STATE OF MICHIGAN
IN THE SUPREME COURT

In re RELIABILITY PLANS OF ELECTRIC UTILITIES FOR 2017-2021

ASSOCIATION OF BUSINESS ADVOCATING TARIFF EQUITY,
Appellee,

v

CONSUMERS ENERGY COMPANY,
Appellant, and

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

Supreme Court Case No. 158305
Court of Appeals No. 340600
Lower Court Case No. 00-01897

ENERGY MICHIGAN, INC.,
Appellee,

v

CONSUMERS ENERGY COMPANY,
Appellant, and

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

Supreme Court Case No. 158306
Court of Appeals No. 340607
Lower Court Case No. 00-01897

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,
Appellee,

v

MICHIGAN PUBLIC SERVICE

Supreme Court Case No. 158307
Court of Appeals No. 340600
Lower Court Case No. 00-01897

COMMISSION,
Appellant, and

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

ENERGY MICHIGAN, INC.,
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MICHIGAN PUBLIC SERVICE
COMMISSION,
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CONSUMERS ENERGY COMPANY, and
MICHIGAN ELECTRIC AND GAS
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Supreme Court Case No. 158308
Court of Appeals No. 340607
Lower Court Case No. 00-01897

ENERGY MICHIGAN, INC.'S RESPONSE TO CONSUMER'S ENERGY COMPANY'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

Appellee, Energy Michigan, Inc. ("Energy Michigan")[1] agrees with Appellant Consumers Energy Company ("Consumers") that this Court has jurisdiction over all other appeals from decisions of the Court of Appeals. Const. 1963, art 6, § 4, MCR 7.303(B)(1). Appellee, Energy Michigan, disagrees that this Court should grant Appellant's August 23, 2018 Application for Leave to Appeal ("Application") the Court of Appeals' July 12, 2018 Opinion reversing the Michigan Public Service Commission's ("MPSC" or "Commission") September 15, 2017 Order in Case No. U-18197 ("September 15 Order"). *In re Reliability Plans of Electric Utilities for 2017-2021,* ___ Mich App ___ (Docket No. 340600; For Publication) (the "Opinion"). Energy Michigan Requests that this Court deny Consumers' Application for Leave to Appeal.

[1] Energy Michigan is a Michigan nonprofit corporation, formed over thirty years ago, to protect and promote the interests of producers and users of independent power and serves as the trade association for alternative and independent power supply, cogeneration, advanced energy industries, and their customers in Michigan. Its membership includes independent power producers, those interested in cogeneration, power suppliers and marketers, project developers, local units of government, and users of electricity.

COUNTERSTATEMENT OF IDENTIFICATION OF ORDER APPEALED AND RELIEF SOUGHT

Consumers Energy Company's ("Consumers") Application before this Court involves a matter of statutory construction of 2016 PA 341 ("Act 341") and the Michigan Public Service Commission's ("MPSC" or "Commission") September 15, 2017 Order implementing certain provisions of Act 341. Energy Michigan agrees with Consumers that in Orders issued in MPSC Case No. U-18197 on June 15, 2017 ("June 15 Order," attached as Exhibit 1) and September 15, 2017 ("September 15 Order," attached as Exhibit 2), the Commission found that Section 6w of Act 341 ("Section 6w") authorizes it to determine and implement a local clearing requirement ("LCR") as a part of the capacity obligations for individual electric providers, including Alternative Electric Suppliers ("AESs"). As Consumers notes, an AES is defined in statute as "a person selling electric generation service to retail customers in this state. Alternative electric supplier does not include a person who physically delivers electricity directly to retail customers in this state. An alternative electric supplier is not a public utility." MCL 460.10g(a). As Energy Michigan discusses herein, the Commission's May 11, 2017 Order ("May 11 Order," attached as Exhibit 3), is also relevant to this Application.

As Consumers states, Energy Michigan and the Association of Businesses Advocating Tariff Equity ("ABATE") appealed the Commission's final September 15 Order to the Court of Appeals in consolidated Docket Nos. 340600 and 340607. The Court of Appeals issued a unanimous, published opinion by Judges Meter, P.J., Gadola and Tukel, J.J. (the "July 12 Opinion" or "Opinion") in favor of ABATE and Energy Michigan, reversing the Commission's determination in its September 15 Order that it had authority to impose a mandatory, individual LCR on AESs.

Energy Michigan disagrees with Consumers' statement in its Application that the Court of Appeals held that "Section 6w does not grant the MPSC authority to implement a local clearing requirement on AESs." In fact, the Court specifically stated that the Commission has the authority to determine a local clearing requirement related to determining capacity obligations, by holding that: "…section 6w(8)(c) thus requires the MPSC to determine the local clearing requirement in order to determine capacity obligations…" Opinion at 10. Additionally, however, the Court found that the Commission was without authority to impose the local clearing requirement on AESs "individually": " . . . [Section 6w] does not specifically authorize the MPSC to impose the local clearing requirement upon alternative electric suppliers individually." Opinion at 10. This is an important and factual distinction that should be clarified at the outset.

The Commission has the statutory authorization to determine capacity obligations and a LCR for all electric providers, including AESs. However, the Court held that pursuant to the plain reading of Act 341, the manner in which the Commission sets those requirements must be "consistent with" the Midcontinent Independent System Operator's ("MISO's") currently effective Resource Adequacy Tariff ("Tariff"),[2] as will be explained in greater detail herein. This is really the core of Consumers' complaint. The statutory language that Consumers and the Commission preferred that would have allowed the Commission to set an individual LCR was removed by the House of Representatives immediately preceding the final passage of the bill (SB 437) that became PA 341. As there remains no clear and unmistakable statutory language to support the Commission's implementation of an individual LCR upon AESs, Consumers and the Commission seek to infer such a requirement. This was a bridge too far for the Court of

[2] MISO Module E-1, "Resource Adequacy" Tariff, §68A, et seq. ("MISO Tariff" or "Tariff").

Appeals, and thus, the Court of Appeals held that, "We therefore will not interpret the language adopted in MCL 460.6w as authorizing what the Legislature explicitly rejected when enacting that statute." Opinion at 14.

For all of the reasons stated herein, Consumers' Application for Leave to Appeal should be denied. This Court should also deny its request for a peremptory order pursuant to MCR 7.305(H)(1) to both reverse the Court of Appeals' July 12 Opinion and affirm the MPSC's determination in Order No. U-18197 that it had the statutory authority to determine and implement a local clearing requirement on individual electric providers, including AESs, as part of their capacity obligations under PA 341.

COUNTERSTATEMENT OF QUESTION PRESENTED

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

The Court of Appeals answered:	"Yes."
Appellee Energy Michigan answers:	"Yes."
Appellee ABATE answers:	"Yes."
Appellant Consumers Energy Company answers:	"No."
Appellant MPSC answers:	"No."

I. BACKGROUND

While Energy Michigan will provide additional, pertinent facts, the Background and Facts provided by the Court of Appeals in its July 12, 2018 Opinion ("Opinion") provide the essential framework for this Court's consideration of Consumers' Application for Leave to Appeal ("Application").

