STATE OF MICHIGAN
IN THE SUPREME COURT

In the matter of the investigation, on the Commission's own motion, into the electric supply reliability plans of Michigan's electric utilities for the years 2017 through 2021.

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

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY'S ANSWER TO THE APPLICATION FOR LEAVE TO APPEAL OF CONSUMERS ENERGY COMPANY

CLARK HILL PLC
Robert A. W. Strong (P27724)
Michael J. Pattwell (P72419)
Attorneys for Appellant Association of Businesses Advocating Tariff Equity
151 S. Old Woodward Avenue, Suite 200
Birmingham, MI 48009
(248) 988-5861
rstrong@clarkhill.com
mpattwell@clarkhill.com

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STATEMENT OF JURISDICTION

Appellee, the Association of Businesses Advocating Tariff Equity (ABATE),[1] agrees with Appellant, Consumers Energy Company ("Consumers"), that this Court has discretionary jurisdiction under Const 1963, art 6, § 4 and MCR 7.303(B)(1) to review the unanimous and published opinion of the Court of Appeals (Meter, P.J., and Gadola and Tukel, JJ.) issued July 12, 2018. However, as set forth in ABATE's Answer, because the Court of Appeals' decision was correct and because no injustice will result from that decision -- which merely preserves the status quo of Michigan's limited competitive electric market -- ABATE asks that this Court deny the Consumers' Application for Leave to Appeal.

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

COUNTERSTATEMENT OF QUESTION INVOLVED

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

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

I. INTRODUCTION

This case involves a relatively straight-forward issue of statutory construction. It asks whether, pursuant to 2016 PA 341 ("Act 341"), the Michigan Public Service Commission ("PSC") has the authority to individually impose upon Alternative Electric Suppliers ("AESs") a novel four-year forward locational capacity requirement, referred to as a Local Clearing Requirement ("LCR").[2] On July 12, 2018, the Court of Appeals (Meter, P.J., and Gadola and Tukel, JJ.) issued a unanimous and published opinion holding that Act 341 did not, by clear and unmistakable language, or necessary inference, authorize the PSC to impose a LCR on individual AESs; many of whom procure their electric capacity resources from out-of-state generators.

The Court of Appeals afforded the interpretation of the PSC the most respectful consideration but ultimately identified several cogent reasons why the PSC's interpretation was erroneous. The Court of Appeals found that while there exists no *express* language in Act 341 authorizing the imposition of a LCR on individual AESs, Act 341 does contain multiple provisions demonstrating an intent by the Legislature to spare AESs, in particular, from having to satisfy an individual LCR. The Court of Appeals also found persuasive that the Legislature deliberately removed from the final version of the Act specific language that had expressly authorized the PSC to impose a LCR on individual AESs.

As is evident from the published opinion and as explained in greater detail below, the Court of Appeals' decision was correct. No manifest injustice has resulted or will result from this decision. Indeed, the decision merely preserves the status quo where AESs: (i) make up less than 10% of the electric load in this State; (ii) are already subject to certain federal reliability

[2] A locational requirement functions as a *de facto* embargo on lower-cost out-of-state resources historically utilized by Michigan's AESs who operate within a limited 10% competitive marketplace. Michigan's incumbent electric monopolies, on the other hand, are largely unaffected by such locational requirements where they are guaranteed a handsome rate of return on their local resources.

requirements designed to promote resource adequacy; and (iii) have never been subject to any compulsory directive mandating that they purchase their capacity resources from more expensive local generators such as Michigan's incumbent rate-regulated utilities. ABATE therefore asks that this Court deny Consumers Energy Company's ("Consumers") Application for Leave to Appeal as well as any and all relief requested therein.

II. COUNTERSTATEMENT FACTS

In response to Consumers' Statement of Facts and Procedural History, ABATE relies on and incorporates herein the Counterstatement of Legal, Factual, and Procedural Background set forth in ABATE's Answer to the PSC's Application for Leave to Appeal at pages 2 through 30.

III. ARGUMENT

A. There exists no express or implied grant of authority in Act 341 authorizing the PSC to impose a LCR on individual AESs.

