit for the cost. Transmission interconnections should be leveraged for reliability.

INTEGRATED RESOURCE PLANNING

Michigan's energy policy should include an integrated resource planning process that cost-effectively incorporates supply side and demand side resources while meeting applicable reliability and environmental laws.

EXPLORATION FOR ENERGY RESOURCES

We should take advantage of the fuel sources that Michigan businesses can provide. Our state has a long history of safe oil and natural gas exploration. Energy exploration in Michigan must continue with strong, science-based, reasonable and not overly-burdensome regulations to protect public health and the environment.

SUSTAINING RETAIL OPEN ACCESS PROGRAMS

Some Chamber members have chosen to utilize alternative energy suppliers for their gas and electricity services and wish to maintain that ability. By sustaining the retail open access programs for electric customers, we ensure access to alternative providers exists.

A TRANSPARENT AND INCLUSIVE ENERGY REGULATORY PROCESS

Transparency is a critical element of a proper regulatory process and must be included in Michigan's energy policy. Job providers need to understand and be involved in the development of rates, new regulations, new generation, investments in alternative and renewable energy projects, efficiency programs, and any other expenditures or policies related to energy.

In addition, the certificate of need process (CON) has provided our state a healthy discussion forum to review potential new energy infrastructure projects to ensure good decisions are made. The CON should remain a key part of the regulatory process.

Furthermore, the ratemaking process should require public discussion and review of all rate cases. The process should always conclude with action by Michigan's regulatory oversight body. This process should be timely for all parties involved to minimize unnecessary costs that could impact ratepayers or providers.

CLEAN ENERGY INVESTMENT

Michigan's energy policy should incorporate opportunities for businesses to invest in clean energy and provide them and the utilities credit for those investments. The use of new and existing technologies to provide clean, low-cost energy to keep Michigan competitive should also be encouraged.

ENERGY EFFICIENCY EFFORTS

Energy efficiency programs should provide a return on investment that is commensurate with

or exceeds program costs. Flexibility on program requirements and the ability to customize solutions is critical to prevent unnecessary and costly burdens. In addition, companies must have the ability to make investments on their own that allow them to exit the program. Such investments should be counted toward statewide clean energy goals and environmental compliance requirement. Efficiency programs should be considered as part of an integrated resource plan to ensure unnecessary capacity is not built.

EXECUTIVE AND LEGISLATIVE PROPOSALS

Governor Snyder has outlined his vision for Michigan's energy future and it focuses on the elimination of energy waste through energy efficiency, continued investment in clean energy, replacing coal generation with natural gas, and overall goal of reducing emissions. Representative Aric Nesbitt, chair of the House Energy committee, has introduced legislation that would eliminate retail open access programs, return Michigan to full electric regulation, eliminate our current energy efficiency programs, and require an integrated resource planning process. Senator Mike Nofs, chair for the Senate Energy & Technology committee, has been working through a draft proposal that would retain the current Retail Open Access programs, but not require the utilities to serve ROA customers that wish to return, require customers returning to the utility to cover any costs, create a clean energy standard, allow Renewable Portfolio Standards to sunset, and require an integrated resource plan be submitted by each utility to ensure long term energy needs are met.

MICHIGAN CHAMBER ENERGY POLICY HISTORY

In 1999 the Michigan Chamber Board adopted an energy policy that supported deregulation of Michigan's electric markets. That position went unchanged until the 2008 energy debate that resulted in the restoration of regulation of 90 percent of electric customers and the creation of the ten percent retail open access cap. The chamber worked to pass a legislative compromise to protect members that wanted to access alternative energy suppliers through the creation of an electric choice grandfather clause along with a ten percent choice cap. When the 2008 energy law was signed, only 3% of customers received service from alternative electric suppliers. As we began energy policy discussions this year, the starting point was to work from the compromise that was reached in 2008.