A. Federal/State Jurisdiction of Energy

The Federal Power Act ("FPA"), 41 Stat. 1063, as amended, 16 U.S.C. §79a *et seq*., vests in the Federal Energy Regulatory Commission ("FERC") exclusive jurisdiction over wholesale sales of electricity in the interstate market. Under the FPA, FERC has exclusive authority to regulate "the sale of electric energy at wholesale in interstate commerce." §824(b)(1). A wholesale sale is defined as a "sale of electric energy to any person for resale." §824(d); *Hughes v Talen Energy Marketing, LLC*, 136 S Ct 1288 (2016). Sales for resale between electric generators, even intrastate, are wholesale sales within FERC's jurisdiction. FERC, therefore, has exclusive jurisdiction of not only the "sales" of electric energy at wholesale in interstate commerce, but also the practices affecting those wholesale sales.

Congress leaves to the States the regulation of "retail" sales – *i.e.*, sales from an energy provider to an end-use customer. The States' reserved authority includes control over in-state "facilities used for the generation of electric energy." §824(b)(1); *Hughes v Talen*, at 1289 (citing *Pacific Gas & Elec Co v State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 205 (1983)).

As the Court of Appeals noted, in 2000 Michigan passed 2000 PA 141 ("Act 141") which "restructured," or partially deregulated, the provisioning of electric generation service in the state. Act 141 "permitted customers to buy electricity from alternative electric suppliers instead of being limited to purchasing electricity from incumbent utilities, such as appellee Consumers

Energy Company (Consumers). *Consumers Energy Co v Michigan Pub Serv Comm*, 268 Mich App 171, 173; 707 NW2d 633 (2005)." Opinion at 2.

Retail choice states, like Michigan, have unique wholesale/retail (i.e., federal/state) jurisdictional splits. As the U.S. Supreme Court noted in *Hughes*:

> Until relatively recently, most state energy markets were vertically integrated Monopolies – *i.e.*., one entity, often a state utility, controlled electricity generation, transmission, and sale to retail consumers. Over the past few decades, many States, including Maryland, have deregulated their energy markets. In deregulated markets, the organizations that deliver electricity to retail consumers – often called "load serving entities" (LSEs) – purchase that electricity at wholesale from independent power generators. To ensure reliable transmission of electricity from independent generators to LSEs, FERC has charged nonprofit entities, called Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs), with managing certain segments of the electricity grid.
>
> Interstate wholesale transactions in deregulated markets typically occur through two mechanisms. The first is bilateral contracting: LSEs sign agreements with generators to purchase a certain amount of electricity at a certain rate over a certain period of time. After the parties have agreed to contract terms, FERC may review the rate for reasonableness. . . . . Second, RTOs and ISOs administer a number of competitive wholesale auctions: for example, a "same-day auction" for immediate delivery of electricity to LSEs facing a sudden spike in demand: a "next-day auction" to satisfy LSEs' anticipated near-term demand: and a "capacity auction" to ensure the availability of an adequate supply of power at some point far in the future.

Hughes, 136 S Ct at 1292-93. While States and the federal government share in the jurisdiction of regulating electricity, the U.S. Supreme Court has held that "States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates." *Id*. at 1291.

B. Pertinent State Energy Laws – 2016 PA 341; 2000 PA 141

The Court of Appeals described the two, pertinent state energy laws as follows:

> At the end of 2016, our Legislature enacted new electric utility legislation that included 2016 PA 341 (Act 341). That act added, among other statutory sections, MCL 460.6w. These appeals arise from an order issued by the MPSC as part of its implementation of MCL 460.6w. By way of background, Michigan's Legislature previously enacted what was known as the Customer Choice and Electricity

> Reliability Act, 2000 PA 141 and 2000 PA 142, MCL 460.10 et seq., to "further the deregulation of the electric utility industry." *In re Application of Detroit Edison Co for 2012 Cost Recovery Plan*, 311 Mich App 204, 207 n 2; 874 NW2d 398 (2015). That act permitted customers to buy electricity from alternative electric suppliers instead of being limited to purchasing electricity from incumbent utilities, such as appellee Consumers Energy Company (Consumers). *Consumers Energy Co v Michigan Pub Serv Comm*, 268 Mich App 171, 173; 707 NW2d 633 (2005). Among the purposes of the act, as amended, is to "promote financially healthy and competitive utilities in this state." MCL 460.10(b).

Opinion at 2.

Energy Michigan adds that AESs, as originally authorized in Act 141, are competitive suppliers that are allowed a limited amount of competition with the state's incumbent electric providers, such as Consumers Energy, to supply generation capacity[3] to customers. While electric generation supply was "restructured" under Act 141, electric transmission and distribution remained regulated services by the MPSC. AESs, both in 2000 and today, are distinct from incumbent electric providers in that they do not own generation resources in the state. Incumbent electric utilities, such as Consumers, an investor-owned utility, as well as many of the state's regulated electric cooperatives and unregulated municipal electric utilities, own the generation resources used to serve their customers in the state. Typically, AESs in Michigan either own generation resources located in another state, or enter into bilateral contracts with a generation provider in-state or in another state in order to serve their customers.

The predominant role of the MPSC in regulating new AESs upon passage of Act 141 was to oversee the licensing functions for AESs, as well as other rules and regulations necessary to implement the provisioning of services between AESs and their customers.[4] Amendments

[3] The term "capacity," for purposes here, means the total amount of electricity (through owned or contracted for electric generation resources) that a provider is able to or capable of delivering to its customers ("load") at peak demand.

[4] *See* PA 141, Section 10a(2).

passed in 2008 limited the amount of customers that might elect to subscribe to electric choice to no more than 10 percent of an electric utility's average weather-adjusted retail sales for the preceding calendar year at any time. This restriction, or cap, was maintained by 2016 PA 341.[5]

C. The Midcontinent Independent System Operator

The Court of Appeals summarized the relevant role of the Midcontinent Independent System Operator as follows:

> . . . the Midcontinent Independent System Operator (MISO) is the regional transmission organization responsible for managing the transmission of electric power in a large geographic area that spans portions of Michigan and 14 other states. To accomplish this, MISO combines the transmission facilities of several transmission owners into a single transmission system. In addition to the transmission of electricity, MISO's functions include capacity resource planning. MISO has established ten local resource zones; most of Michigan's lower peninsula is located in MISO's local resource zone 7, while the upper peninsula is located in MISO's local resource zone 2.
>
> Each year, MISO establishes for each alternative electric supplier in Michigan the "planning reserve margin requirement." MISO also establishes the "local clearing requirement." **Under MISO's system, there generally are no geographic limitations on the capacity resources that may be used by a particular supplier to meet its planning reserve margin requirement. That is, MISO does not impose the local clearing requirement upon alternative electric suppliers individually, but instead applies the local clearing requirement to the zone as a whole. Each individual electricity supplier is not required by MISO to demonstrate that its energy capacity is located within Michigan, as long as the zone as a whole demonstrates that it has sufficient energy generation located within Michigan to meet federal requirements.** MISO also serves as a mechanism for suppliers to buy and sell electricity capacity through an "auction." This allows for the exchange of capacity resources across energy providers and resource zones. The MISO auction is conducted each year for the purchase and sale of capacity for the upcoming year, which allows suppliers to buy and sell enough capacity to meet their planning reserve margin requirement and allows each zone as a whole to meet the zone's local clearing requirement.