Consumers argues, at length, that Act 341 purportedly grants to the PSC the authority to impose a LCR on individual AESs because Sections 6w(8)(a) and (b) require regulated electric utilities, AESs, Cooperative Electric Utilities ("Co-Ops"), and Municipally-Owned Electric Utilities ("Munis") to meet capacity obligations set by the PSC or the Midcontinent Independent System Operator ("MISO"), and Section 6w(8)(c) directs the PSC, in determining capacity obligations, to "set" "any required"[3] LCR and Planning Reserve Margin Requirements ("PRMR") "consistent with federal reliability requirements."[4] (Consumers App at 27-36 (citing

[3] The use of the phrase "any required" to modify the PSC's duty to set a LCR shows that the Legislature envisioned situations where the LCR would not be required.

[4] Consumers' interpretation of 6w(8)(c) leads to a self-defeating result because MISO's "federal reliability requirements" only implement the LCR on a zonal, as opposed to individual, basis. If 6w(8)(c)'s obligation to "set" the LCR incorporated the authority to "impose" the LCR on an individual, as opposed to a zonal, basis, then the individual imposition of the LCR purportedly called for by 6w(8)(c) would be inconsistent with "federal reliability requirements." As such, it is illogical to read 6w(8)(c) as authorizing the PSC to impose the LCR on individual AESs.

MCL 460.6w(8)(a),(b),(c)).) As recognized by the Court of Appeals, none of these provisions authorize the PSC to impose a share of the LCR on individual AESs, much less by the "clear and unmistakable language" the Legislature must use to vest authority in the PSC. (COA Op at 8 (*citing Consumers Power Co v PSC*, 460 Mich 148, 155; 596 NW2d 126 (1999); *Union Carbide Corp v PSC*, 431 Mich 135, 151; 428 NW2d 322 (1988); *Huron Portland Cement Co v PSC*, 351 Mich 255, 262; 88 NW2d 492 (1958).)

Consumers' real argument is that because the PSC has the power to "set" the overall LCR for the two MISO Zones in Michigan, the PSC must have the power to specifically "impose" a share of the LCR on individual AESs. (Consumers App at 27-36.) But the power to "set" the LCR must be "strictly construed." *Herrick Dist Library v Library of Mich*, 293 Mich App 571, 583; 810 NW2d 110 (2011) ("[I]f a statute does explicitly grant an agency a power, that power is subject to strict interpretation"). The function of "setting" the LCR is markedly different from the function of "imposing" the LCR. *Alcona Co v Wolverine Envtl Prod, Inc*, 233 Mich App 238, 247; 590 NW2d 586 (1998) ("[W]here powers are specifically conferred [on an agency] they cannot be extended by inference"). Thus, Sections 6w(8)(b) and (c) cannot be read to grant the PSC with the express power to "impose" the LCR on individual AESs.

Nor can the power to individually impose the LCR on AESs be necessarily inferred from Sections 6w(8)(b) and (c) because imposition of the LCR on individual AESs is not "necessary to the due and efficient" implementation of the power to set a LCR generally. *Ranke v Corp & Sec Comm'n*, 317 Mich 304, 309; 26 NW2d 898 (1947). As the Court of Appeals recognized, "imposing" a LCR on individual AESs is not necessary to "set" the LCR for each MISO Zone in Michigan. And, contrary to Consumers' assertions, the inability of the PSC to impose the LCR on AESs does not render the task of setting the LCR futile. Reading Act 341, as a whole, several

independent purposes become apparent. For example, because Section 6w(8)(b) imposes the LCR on Co-ops and Munis, the LCR must be set. MCL 460.6w(8)(b). Also, determination of a forward LCR, as opposed to MISO's prompt LCR, assists the PSC with its regulation of incumbent utilities: (i) utility integrated resource planning, MCL 460.6t; (ii) supervision of utility mergers, MCL 460.6q; (iii) approval of certificates of necessity, MCL 460.6s; (iv) evaluation of performance based regulations, MCL 460.6u; and (v) deciding utility abandonment petitions, MCL 460.6z.

