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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

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APPELLANT CONSUMERS ENERGY COMPANY'S REPLY TO THE RESPONSE OF THE ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY

ORAL ARGUMENT REQUESTED

Dated: September 6, 2019

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I. Introduction

Pursuant to MCR 7.312 and the Supreme Court's June 21, 2019 Order in this proceeding, Consumers Energy Company ("Consumers Energy" or the "Company") files this Reply to the August 23, 2019 Response of the Association of Businesses Advocating Tariff Equity ("ABATE").

II. Standard of Review

ABATE contends that the statutory burden set forth in MCL 462.26(8), which requires an appellant to show by clear and convincing evidence that a Michigan Public Service Commission ("MPSC" or the "Commission") order is unlawful or unreasonable, does not apply in this case because the proceeding was not a contested case proceeding and the issue involved is one of statutory construction. But, MCL 462.26(8) applies to "all appeals" of MPSC orders. The Supreme Court did not rule that statute nugatory in appeals concerning statutory construction in the *Rovas* case. *In re Complaint of Rovas*, 482 Mich 90; 754 NW2d 259 (2008). The *Rovas* court confirmed that the proper standard of review for agency statutory construction is as explained in *Boyer–Campbell v Fry,* 271 Mich 282; 260 NW 165 (1935), which provides that:

> the 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.

The *Rovas* court made clear that an agency's interpretation deserves "respectful consideration," but cannot conflict with plain statutory language:

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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. [*In re Complaint of Rovas Against SBC Michigan*, 482 Mich. 90, 103, 754 NW2d 259, 267 (2008).]

The MPSC's construction of Section 6w of Public Act 341 of 2016 ("Act 341") in this case reflects the plain language and intent of that statute, and should be affirmed by the Supreme Court. Neither ABATE nor the Court of Appeals provided a "cogent reason" for overruling the MPSC's interpretation. The Supreme Court's de novo review under the principles of *Rovas* and MCL 462.26(8) should affirm the MPSC's interpretation of the statute.

III. Section 6w of Act 341 Authorizes the MPSC to Determine and Implement a Local Clearing Requirement as Part of Each Electric Provider's Four-Year Forward Capacity Obligations, Including Individual Alternative Electric Suppliers

ABATE admits that the MPSC can implement a Planning Reserve Margin Requirement ("PRMR") on each of the state's individual electric providers, including Alternative Electric Suppliers ("AESs"). ABATE also admits that the MPSC can implement a Local Clearing Requirement ("LCR") on municipal utilities, cooperative utilities, and investor-owned utilities such as Consumers Energy. These admissions are important, because the statute which authorizes the MPSC's authority to implement an individual PRMR and an LCR on municipal and cooperative utilities and incumbent utilities *is the same statutory provision which authorizes it to implement an LCR on individual AESs*. In setting forth the requirements of a State Reliability Mechanism ("SRM"), Section 6w(8)(c) of Act 341 requires the MPSC "to determine the capacity obligations . . . [including] the local clearing requirement and planning reserve margin requirement." MCL 460.6w(8)(c). Act 341 defines an AES as an "electric provider."

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MCL 460.6w(12)(iv). Act 341's "capacity obligations" include a PRMR and an LCR for all individual electric providers, including AESs. MCL 460.6w(8)(c).

While statutes other than Section 6w(8)(c) *reference* the LCR, those references do not diminish the authority to determine it and impose it on individual electric providers, set forth in Section 6w(8)(c). ABATE notes the requirement that incumbent utilities include in their Integrated Resource Plans, filed under Section 6t of Act 341, information about the capacity resources they intend to rely upon to meet the applicable LCR. This is irrelevant. The establishment and imposition of the LCR on utilities stems from the authority granted to the MPSC under Section 6w of Act 341, the same statute which requires individual AESs to comply with MPSC-established four-year forward capacity obligations, including an LCR. ABATE also references the allowance for capacity aggregation afforded to municipal and cooperative utilities in Section 6w(8)(b) of Act 341. But, the referenced aggregation allowance is not the only statutory provision which authorizes the MPSC's imposition of an LCR on municipal and cooperative utilities. Again, Section 6w(8)(c) includes that authorization. And Section 6w(8)(c) applies to all electric providers, including individual AESs.

ABATE's position that the MPSC can "determine" the LCR, but somehow lacks authority to implement that component of AESs' four-year forward capacity obligations, is illogical and inconsistent with the language of the statute. There would be no need to "determine" the applicable LCR, or the PRMR, for that matter, if the MPSC could not implement those requirements as part of electric providers' individual "capacity obligations." The MPSC does not set capacity obligations for the entire Zone; rather, Section 6w directs it to establish capacity obligations for each retail electric provider, including AESs. Reading Section 6w as a whole shows that its entire purpose is to require individual electric providers to meet four-year

forward capacity obligations as determined by the MPSC. The Legislature's express authorization for the MPSC to establish an LCR "in order to determine the capacity obligations" of the state's retail electric providers empowers the Commission to apply the determined LCR to individual electric providers' capacity obligations under Section 6w(8)'s SRM. There would be no reason for the MPSC to "determine" the LCR if it is prohibited from applying the LCR to individual electric providers' capacity obligations. ABATE's argument that the MPSC lacks authority to implement the LCR component of capacity obligations on individual AESs conflicts with the text of Section 6w and to the entire purpose of that section - to establish new capacity obligations for individual electric providers, which include AESs.