Opinion at 2-3 (emphasis added).

[5] PA 341, Section 10a(1)(a).

A recent whitepaper by Staff from the Illinois Commerce Commission elaborates on MISO's Resource Adequacy construct and is instructive for the current controversy's purposes:

> The responsibility for achieving resource adequacy in MISO rests with load serving entities ("LSEs"),[6] with oversight by states, as applicable by jurisdiction. MISO provides LSEs with three options to meet their resource adequacy capacity obligation.[7]
>
> First, an LSE can demonstrate achievement of its assigned planning reserve margin requirement through submission of a fixed resource adequacy plan ("FRAP"). These plans may include such resources as owned generators and bilateral purchase contracts with generating companies either inside or outside of the LSE's local resource zone.
>
> Second, LSEs can use the "self-supply" option, where the LSE offers into MISO's annual Planning Resource Auction ("PRA") supply resources that are owned by, or committed to, the LSE. In MISO, these first two options are most commonly used by LSEs that are traditionally regulated and are able to build and own generating units or do so jointly with other utilities. Such LSEs with relatively stable load can limit their exposure to fluctuations in fuel prices, construction costs, regulatory requirements and other economic factors by entering into long-term purchase arrangements with independent facility developers or utilities with excess generating capacity. However, in restructured retail markets, the load of alternative retail electric suppliers and the basic service provider utility is subject to fluctuation due to customer switching, often making long-term contracts and the construction of generating resources impractical.
>
> Accordingly, such LSEs are more likely to use MISO's third option for demonstrating resource adequacy compliance, namely, procuring capacity through MISO's annual PRA. Participation in MISO's PRA is voluntary for LSEs and the annual auction is typically held during the final three business days of March. LSEs use the auction to acquire capacity for the immediate planning year, which is the twelve-month period from June 1 to May 31. Generators use the PRA to sell capacity commitments on generation capability for which they do not have forward sales contracts. The auction is designed to optimize regionally and locally to establish the lowest-cost result for LSEs needing to procure capacity commitments.[8]

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[6] The term Load Serving Entity encompasses traditional utilities (whether investor-owned municipal or coop), distribution utilities acting in their basic service provider role, and Alternative Retail Electric Suppliers [known in Michigan as Alternative Electric Suppliers or AESs].

[7] Eligible capacity resources include generators, generation purchase contracts, demand resources and energy efficiency.

[8] Illinois Commerce Commission Staff Whitepaper, *Resource Adequacy in Zone 4*, November 1, 2017 at 4. https://www.icc.illinois.gov/downloads/public/ICC MISO Zone 4 White Paper 11-1-17.pdf.

In summary, MISO ensures reliability for its 10-zone regions via its Resource Adequacy Construct in which all electric providers must participate. Per MISO, "MISO's resource adequacy mechanism is used to demonstrate that resources are available to reliably operate the electric grid over the next planning year. Load-serving entities can demonstrate sufficient capacity with owned resources, contracted resources or through participation in MISO's voluntary Planning Resource Auction. The auction provides an additional mechanism for load-serving entities to secure sufficient resources in the right places to maintain reliability across the MISO region."[9] MISO summarizes key facets of its MISO Adequacy construct by noting that:

- MISO's Resource Adequacy construct is based, in part, on "Zonal capacity requirements (Local Clearing Requirement);"
- The MISO-wide reserve margin is shared among the Zones, and the Zones may import capacity to meet this requirement;
- Multiple options exist for Load-Serving Entities to demonstrate Resource Adequacy:
    - Submit a Fixed Resource Adequacy Plan
    - Utilize bilateral contracts with another resource owner
    - Participate in the Planning Resource Auction
- The Independent Market Monitor reviews the auction results for physical and economic withholding.[10]

The fact that MISO predominantly operates a voluntary capacity market is due to the fact that the majority of the states in MISO do not depend on the energy and capacity market to meet resource adequacy needs, since the majority of MISO states, with the exception of Illinois and 10% of Michigan, are fully regulated states. As noted above, electric providers utilize the

[9] MISO Clears Sixth Annual Planning Auction, April 12, 2018: https://www.misoenergy.org/about/media-center/miso-clears-sixth-annual-planning-resource-auction/.

[10] 2018/2019 Planning Resource Auction Results, April 13, 2018: https://cdn.misoenergy.org/2018-19%20PRA%20Results173180.pdf.

voluntary PRA, as needed, to either meet its MISO-required Resource Adequacy construct, via the PRMR, and/or for additional, needed capacity to serve other needs. Importantly for purposes here, MISO leaves it up to LSEs to decide best how to meet their respective PRMR, without prescribing a mandatory individual LCR upon a LSE.

D. PA 341's New Resource Adequacy Construct

The Court of Appeals described the new Resource Adequacy construct as passed by the Legislature in PA 341 as follows:

> At the end of 2016, our Legislature enacted Act 341, in part adding MCL 460.6w, which imposes resource adequacy requirements upon electric service providers in Michigan and imposes certain responsibilities upon the MPSC. Under MCL 460.6w(2), the MPSC is required under certain circumstances to establish a state reliability mechanism. That section provides, in relevant part:
>
> > If, by September 30, 2017, the Federal Energy Regulatory Commission does not put into effect a resource adequacy tariff that includes a capacity forward auction or a prevailing state compensation mechanism, then the commission shall establish a state reliability mechanism under subsection (8). MCL 460.6w(2).
>
> The parties agree that because the Federal Energy Regulatory Commission did not put into effect the MISO-proposed tariff, the MPSC is required by section 6w(2) to establish a state reliability mechanism. A "state reliability mechanism" is defined by the statute as "a plan adopted by the commission in the absence of a prevailing state compensation mechanism to ensure reliability of the electric grid in this state consistent with subsection (8)." MCL 460.6w(12)(h). The state reliability mechanism is to be established consistent with section 6w(8), which provides, in relevant part, that the MPSC shall:
>
> > (b) Require . . . that each alternative electric supplier, cooperative electric utility, or municipally owned electric utility demonstrate to the commission, in a format determined by the commission, that for the planning year beginning 4 years after the beginning of the current planning year, the alternative electric supplier, cooperative electric utility, or municipally owned electric utility owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable. One or more municipally owned electric utilities may aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision. One or more cooperative electric utilities may aggregate their capacity resources that are located in the same

> local resource zone to meet the requirements of this subdivision. A cooperative or municipally owned electric utility may meet the requirements of this subdivision through any resource, including a resource acquired through a capacity forward auction, that the appropriate independent system operator allows to qualify for meeting the local clearing requirement. A cooperative or municipally owned electric utility's payment of an auction price related to a capacity deficiency as part of a capacity forward auction conducted by the appropriate independent system operator does not by itself satisfy the resource adequacy requirements of this section unless the appropriate independent system operator can directly tie that provider's payment to a capacity resource that meets the requirements of this subsection. By the seventh business day of February in 2018, an alternative electric supplier shall demonstrate to the commission, in a format determined by the commission, that for the planning year beginning June 1, 2018, and the subsequent 3 planning years, the alternative electric supplier owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable. If the commission finds an electric provider has failed to demonstrate it can meet a portion or all of its capacity obligation, the commission shall do all of the following:
>
> (i) For alternative electric load, require the payment of a capacity charge that is determined, assessed, and applied in the same manner as under subsection (3) for that portion of the load not covered as set forth in subsections (6) and (7). . . . [MCL 460.6w(8)(b) (emphasis added).]