No matter how many times Consumers repeats its supposedly textual argument, Consumers cannot avoid the inescapable fact that while Section 6w(8)(b) effectively imposes a LCR on Co-Ops and Munis, MCL 460.6w(8)(c), and while Section 6t effectively imposes a LCR on regulated utilities, MCL 460.6t(1)(e-f), (3), (6), (8)(a)(i), there exists no provision in Act 341 that explicitly or by necessary inference authorizes the PSC to impose a LCR on individual AESs.[5] Nor can Consumers avoid the fact that: (i) Section 6w(6), which applies only to AESs, expressly permits AESs to meet "capacity obligations" through "any resource that MISO allows to meet the capacity obligation," and expressly forbids the PSC from assessing a capacity charge against AESs in any manner that "conflicts with a federal resource adequacy tariff," MCL 460.6w(6); and (ii) MISO allows LSEs to meet MISO's capacity obligations with external (*i.e.*, non-local) resources and thus does not impose a LCR on individual LSEs.[6]

[5] The PSC and the PSC's Staff have repeatedly acknowledged that "Act 341 is silent about the Commission's authority to impose the [LCR] on [AESs]," (PSC App at 40, 46-47), and "the statute [(*i.e.*, Act 341)] is silent on the allocation of LCR," (U-18444, Doc No 117 at 36-37).

[6] The PSC has acknowledged that "MISO does not currently require LSEs to meet their individual share of the overall locational requirement." (U-18197, Doc No 86 at 8-9.) Likewise, the PSC's Staff has agreed that "[t]here is no mandatory prompt-year requirement in MISO's resource adequacy construct that requires an individual LSE to supply any particular level of local resources" but rather "MISO's local clearing requirement is for a local resource zone, as a whole." (U-18444, Doc No 126 at 3.)

This holistic regarding of Act 341 is, of course, consistent with the fact that that House Substitute 4 ("H-4") of SB 437, which ultimately became Act 341, deliberately removed "contentious" language from Senate Substitute 7 ("S-7") of SB 437 that had expressly required individual AESs to meet a prescribed percentage of their proportional share of the LCR. (See ABATE Answer to PSC App at 10-13, 42-44.) Consumers would rather ignore this "highest form of legislative history" then be forced to confront this Court's decision in *Bush v Shabahang*, 484 Mich 156, 173-174; 772 NW2d 272 (2009), which holds that where, as here, "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." (Consumers App at 46-48.)

B. The special aggregation provision for Michigan Co-Ops and Munis does not empower the PSC to impose a share of the LCR on individual AESs.

The first sentence of 6w(8)(b) requires Co-ops, Munis, and AESs to meet their "capacity obligations." MCL 460.6w(8)(b). The next two sentences enhance the ability of Co-ops and Munis to meet their "capacity obligations" by allowing them to "aggregate their capacity resources that are located within the same local resource zone." *Id.* The fourth sentence imposes a LCR on Co-ops and Munis (*i.e.*, the only entities that are permitted to meet their capacity obligations collectively) by providing that they may use "any resource . . . [MISO] allows to qualify for meeting the [LCR]." *Id.* Consumers somehow reads these four sentences to mean that the PSC must not only impose the LCR on Co-ops and Munis, but must also impose the LCR on AESs. (Consumers App at 38-40.) The inference is belied by the text of the Act and was flatly rejected by the Court of Appeals. (COA Op at 11 n 8.)

First, and foremost, no such inference may be drawn from statutory language that, on its face, applies to Co-ops and Munis but does not mention AESs. *Alcona*, 233 Mich App at 247.

For the PSC to impose a LCR on Co-ops and Munis, it is not "necessary" for the PSC to "impose" a LCR on AESs. *Ranke*, 317 Mich at 309.

Second, 6w(6) expressly permits AESs to use "any resource that [MISO] allows to meet the capacity obligation of the electric provider" and provides that "[t]he preceding sentence shall not be applied in any way that conflicts with a federal resource adequacy tariff, when applicable." MCL 460.6w(6). This AES-specific provision is critical. Consumers fails to read 6w(6) and (8)(b) together as it must. *Detroit Pub Schs v Connecticut*, 308 Mich App 234, 247-48; 863 NW2d 373 (2014) (subsections of cohesive statutory provisions must be read together). Furthermore, because 6w(6) is the most specific provision regarding what resources AESs may use to meet capacity obligations, it controls over the more general provisions in 6w(8)(b). *Slater v Ann Arbor Pub Sch Bd*, 250 Mich App 419, 434-35; 648 NW2d 205 (2002) ("[W]here two statutes or provisions conflict . . . the specific statute prevails").