IV. The Midcontinent Independent System Operator, Inc. Currently Does Not Establish Capacity Obligations for Any Period Beyond the Current Planning Year, and Its Residual Planning Reserve Auction Does Not Govern the Four-Year Forward Capacity Obligations Required by Section 6w of Act 341

ABATE admits at page 4 of its Response to the MPSC's Supplemental Brief that "The PRA serves as a mechanism for [electric providers] to sell and buy capacity in the near-term (i.e. prompt year) through an auction." Had the Federal Energy Regulatory Commission ("FERC") approved the Midcontinent Independent System Operator, Inc.'s ("MISO") proposed Competitive Retail Solution ("CRS") tariff, MISO would have had the ability to implement a Forward Resource Auction ("FRA") as a long-term capacity auction to complement the PRA. If the CRS had been implemented, electric providers could have used the FRA to meet the state's long-term capacity obligations under Section 6w of Act 341. But FERC rejected the CRS. The MPSC was therefore obligated under Section 6w(2) to implement the SRM pursuant to Section 6w(8) of Act 341. The SRM does not allow electric providers to satisfy their forward capacity obligations by simply relying on the current year's MISO Planning Reserve Auction ("PRA"). Had that been the case, there would have been no need or reason to implement an SRM and its

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capacity obligations, which are in addition to and complementary to the prompt-year ones used by MISO.

Act 341 does not contemplate electric providers, including AESs, satisfying four-year forward capacity obligations required under the SRM by simply relying on the resources that MISO allows them to purchase in the PRA for the current planning year. Section 6w(6) of Act 341's allowance for an AES "to 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" was drafted and enacted at a time when MISO had proposed a tariff which included a capacity auction for a forward period, as well as a Prevailing State Compensation Mechanism, both of which could have been used to meet the "capacity obligations" as established by the MPSC pursuant to Section 6w of Act 341. But FERC rejected the MISO CRS proposal. Had the Legislature intended to allow AESs to rely on the already-existing MISO current year PRA (which is widely characterized as a "residual auction" and designed for short-term capacity needs) to demonstrate long-term resource adequacy, there would have been no need to implement Section 6w of Act 341 for ensuring the long-term reliability of electric providers' capacity resources, because the short-term MISO resource adequacy construct was already in place.

MISO's rules regarding what resources can count to meet the applicable Zone's LCR remain relevant to determining whether an electric provider meets the four-year forward capacity obligations as determined by the MPSC as part of the SRM. The MPSC addressed what resources an electric provider may count toward meeting the LCR as a component of an electric provider's capacity obligation under the SRM. The MPSC determined that "all resources that MISO currently counts towards meeting MISO's LCR, count towards meeting Michigan's

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forward locational requirements," and noted 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 to the Company's Supplemental Brief in this case, 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 302a.

Act 341's institution of a state long-term resource adequacy planning process, including the requirement of complying with an LCR as determined by the MPSC, does not prohibit electric providers from continuing to use the MISO PRA for the current planning year. That said, the obligations for the PRA and the SRM, while complementary, are not the same, and the differences between Act 341's four-year forward capacity obligations and the capacity obligations which apply to the PRA are substantive, not only temporal, as contended by ABATE.

Section 6w(8)(b) requires AESs to meet the SRM capacity obligations with resources either owned or under the AES's existing contractual rights. An AES who intends to use the PRA for the current planning year cannot have ownership or contractual rights to those resources until after the auction has concluded, which happens in April of each year, well after the AES must demonstrate compliance with four-year forward capacity obligations to the MPSC in February of each year with capacity resources that it either owns or has under contract at the time of the forward capacity demonstration. This illustrates that the PRA is not the same as "ownership" or "contractual rights" to a capacity resource four years in advance of using that resource to serve retail customers. Contrary to ABATE's position, an electric provider's potential to avoid meeting a share of the Zone's total LCR when using the MISO PRA does not mean that the rules for the residual, current-year PRA apply as the "capacity obligation" as that

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term is used in the four-year forward planning process set forth in Section 6w of Act 341. The Supreme Court should reject the contention that compliance with MISO's rules for the current year PRA constitutes compliance with an AES's four-year forward capacity obligation for purposes of Act 341's SRM. To do otherwise would render the SRM meaningless. There is no reason for the MPSC to set a Zonal LCR because MISO already does that. The purpose of the SRM is for the MPSC to determine the LCR and apply it to individual electric providers to help ensure they all meaningfully contribute to the state's long-term electric reliability. ABATE's contention that Section 6w(6) allows AESs to meet the SRM capacity obligations using any resource which they can obtain through the prompt year PRA ignores the forward nature of SRM capacity obligations. Analogously, an electric provider cannot meet its four-year forward PRMR obligation by simply saying it will buy all of its four-year forward requirements in the current year's PRA, because the PRA does not allow for auction of capacity resources on a forward basis. Under ABATE's theory, a four-year forward SRM capacity charge would never apply to an AES as long as it claims it will purchase its capacity requirements from the prompt year residual PRA. ABATE's argument renders the exception provided to AESs by Section 6w(6) meaningless, because the exception itself would be unnecessary if the Legislature had intended to allow AESs to demonstrate compliance with SRM capacity obligations by mere satisfaction with the minimal requirements for obtaining prompt year capacity through the PRA.