Thus, section 6w(8)(b) requires each alternative electric supplier, cooperative electric utility, and municipally owned electric utility to demonstrate to the MPSC that it has sufficient capacity to meet its "capacity obligations." The statute does not define "capacity obligations," but in section 6w(8)(c), the statute provides that:

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

Section 6w(8)(b) also provides that municipally owned electric utilities are permitted to "aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision" and that cooperative electric utilities are permitted to "aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this

> subdivision." Section 6w(8)(b) also permits a cooperative or municipally owned electric utility to "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 local clearing requirement." Section 6w(8)(b), however, does not include a similar provision for alternative electric suppliers and is, in fact, silent as to whether alternative electric suppliers may aggregate their capacity resources that are located in the same local resource zone to meet the requirements of the subdivision.
>
> MCL 460.6w(3) directs the MPSC to establish a capacity charge that a provider must pay if it fails to satisfy the capacity obligations established under section 6w(8). Section 6w(6), however, directs that no capacity charge be assessed against an alternative electric supplier who demonstrates that "it can meet its capacity obligations through owned or contractual rights to any resource that the appropriate independent system operator allows to meet the capacity obligation of the electric provider. The preceding sentence shall not be applied in any way that conflicts with a federal resource adequacy tariff, when applicable." MCL 460.6w(6).

Opinion at 3-4.

The definition of "local clearing requirement" in PA 341 is also instructive, as it defines the term 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 as determined by the appropriate independent system operator for the local resource zone in which the electric provider's demand is served and by the commission under subsection (8)." MCL 460.6w(12)(d). It is noteworthy that this definition emphasizes that it is the amount of resources required to be "in the local resource zone" to ensure reliability "in that zone." There is no mention of a provider-specific or individual "local clearing requirement." The goal is meeting a zonal standard, not an individual, provider-specific standard. The focus for reliability is a zonal one, to be met "consistent" with how MISO allows LSEs to meet reliability requirements.

E. MISO's Failed Individual LCR – the Competitive Retail Solution

As the Court of Appeals noted, MCL 460.6w(2) was the Legislature's allowance for the MPSC to establish a state reliability mechanism ("SRM") if MISO did not "put into effect a

resource adequacy tariff that includes a capacity forward auction or a prevailing state compensation mechanism [PSCM]." This was in reference to MISO's Competitive Retail Solution Tariff ("CRS") that was pending in 2016 before FERC. As Consumers states, "MISO's proposed CRS tariff's PSCM would have required electric providers to: (i) demonstrate three-year forward capacity resources sufficient to meet the electric provider's load-ratio share of the Zone's Planning Reserve Margin Requirement and Local Clearing Requirement; or (ii) have their retail customers become subject to a state capacity charge for the load which was found to be in excess of the provider's demonstrated capacity resources." Consumers Application at 10 (emphasis in original). Consumers also correctly states that on February 2, 2017, the FERC rejected MISO's application for approval of the CRS tariff in Docket No. ER17-284-000, thus not only resulting in "no MISO capacity forward auction or PSCM," but also, as Consumers emphasizes, no MISO requirement for electric providers to meet a load-ratio share of the Zone's therefore [we] reject it."[11]

F. The MPSC's Implementation of a Mandatory Individual Local Clearing Requirement Upon AESs

Following passage of PA 341 and FERC's rejection of MISO's CRS Proposal, the MPSC had to determine how to implement the terms of PA 341. As the Court of Appeals noted:

> After the enactment of Act 341, the MPSC worked collaboratively in a workgroup process to implement MCL 460.6w. On September 15, 2017, the MPSC issued an order in its case number U-18197, imposing new requirements on alternative electric suppliers as part of its implementation of MCL 460.6w. Among the holdings of the MPSC in that order, the MPSC determined that MCL 460.6w authorizes it to impose a local clearing requirement upon individual alternative electric suppliers. ABATE and Energy Michigan challenge this interpretation of MCL 460.6w as erroneous, while Consumers supports the decision of the MPSC.

Opinion at 3-5.

[11] *Midcontinent Independent System Operator, Inc*, Order Rejecting Tariff Filing, 158 FERC ¶ 61,128 (February 2, 2017) at 6, 7-8.

As further explained herein, the MPSC spent considerable time – through an informal stakeholder process that culminated in several orders leading up to the September 15, 2017 Order – to decide whether or not to institute an individual local clearing requirement upon all electric providers, including AESs.

II. ARGUMENT

A. Standard of Review

Whether the Commission exceeded the scope of its authority is a question of law that this Court reviews de novo. *Consumers Power Co v Pub Service Comm*, 460 Mich 148, 157; 596 NW2d 126 (1999). The Commission possesses only the authority granted to it by the Legislature and has no common law powers. *Id.* at 156. The statutes that confer power on the Commission are strictly construed. *Id.* In determining whether an agency has engaged in improper rulemaking, the label an agency gives to a directive is not determinative of whether it is a rule or a guideline under the APA. *Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Servs*, 431 Mich 172, 188; 428 NW2d 335 (1988). Instead, this Court must review the "actual action undertaken by the directive, to see whether the policy being implemented has the effect of being a rule." *Id.* (quoting *Schinzel v Dep't of Corrections*, 124 Mich App 217, 219; 333 NW2d 519 (1983)). Finally, courts reviewing an administrative agency's statutory interpretation may grant "respectful consideration" to the agency's interpretation but they do not grant deference to its interpretations, and "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 v Public Serv Comm*, 482 Mich 90, 103; 754 NW2d 259 (2008).