Third, Consumers fails to ascribe different meaning to different terms used in 6w(6) and (8)(b). *Autodie, LLC v Grand Rapids*, 305 Mich App 423, 435; 852 NW2d 650 (2014). To describe what "resources" may be used by AESs, Co-ops, and Munis to satisfy their respective capacity obligations, the Legislature employed different terminology. For example, AESs may use "any resource that [MISO] allows to meet the capacity obligation . . . ." MCL 460.6w(6). While Co-ops and Munis are limited to "any resource . . . [MISO] allows to qualify for meeting the LCR." MCL 460.6w(8)(b). "If the Legislature had intended the same meaning in both statutory provisions, it would have used the same word[s]." *Honigman v Detroit*, 2018 WL 472190, at *2 (Mich Ct App Jan 18, 2018). "The omission of a provision in one part of a statute that is included in another should be construed as intentional." *People v Barrera*, 278 Mich App 730, 741; 752 NW2d 485 (2008).

Fourth, Consumers' circular argument is based on a false premise stemming from its failure to accord meaning to the sequence of 6w(8)(b). The purpose of 6w(8)(b)'s special "aggregation provision" is not, as Consumers contends, to allow Co-ops and Munis "to meet their LCR." Rather, as recognized by the Court of Appeals, the express purpose of the special "aggregation provision" is to allow them "to meet the requirements of this subdivision," which, as set forth in the immediately preceding sentence, are the "capacity obligations." MCL 460.6w(8)(b) (first three sentences). It is not until the fourth sentence that the Legislature imposes a LCR on Co-ops and Munis. *Id.* As the sequence of 6w(8)(b) shows, it is because Michigan Co-ops and Munis may aggregate their resources to meet their capacity obligations, that the Legislature imposed the LCR on them. *McCormick v Carrier*, 487 Mich 180, 192; 795 NW2d 517 (2010) (courts must consider not only "the plain meaning of a statute's words" but also their "placement and purpose in the statutory scheme").

Fifth, the PSC's argument (quoted by Consumers) that it would be unfair to interpret the 6w(8)(b) as imposing a LCR on only Co-ops and Munis -- because they are non-profit utilities -- misunderstands the PSC's relationship with the Legislature. In construing 6w, the "Court does not weigh the economic and public policy factors." *Consumers*, 460 Mich at 156. "The Legislature . . . is the body that must consider these questions." *Id.* Here, the Legislature, as reflected in the text and legislative history of the Act, chose not to impose a LCR on AESs. It was impermissible for the PSC to read into the statute such an imposition on AESs because it believed such a result to be equitable or because it peripherally speculated that this was the intent of the Legislature. *Detroit Pub Schs*, 308 Mich App at 248.

C. Consumers infers that because Act 341 allows the PSC to impose a LCR on regulated utilities it must follow that the PSC may impose a LCR on AESs.

Consumers argues, for the first time on appeal, that because Sections 6w(7) and 6t, when read together, allow the PSC to impose a LCR on regulated utilities, it must follow that the PSC may impose a LCR on AESs. (Consumers App at 40-42.) Again, no such inference may be drawn from statutory language that, on its face, applies to regulated utilities but does not mention AESs. *Alcona*, 233 Mich App at 247. For the PSC to impose a LCR on regulated utilities, it is not "necessary" for the PSC to "impose" a LCR on AESs. *Ranke*, 317 Mich at 309. Relevantly here, the leading scholar on administrative law in Michigan has explained that "a specific grant of statutory authority allowing an agency to act in one circumstance does not authorize it to do so in another." LeDuc, Michigan Administrative Law § 1:2 (2013 Edition) (*citing In re Consumers Energy Application For Rate Increase*, 291 Mich App 106, 119-20; 804 NW2d 574 (2010); *In re Detroit Edison Co Application*, 296 Mich App 101, 108–10; 817 NW2d 630 (2012)).

Consumers' claims of a looming supply-based electric reliability crisis are also unfounded. There exists no reliability-driven justification for compelling AESs (all of whom operate in a limited competitive marketplace unshielded by the broad protections afforded to regulated monopolies) to meet their capacity obligations with even more local capacity. The PSC's own Staff has adamantly explained that imposition of "an individual LCR is unnecessary purely to maintain reliability" and "there is no projected shortfall in MISO LRZ 7 to remedy." (U-18444, Doc No 117 at 11-14, 37, 42.) Despite the lack of any individually imposed locational requirement in the past, PSC Staff has highlighted that "no Michigan Zone has ever failed to meet its LCR." (*Id.* at 42.) Staff has, in fact, characterized the utilities' bombastic reliability concerns as "needlessly hyperbolic" and "patently false." (*Id.* at 19, 24).