As noted, the Legislature enacted Section 6w(6) when the MISO CRS proposal was pending at FERC. Had FERC approved the CRS proposal, AESs could have procured forward capacity necessary to meet its SRM capacity obligations via a MISO forward auction, which included a requirement for the electric provider to demonstrate a load-ratio share of the Zone's LCR. In addition, as noted by the MPSC, an AES can still demonstrate compliance with the

SRM's LCR by owning or having contract rights to capacity resources which contribute to the Zone's LCR. The exception of Section 6w(6) has meaning, but it is not a blanket exception, swallowing the rule, for AESs to avoid an LCR requirement.

V. <u>The MPSC's Authority to Determine and Implement an LCR as Part of Individual AESs' SRM Capacity Obligations Appropriately Supplements Public Act 141 of 2000 to Ensure that All Electric Providers Contribute to Reliability</u>

ABATE incorrectly argues (Response to Consumers Energy's Supplemental Brief, page 22) that the MPSC's implementation of an LCR as part of individual AESs' SRM capacity obligations would "prohibit AESs from accessing out-of-state resources, including those available in wholesale power markets such as the MISO PRA," and would violate a purpose of Public Act 141 of 2000 ("Act 141"). First, the imposition of an LCR for a four-year forward SRM capacity obligation does not impact an AES's ability to participate in the prompt-year MISO PRA, because they are two different capacity constructs, and compliance with the state's four-year forward SRM capacity obligations does not impermissibly affect an AES's ability to participate in the prompt-year MISO PRA. The Legislature was fully aware of Act 141's provision for 10% retail open access, and to allow access to wholesale markets. That access is not unlimited under the SRM, however, and must now comply with the more recent resource adequacy requirements of the SRM. The Court's interpretation of these two statutes should construe them as a whole to harmonize them and to carry out the purpose of the Legislature. When there is tension, or even conflict, the Court has a "duty to, if reasonably possible, construe them both so as to give meaning to each; that is, to harmonize them." *Nowell v Titan Ins Co,* 466 Mich 478, 483; 648 NW2d 157 (2002). "Statutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates." *Mich Deferred Presentment*

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Servs Ass'n, Inc v Comm'r of Office of Financial & Ins Regulation, 287 Mich App 326, 334; 788 NW2d 842 (2010) (quotation marks and citation omitted). "The object of the *in pari materia* rule is to give effect to the legislative intent expressed in harmonious statutes." *Id.* (quotation marks and citation omitted). "When there is a conflict between statutes that are read *in [sic] para materia,* the more recent and more specific statute controls over the older and more general statute." *People v Buehler,* 477 Mich 18, 26; 727 NW2d 127 (2007); *O'Connell v Dir of Elections*, 316 Mich App 91, 98–99; 891 NW2d 240 (2016). Section 6w of Act 341 is complimentary and harmonious with Act 141. In any event, as the more recent and more specific statute related to resource adequacy, the provisions of Section 6w of Act 341 must prevail if the Court finds a conflict with Act 141.

VI. **The Legislative History of Act 341 Supports the MPSC's Authority to Determine and Implement an LCR on Individual AESs**

The Supreme Court should also reject ABATE's arguments regarding the legislative history of Section 6w of Act 341, for the reasons set forth on pages 48 through 50 of Consumers Energy's August 2, 2019 Supplemental Brief.

VII. **Section 6w of Act 341 Does Not Violate the Non-Delegation Doctrine**

The Supreme Court should reject ABATE's non-delegation argument. The MPSC's authority to determine and implement an LCR for electric providers satisfies the non-delegation doctrine. *State Conservation Dept v Seaman,* 396 Mich 299, 308; 240 NW2d 206 (1976). The MPSC's authority to implement an LCR is neither absent of standards nor devoid of administrative due process. Subsection 6w(12)(d) of Act 341 defines "local clearing requirement," and this definition provides a standard by which the MPSC will make its determination. Section 6w(8)(c) requires the MPSC to obtain additional technical assistance from MISO in determining the LCR. The MPSC conducted a contested case (Case No.

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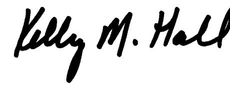
U-18444) in which it obtained additional evidence to determine the LCR. The MPSC used its administrative expertise to accomplish the legislative intent of Section 6w, and satisfied the non-delegation doctrine.

VIII. 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 implement a local clearing requirement as part of alternative electric providers' capacity obligations under Section 6w of Act 341.

Respectfully submitted,

CONSUMERS ENERGY COMPANY



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[1] Pursuant to the instructions given by the Michigan Appellate Courts, this document is being filed on September 7, 2019 due to the court migration system.

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