B. Section 6w of Act 341 Requires That the MPSC's Resource Adequacy Rules be Consistent with MISO's Requirements and Not Conflict with Federal

Resource Adequacy Standards. The Court of Appeals Correctly Found that An Individual LCR Violated Section 6w

At the outset, the issue in dispute is whether MCL 460.6w ("Section 6w") authorizes the MPSC to require that an AES meet its four-year capacity obligation by a restricted use of the MISO wholesale capacity market, in combination with an assigned "proportionate share" of a LCR (what Consumers and the MPSC have called an "individual LCR") as set by the Commission. The Court of Appeals agreed with Energy Michigan that no such authorization for an individual LCR is provided in Section 6w. The Court held that although AESs will now have capacity obligations pursuant to Act 341 and will share in meeting a MPSC-established local clearing requirement, any established LCR must be applicable to the entire zone, and an AES is allowed to meet that requirement by use of any resource (owned or contracted; in-zone or out-of-zone) that MISO recognizes as sufficient to meet an LCR (*i.e.*, in a manner "consistent with" MISO). Thus, the Court of Appeals held:

> Moreover, a review of the entire statute suggests that the MPSC is obligated to apply the local clearing requirement in a manner consistent with MISO. . . The parties acknowledge that MISO permits an alternative electric supplier to meet its capacity obligations, including the local clearing requirement, by owning or contracting for capacity resources located outside the applicable local resource zone, and does not require each alternative electric supplier to demonstrate a proportionate share of the local clearing requirement.

Opinion at 10.

First, Consumers argues that the "Commission's authority to implement an LCR on individual alternative providers" is a necessary requirement of Section 6w, and that the Court of Appeals' finding that Section 6w does not "clearly and unmistakably" authorize the Commission to implement an LCR as a component of individual AESs' "capacity obligations" nullifies the actual text of the statute, and is therefore erroneous. Application at 33-34. Consumers also argues that such an interpretation "is not logical and is not consistent with the text and the

purpose of the statute," and that the "July 12 Opinion would eliminate the Commission's ability to implement a key component of ensuring long-term reliability for the state's electric grid and will negatively impact reliability of the electric supply for the entire state." Application at 36. All of these arguments are without merit and were properly rejected by the Court of Appeals. For clarification, however, the Court of Appeals' Opinion did *not* remove the MPSC's ability to apply either a local clearing requirement nor a planning reserve margin requirement ("PRMR"). On the contrary, the Court affirmed the ability of the MPSC to apply a local clearing requirement (and presumably a planning reserve margin requirement) so long as it is consistent with MISO and the federal reliability requirements – that is, as long as it is *not* what the Commission and Consumers term an individual local clearing requirement. COA Order at 10.

This is the distinction Consumers repeatedly fails to make in its Application, between the concept of a zonal local clearing requirement as applied by MISO and consistent with the definition in Act 341, and the concept of an individual local clearing requirement, the latter newly-created by the MPSC itself. Thus, Consumers' use of "local clearing requirement" for both the MISO-approved zonal requirement and for the Commission's own newly minted "individual" requirement is confusing at best and misleading at worst. The Court of Appeals plainly understood the difference: "reading MCL 460.6w as a whole indicates that the MPSC is directed to impose a local clearing requirement upon alternative electric suppliers in a manner consistent with MISO, and not individually upon alternative electric suppliers." COA Order at 10 (emphasis added). It is plain, then, that the Court of Appeals is not "holding handcuffs [on] the MPSC's ability to implement a key component of Act 341," as Consumers claims. Application at 36. Clearly, the Court of Appeals understood that AESs have capacity obligations, contrary to Consumers' assertions otherwise, but those must be consistent with their obligations under

MISO's resource adequacy construct. As the Court rightly held, the Commission is prohibited from implementing an individual local clearing requirement upon electric providers, including AESs, because it would be inconsistent with MISO's requirements. However, what the MPSC signaled that it may do, in Case No. U-18197, and what it eventually did do - in the subsequent contested case in No. U-18444, is to place a mandatory individual or "proportional share" of the zonal LCR upon individual AESs, that can *only* be met by owned or contracted for resources within Zone 7. This "individual local clearing requirement" is clearly inconsistent with MISO's requirements for many reasons, including the fact that it places a proportional share of the LCR requirement in a restrictive manner that is not required by MISO's current resource adequacy tariff.

Consumers alleges that the Legislature intended for the Commission to implement *only* what it describes as an individual LCR, and that if the Commission is not allowed to do so, its "legislatively-granted duties" will be hindered and it will "negatively affect reliability of electric supply for the entire state." Application at 36. If the legislative mandate for an individual LCR were as clear as Consumers purports, and if not implementing such a requirement would certainly lead to tremendous reliability repercussions, then it would seem unlikely that the Commission would have spent significant stakeholder time even considering any other implementation of Section 6w. Yet it did. For over the year-and-a-half, through various informal proceedings in Case No. U-18197 at the MPSC, the Commission considered the option of not applying an "individual LCR" to AESs. In its March 10, 2017 Order ("March 10 Order"), the Commission stated, in part, that MPSC Staff was directed to, among other things, "Develop recommendations regarding load forecasts, planning reserve margin requirements and locational

requirements for capacity resources." March 10 Order at 19. In its May 11, 2017 Order ("May 11 Order"), the Commission stated the following:

> Issuance of this follow-up order to the March 10 order that established the above-described technical conferences in Case No. U-18197 is necessary to reinforce the Commission's determination to address certain issues related to its implementation of Section 6w of 2016 PA 341 (Act 341), MCL 460.6w, solely through the use of the technical conferences instead of in the context of contested cases. Specifically, the Commission thought it had clearly indicated in the March 10 order that the format for the demonstration required of an electric utility by Section 6w(8)(a) of Act 341, MCL 460.6w(8)(a) that the utility "owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable" for the "planning year beginning 4 years after the beginning of the current planning year" was to be determined through collaborative efforts in the technical conferences. Likewise, it was the Commission's intent that the format for the demonstrations required of AESs, cooperative electric utilities, and municipally-owned electric utilities by Section 6w(8)(b) of Act 341, MCL 460.6w(8)(b) also was to be determined through collaborative efforts in the technical conferences.
>
> The Commission is concerned that Consumers Energy Company (Consumers) and DTE Electric Company (DTE Electric) have, in their recently-filed applications in their SRM cases and in their currently-pending general electric rate cases, filed testimony pertaining to these capacity demonstration issues and are seeking in those proceedings to adjudicate what may be counted in the capacity demonstration determinations to be made by the Commission. While the Commission recognizes Consumers and DTE Electric may have been attempting to keep options open in various cases to address these issues, the Commission finds that the use of an adjudicative proceeding to resolve these issues is misplaced. **Every regulated electric utility, AES, cooperative electric utility, and municipally-owned electric utility will be required by Section 6w(8) of Act 341, MCL 460.6w(8) to demonstrate that it owns or has contractual rights to sufficient capacity to meet its capacity obligations under the law. The Commission has determined that technical conferences, rather than piecemeal litigation that cannot involve all of the affected energy providers at the same time, are a sounder method to determine this issue. . .**
>
> **First, the Commission finds that the stakeholders should be given an immediate opportunity to provide comments and reply comments regarding the following threshold issues:**
>
> **. . . 3. Should there be a "locational requirement" for resources used to satisfy capacity obligations, and if so, should individual load serving entities (LSEs) be required to demonstrate a share of the overall locational requirement?**

May 11 Order at 3-6 (emphasis added). The Commission Staff held three Technical Conferences to obtain stakeholder feedback on whether or not a "locational requirement" (*i.e.*, an "individual LCR") should be required of all electric providers, including AES's. These conferences were held on April 11, 2017; April 26, 2017 and June 8, 2017. In its June 15, 2017, Order ("June 15 Order"), the Commission found, in part that "(3) Section 6w authorizes a locational requirement to be applied to individual electric providers, but allocating such a requirement based on individual electric providers' proportional share of the peak load may not be equitable or reasonable, and (4) the remaining technical conferences should be used to address the appropriate design of a locational requirement for capacity obligations." September 15 Order at 4.