D. Act 341's State Reliability Mechanism is not the same MISO's proposed Capacity Forward Auction and Prevailing State Compensation Mechanism both of which were rejected by FERC.

Consumers argues that the comparative analysis called for by Section 6w(1) and (2) of Act 341 shows an intent that the PSC be empowered to impose a share of the LCR on individual AESs. (Consumers App at 36-38.) In order to determine what would be a better means "for this state in meeting" the LCR and PRMR, those sections directed the PSC to compare MISO's proposed capacity forward auction ("CFA") with MISO's proposed prevailing state compensation mechanism ("PSCM") or compare MISO's proposed CFA with Section 6w(8)'s State Reliability Mechanism ("SRM") (Consumers App at 36-38.) Setting aside the obvious fact that FERC rejected MISO's CFA and PSCM, and the cited statutory provisions were never triggered, Consumers' argument, again, is hopelessly inference-based.

When determining the extent of the PSC's power under 6w, the only permissible inference is that "no other or greater power was given than that specified." *Alcona*, 233 Mich App at 247. Nowhere in 6w did the Legislature specify that the PSC may impose the LCR on AESs. And, in order to perform the comparative examination called for in 6w(1) and (2), it is not "necessary" for the PSC to "impose" a share of the LCR on individual AESs. *Ranke*, 317 Mich at 309. It cannot even be said that for Michigan to meet the LCR, a share of the LCR must be imposed on individual AESs. No such requirement has ever existed (*i.e.*, MISO's LCR is applied on a zonal basis) and, as the PSC has acknowledged, no Michigan Zone has ever failed to meet its LCR.[7] Moreover, the Legislature's employment of the phrase "for this state" before the phrase "in meeting the [LCR] and the [PRMR]," further cuts against the Consumers' reading. MCL

[7] Consumers interprets MISO's *rejected* PSCM as having called for the imposition of the LCR on individual AESs and then peripherally opines, without any textual support, that the same requirement must apply to the SRM because the SRM was purportedly intended to be a substitute for the PSCM. (Consumers App at 36-38.) No such requirement is found in the text of the Act.

460.6w(1) and (2). The text shows an intent for the PSC to select the reliability mechanism that would best allow Michigan to meet the LCR and PRMR. This makes sense where MISO applies the LCR in the aggregate and not individually. For this reason as well, Sections 6w(1) and (2) do not create an inference that the PSC may impose a share of the LCR on individual AESs.

It is also worth noting that the PSC's own Staff rejected this exact argument which was put forth by Consumers in the underlying LCR methodology proceeding:

> Consumers Energy argues that the PSCM requirements should apply to the SRM, stating that the SRM was clearly intended to be the state substitute for the PSCM in the event FERC did not approve the PSCM. Consumers Energy is wrong – by its terms §6w(8)(c) requires the Commission to establish an SRM that is consistent with existing federal adequacy requirements – not proposed requirements that the FERC rejected.
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> * * *
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> In advocating strict adherence to the rejected CRS, Consumers Energy ignores the fact that the CRS was not designed to suit Michigan. The CRS also addressed problems arising from Illinois' alternative market structure. Choice is not capped in Illinois. The CRS was thus not tailored to suit Michigan's particular needs, which are very different from Illinois' needs. [(U-18444, Doc No 126 at 10-14.)]

Accordingly, Sections 6w(1) and (2) do not authorize the PSC to impose a share of the LCR on individual AESs.

IV. REQUEST FOR RELIEF

WHEREFORE, ABATE respectfully requests that the Michigan Supreme Court reject the Consumers' Application for Leave to Appeal and any and all relief sought therein. The unanimous and published decision of the Court of Appeals is correct, preserves the status quo of Michigan's limited competitive electric market, and should not be disturbed by this Court.

Dated: October 4, 2018

Respectfully submitted,

CLARK HILL PLC

By: /s/ Michael J. Pattwell

Robert A. W. Strong (P27724)
Michael J. Pattwell (P72419)
Attorneys for ABATE
212 East Grand River Avenue
Lansing, MI 48906
(517) 318-3100
mpattwell@clarkhill.com