Clearly, the Commission spent some time considering whether or not to impose a zonal LCR, as Energy Michigan advocated, or an "in-zone" "proportional share" of the LCR on each, *individual*, electric provider, as Consumers advocated.[12] There was considerable discussion over how providers would meet the new individual LCR while still being in a consistent manner with MISO. Therefore, the Commission highlighted parties' "apparent disagreement" as between:

> **Locational Requirement:**
> a. **Whether a LCR should be applicable to individual LSEs or not**.
> b. If applicable to individual LSEs, the methodology and amount. . . . Much of the disagreement concerned the locational requirement.

September 15 Order at 20 (emphasis added).

The fact that the Commission spent considerable time and stakeholder effort to decide whether or not to apply a "LCR. . . to individual LSEs or not" counters Consumers erroneous contentions that the Legislature essentially mandated an individual LCR, and that the MPSC's

[12] Consumers Energy Reply Comments, Case No. U-18197, dated June 5, 2017, at 8. https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t0000001UVO9AAO.

administrative powers would be harmed by not being allowed to require one. The Commission would not have spent considerable stakeholder time contemplating whether or not to impose an individual LCR if the Legislature had mandated it or if the MPSC's authority would be crippled without imposing one.

C. The Legislative History Does Not Authorize the MPSC to Redraft Section 6w to Mirror a Failed MISO Tariff.

Consumers argues that the "text of Section 6w shows the Legislative intent for the SRM to be the state substitute for a FERC-approved PSCM in the event the PSCM was not approved, and the SRM was structured to mirror the PSCM proposal pending at FERC at the time Act 341 was enacted. The Legislature's actions were an appropriate exercise of state rights and cooperative federalism." Application at 37-38. As a proposal that never was approved by MISO's federal regulator, the CRS has never had any legal authority.

The Legislature foresaw that FERC might reject MISO's proposed tariff, but rather than instructing the MPSC to implement a mechanism identical to the rejected tariff, it determined that the MPSC must implement a state reliability mechanism consistent with the then-existing MISO requirements and federal resource adequacy standards. Consumers, however, instead seeks to reinvigorate the deceased MISO proposal and clothe it in the state reliability mechanism that the Legislature approved. There are numerous problems with this alleged scheme, including that it requires reading into the statute language that is not present, and so violates the *Chesapeake* standard (*i.e.*, not being within the enabling statute, and not complying with underlying legislative intent). See *Chesapeake & Ohio R Co v Pub Serv Comm*, 59 Mich App 88, 98–99; 228 NW2d 843 (1975).

MISO's CRS Tariff was rejected by FERC as "unjust and unreasonable." Although the MPSC prefers this failed CRS Tariff, the MPSC is without legal authority to step in MISO's

shoes and implement at the state level a failed wholesale market tariff that it wishes to implement for all state electric providers.

The FPA provides FERC with exclusive jurisdiction over wholesale sales of electricity, as well as rates and practices affecting those wholesale sales. While the FPA vests states with exclusive jurisdiction over intrastate "facilities used for the generation of electric energy,"[13] the Commission's attempted practice with the individual LCR is to limit an AES's ability to use the MISO PRA for wholesale purchases and by placing an individual, proportional share of the LCR upon that AES. Affecting an AES's use of the wholesale market and dictating how it may contract in that market to legitimately meet its state-instituted capacity obligations is a "practice" that impermissibly reaches into the wholesale energy market and is thus outside of the MPSC's jurisdiction.[14] The Legislature recognized this and properly addressed this issue in Section 6w by requiring that anything the MPSC implements be consistent with MISO.

As noted above, AESs are distinct from incumbent utilities that own their own generation in the state. Therefore, while all electric providers now have a resource adequacy commitment stemming four years forward, the Legislature specifically allowed AESs to meet those requirements in a manner "consistent with MISO's" existing tariff. As MISO allows a provider's full use of the PRA to meet its PRMR and LCR, the same must be allowed in any SRM set by the Commission. This is not only the plain reading of the statute, it is also consistent with federal/state jurisdictional boundaries.

[13] 16 U.S.C. §824(b)(1)(2012); *Hughes v Talen Energy Mktg., LLC*, 136 S Ct 1288, 1292 (2016) (describing the jurisdictional divide set forth in the FPA).

[14] *Hughes*, supra, at ___."... .States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates . . ."

Therefore, the Legislature's requirement that an LCR must be "consistent with" MISO's tariff can only mean the current MISO tariff. MISO's tariff does not require a mandatory, individual LCR for any electric provider. Instead, MISO's LCR is a zonal requirement that is applied in the aggregate. Consumers' attempts to require the MPSC to implement a failed MISO wholesale market tariff should be rejected.

D. The Legislature's Special Aggregation Provisions in MCL 6w(8)(b) for the State's Electric Cooperatives and Municipal Providers do Not Create an Individual LCR Requirement for AES's. Consumers Errs in Attempting to Infer Such Authority.

Consumers asserts that the legislative language in MCL 460.6w(8)(b) supports the Commission's statutory authority to include an LCR "for all individual electric providers' capacity obligations under Act 341, including AESs." Application at 39 (emphasis in original). Furthermore, Consumers states that the "Commission appropriately found that the referenced allowance for cooperative and municipal utilities *logically supports the proposition* that Act 341 authorizes it to impose an LCR on all electric providers." Application at 39 (emphasis added). The relevant part of Section 6w(8)(b) on which Consumers relies states:

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

MCL 460.6w(8)(b).

Energy Michigan submits that nothing in this statutory provision clearly imposes an "individual" local clearing requirement upon municipal utilities ("munis") and cooperative electric utilities ("co-ops") as the MPSC envisions an individual LCR. Nor can either

Consumers infer such a mandate through the means of "logically supporting the proposition" that such an individual mandate should exist. As the Court of Appeals reminded the Commission:

> "The MPSC has no common law powers and possesses only the authority granted to it by the Legislature. *Consumers Power Co*, 460 Mich [148] at 155. In addition, [courts] strictly construe the statutes that confer power upon the MPSC, and that power must be conferred by 'clear and unmistakable language,' *Id.*, quoting *Union Carbide Corp v Public Service Comm*, 431 Mich 135, 151; 428 NW2d 322 (1988). Accordingly, 'powers specifically conferred on an agency cannot be extended by inference; . . . no other or greater power was given than that specified.' *Herrick Dist Library v Library of Mich*, 293 Mich App 571, 582-583; 810 NW2d 110 (2011) (quotation marks and citations omitted)."

Opinion at 8. There is no clear and unmistakable language requiring that an LCR be imposed upon munis and co-ops on an "individual," pro-rata share, non-zonal use basis. To the contrary. The Legislature specifically allowed munis and co-ops to "aggregate" their resources in order to meet a LCR imposed by the Commission in a manner consistent with MISO's Tariff, i.e., through the unfettered use of "any resource," "including a resource acquired through a capacity forward auction" (*i.e.*, MISO's PRA), "that the appropriate independent system operator" (MISO) "allows to qualify for meeting the local clearing requirement" (*i.e.*, "consistent with" MISO). MCL 460.6w(8)(b). The Court of Appeals correctly dismissed Consumers' and the MPSC's attempts to infer authority that is not clearly provided for in statute:

> " . . . although section 6w(8)(c) thus requires the MPSC to determine the local clearing requirement in order to determine capacity obligations, it does not specifically authorize the MPSC to impose the local clearing requirement upon alternative electric suppliers individually. Because the MPSC has only the authority granted to it by the Legislature by "clear and unmistakable language," *Consumers Power Co*, 460 Mich at 155-156, and because authority cannot be extended by inference, *Herrick Dist Library*, 293 Mich App at 582-583, we must decline the invitation to infer such additional authority upon the MPSC in this case."

Opinion at 10. The Court of Appeals correctly held that it was improper for the MPSC to infer authority that it did not otherwise possess. Consumers has presented no new argument or law to find otherwise, so its attempts to infer authority for an individual LCR must fail.

E. Consumers Inaccurately Frames the Court of Appeals' Opinion and Attempts to Raise Red Herrings Which Should be Disregarded.

Consumers alleges harms that will befall the state if an individual LCR is not imposed (*i.e.*, "material harm to the entire state," and "[t]he reliability of electric service for all electric customers will be jeopardized if AESs are allowed to evade a key component of grid reliability"). Application at 41. These are simply red herrings. As noted above, the Court of Appeals never held that AESs should be relieved of their capacity obligations, just that the MPSC cannot impose an individual LCR. Energy Michigan readily accepts that AESs must share in the responsibility of meeting the newly-established four-year-forward locational clearing requirements set by the Commission. However, Energy Michigan agrees with the Court of Appeals that the proper interpretation of such resource adequacy requirements must be to allow an AES to meet them in the same manner (*i.e.*, "consistent") with how MISO allows providers to meet its requirements – i.e., through the full use of the PRA, and with any resource and contractual commitment that MISO would recognize as supportive of meeting its resource adequacy requirements. The Commission's imposition of an "individual LCR," which restricts both the location of the available resources and manner in which the AES may use the PRA is unlawful. The Court of Appeals' Opinion in this regard should be upheld.

F. The Court of Appeals Correctly Held That The Commission's Implementation of an Individual LCR Was Not "Consistent" With MISO's Resource Adequacy Requirements.

Consumers asserts that despite clear language in Section 6w(6) that prohibits the MPSC from imposing a capacity charge on an AES if the AES "can meet its capacity obligations through owned or contractual rights to any resource that the appropriate independent system operator [MISO] allows to meet the capacity obligation of the electric provider," this language should be ignored, because "[t]he term 'capacity obligation' is also used in Section 6w(8), which

expressly authorizes the MPSC to determine LCR as part of AESs' 'capacity obligations'." Application at 42-43. Consumers continues that because Section 6w(8) "clearly, and more specifically" requires AESs to demonstrate owned or contracted capacity resources sufficient to meet their "capacity obligations" four years in advance of the Planning Year, and at the time Act 341 was enacted MISO's CRS tariff proposal was pending at FERC, that somehow this all leads to a conclusion that these statutory provisions cannot be consistent with MISO's tariff because MISO does not have a four-year forward capacity obligation. Therefore, Consumers argues, these statutory provisions are somehow nullified. Energy Michigan submits that this sequence of attempted linkages is simply a distraction from the plain reading of the statute.

As Consumers itself admits, the Legislature was well aware that MISO's CRS proposal could, in fact, fail. That is why there was the "backstop," as Consumers refers to it, of the state-created SRM. The fact that MISO's current capacity market is only a one-year prompt market, while Michigan requires a four-year forward demonstration, does not render the plain words of the statute inapplicable as regards the Commission's mandate to make its reliability requirements consistent with the federal requirements

Nor does Consumers' comparison of the individual LCR to MISO's FRAP justify the creation of an individual LCR. In this regard, Consumers suggests that "Rather than prohibiting the MPSC from implementing an LCR as one part of an AES's capacity obligations, which is expressly permitted throughout other portions of Section 6w, this understanding of Section 6w(6) would simply ensure that AESs are permitted to demonstrate they can meet their four-year forward capacity obligations with the same resources that MISO permits LSEs that have a FRAP to use to meet their single-year capacity obligations." Application at 44. This argument clearly must fail for several reasons.

First, as noted above, it is typically incumbent utilities, such as Consumers Energy, that FRAP within MISO. As the Illinois Staff Whitepaper stated, incumbent utilities are "traditionally regulated and are able to build and own generating units or do so jointly with other utilities. Such LSEs with relatively stable load can limit their exposure to fluctuations in fuel prices, construction costs, regulatory requirements and other economic factors by entering into long-term purchase arrangements with independent facility developers or utilities with excess generating capacity. However, in restructured retail markets, the load of alternative retail electric suppliers and the basic service provider utility is subject to fluctuation due to customer switching, often making long-term contracts and the construction of generating resources impractical. Accordingly, such LSEs are more likely to use MISO's third option for demonstrating resource adequacy compliance, namely, procuring capacity through MISO's annual PRA."[15] While it is easy enough for Consumers to FRAP its supply, due to the fact that it owns significant generation in Zone 7, the same is not true for AESs, who typically do not own generation in the state, and may have contracts for generation supply in another zone, thus using that supply to meet its capacity obligations in a given zone. Thus, the Legislature giving AESs the full flexibility of the MISO resource adequacy constructs makes perfect sense.

Equally as important, MISO's allowance of a provider's use of the FRAP, whereby the provider removes some or all of its capacity resources from the PRA, is a voluntary decision made by the provider. Consumers' attempt to somehow make this "voluntary" use of the FRAP consistent with the Commission's "mandatory" provision of a provider's in-zone, independent proportional share of an LCR is simply illogical. MISO's only mandatory LCR is the zonal one. MISO does not mandate that all providers use a FRAP in any given zone, due to the fact that

[15] Illinois Staff Whitepaper, *supra*.

some providers simply do not own or have operational control over specified resources with which to FRAP. Therefore, for the MPSC's mandatory locational requirement to be "consistent" with MISO's, it must also be zonal, not individual. A mandatory individual LCR is clearly inconsistent with MISO's voluntary FRAP. The Court of Appeals correctly ruled that "such an interpretation is contrary to the directive of section 6w that the local clearing requirement be imposed in accordance with MISO's practices, which do not impose the local clearing requirement on individual alternative electric suppliers…" Opinion at 13. The Court of Appeals' Opinion should be upheld.

G. The Legislative History of Section 6w, Including The Removal of Specific Language Authorizing An Individual LCR, Demonstrates That the Legislature Rejected Such An Imposition Upon AESs.

Consumers alleges that the Court of Appeals erred in finding that the legislative history of the House of Representatives' removal in Senate Bill 437 (H-4) of specified language from Senate Bill (S-7) that specifically would have allowed the imposition of in individual LCR (i.e., requiring AESs to meet a proportional share (90%) of the Zone's LCR – an individual LCR) demonstrated that the Commission was without authority to impose an individual LCR. Consumers makes the same arguments it and the Commission made to the Court of Appeals, namely that removal of what once was the statutory authority to impose an individual LCR is essentially meaningless; that the "actual language of enacted Act 341" allegedly "still authorizes" the Commission to determine and implement an LCR as part of all individual electric providers' capacity obligations; and that the Court's reliance on the change from House Substitute 4 (H-4) to the language actually enacted in Act 341 is contrary to well-established rules of statutory construction. Application at 47-48. All of these arguments must similarly fail before this Court.

The individual LCR language was removed from SB 437(S-7) due to the fact that it was highly controversial. As the Commission noted in its September 15 Order, the establishment of a forward locational requirement for the generation resources required to meet the new capacity obligation imposed by the State was "[b]y far the most contentious issue, in both the development of Section 6w through the legislative process and during the collaborative proceeding to establish a capacity demonstration process." September 15 Order at 34 (emphasis added).

The previous version of the bill, as passed by the Senate, is available on the State of Michigan's website at: http://www.legislature.mi.gov/documents/2015-2016/billengrossed/Senate/pdf/2015-SEBS-0437.pdf (the "Senate Bill"). The pages constituting Section 6w have been attached as Exhibit 4. It is noteworthy that the Senate Bill contained detailed requirements in subsection 6w(5), mandating that the Commission monitor whether market manipulation is occurring through generators withholding capacity from the local market. The Senate Bill clearly required a local purchase obligation for capacity and the Legislature was plainly concerned about the market power of a small number of LSEs, such as Consumers Energy, who control the vast majority of local generation capacity. Significantly, along with the detailed process in subsection 6w(2) of the Senate Bill, for determining how much capacity must be sourced locally, the requirements in subsection 6w(5) on market manipulation of local capacity were removed in the version that became Public Act 341. The reason for this simultaneous removal seems apparent–when the local sourcing requirement was removed from Section 6w(2), the market manipulation control requirements in Section 6w(5) were no longer needed and so were also removed.

If, as Consumers and the Commission claims, the standards and restrictions on Commission action in setting a local purchase obligation were removed by the Legislature without removing the Commission's authority to nevertheless create, at its own discretion and without standards, such an obligation, then it does not make sense why the tandem market manipulation protections in subsection (5) should have been removed. They would still be necessary–perhaps even more so–since the Legislature was, under the Commission's interpretation, granting the Commission unbridled authority to create any kind of local purchase obligation it wished.

Thus, the Commission mistakenly claims in its September 15 Order that, "[w]hat changed from the version passed by the Senate to the one ultimately enacted into law is not that a locational requirement went away entirely, but that an explicit methodology was removed and replaced with provisions that leave decisions on the methodology of how to establish the locational requirement up to the Commission." September 15 Order at 36. In fact, what changed was that the locational requirement in subsection 6w(2) as applied to individual electric providers was removed, along with such supporting requirements as the anti-market manipulation requirements in Section 6w(5). Thus the Commission, in its September 15 Order, attempted to read language back into Act 341 that the Legislature deliberately removed, and so attempted to claim for itself the ability to enact requirements that were explicitly considered and rejected by the Legislature. *In re MCI Telecommunications Complaint*, 460 Mich 396, 596 NW2d 164 (1999) ("Where the Legislature has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to explicitly authorize what the Legislature explicitly rejected."); *Rovas*, 482 Mich at 98 ("While administrative agencies have what have been described as 'quasi-legislative' powers, such as

rulemaking authority, these agencies cannot exercise legislative power by creating law or changing the laws enacted by the Legislature."). Energy Michigan submits that the determinations in the Commission's September 15 Order fail to meet the first *Chesapeake* standard as they are not "within the matter covered by the enabling statute" and so are invalid. *Chesapeake*, 59 Mich App at 98-99.

The Court of Appeals agreed with Energy Michigan, and held that:

> " . . . In sum, the MPSC urges us to read into the statute an implied grant of authority to the MPSC to impose a local clearing requirement on individual alternative electric suppliers even though (1) such authority is not clearly and unmistakably granted by the statute, (2) such an interpretation is contrary to the directive os section 6w that the local clearing requirement be imposed in accordance with MISO's practices, which do not impose the local clearing requirement on individual alternative electric suppliers, and even though (3) the Legislature rejected language granting such authority to the MPSC, removing it from the final draft of the statute ultimately enacted. We decline the invitation to engage in these interpretative gymnastics and return to our ultimate concern and primary objective when reviewing an agency decision interpreting a statute, which is the proper construction of the plain language of the statute and to discern and give effect to the Legislature's intent." *Rovas*, 482 Mich at 108; *City of Coldwater*, 500 Mich at 167.

Opinion at 13-14. The Court of Appeals was correct in its ruling and Consumers presents nothing new before this Court to show otherwise.

Although Consumers alleges that the "actual language of enacted Act 341" allegedly "still authorizes" an individual LCR, Consumers' entire pleading is devoid of any such language. Consumers' own case law calls for such specified language that it fails to find: "When the Legislature has conveyed its intent in the words of a statute, the Court's role is to simply apply its terms. *In re Certified Question from US Court of Appeals for Sixth Circuit,* 468 Mich 109, 113; 659 NW2d 597 (2003). When the Legislature's language is clear, the Courts are bound to follow its meaning. *People v Gardner*, 482 Mich 41, 58-60; 753 NW2d 78 (2008)." Application at 47. Yet as the Court of Appeals found, "We cannot follow the urging of the MPSC and Consumers,

however, because a review of the statue reveals that no provision of MCL 460.6w clearly and unmistakably authorizes the MPSC to impose a local clearing requirement upon individual alternative electric providers." Opinion at 10.

Consumers fails to provide any clear and unmistakable legislative language that would authorize an individual LCR. The Court of Appeals correctly found that not only is there, in fact, no such clear language, the language that would have provided one was removed. The Court of Appeals correctly ruled in this and every other regard in its July 12 Opinion. The Supreme Court should deny Consumers' Application for Leave to Appeal.

III. REQUEST FOR RELIEF

Wherefore, Energy Michigan respectfully requests that the Michigan Supreme Court reject Consumers Energy's Application for Leave to Appeal and all of the relief requested therein. The Court of Appeals' July 12, 2018 unanimous and published Opinion was correct in all regards and should be upheld.

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Date: October 5, 2018

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