STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
Meter, P.J., Gadola and Tukel, JJ

In re RELIABILITY PLANS OF ELECTRIC UTILITIES FOR 2017-2021

MICHIGAN PUBLIC SERVICE COMMISSION and CONSUMERS ENERGY COMPANY — Supreme Court No. 158305

Appellants, — Court of Appeals No. 340600

v — MPSC No. U-18197

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY

Appellee.
_____/

In re RELIABILITY PLANS OF ELECTRIC UTILITIES FOR 2017-2021

MICHIGAN PUBLIC SERVICE COMMISSION and CONSUMERS ENERGY COMPANY — Supreme Court No. 158307

Appellants, — Court of Appeals No. 340607

v — MPSC No. U-18197

ENERGY MICHIGAN, INC.

Appellee.
_____/

APPELLANT CONSUMERS ENERGY COMPANY'S REPLY IN RESPONSE TO THE ANSWERS OF ABATE AND ENERGY MICHIGAN, INC.

Dated: October 25, 2018

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I. Introduction

Pursuant to MCR 7.305(E), Consumers Energy Company ("Consumers Energy" or the "Company") files this Reply in response to the Answers in this matter filed by the Association of Businesses Advocating Tariff Equity ("ABATE") and Energy Michigan, Inc. ("Energy Michigan").

II. Act 341 Authorizes the Michigan Public Service Commission To Determine And Implement An LCR As Part of All Electric Providers' Four-Year Forward Capacity Obligations, Including AESs

ABATE's Answer to the Michigan Public Service Commission's ("MPSC") Application (page 37) admits that the MPSC has authority to implement a Planning Reserve Margin Requirement ("PRMR") on all of the state's individual electric providers, including Alternative Electric Suppliers ("AES"). ABATE and Energy Michigan also admit that the MPSC has authority to implement a Local Clearing Requirement ("LCR") on municipal utilities, cooperative utilities, and investor-owned utilities such as Consumers Energy. The source of the MPSC's authority to implement a PRMR and an LCR on municipal and cooperative utilities and incumbent utilities *is the same statute which authorizes it to implement an LCR on AESs*. In setting forth the requirements of a State Reliability Mechanism ("SRM"), Section 6w(8)(c) of Public Act 341 of 2016 ("Act 341") requires the MPSC "to determine the capacity obligations . . . [including] the local clearing requirement and planning reserve margin requirement." MCL 460.6w(8)(c). Act 341's "capacity obligations" include a PRMR and an LCR for all individual electric providers, including AESs, who are expressly included in Act 341's definition of an "electric provider." See MCL 460.6w(12)(iv).

While statutes other than Section 6w(8)(c) reference the LCR, those references to not diminish the authority provided by Section 6w(8)(c). ABATE notes (Answer to the MPSC, page 38) the requirement that incumbent utilities include in their Integrated Resource Plans

("IRP"), filed under Section 6t of Act 341, information about the capacity resources they intend to rely upon to meet the applicable LCR. However, the establishment and imposition of the LCR on utilities stems from the authority granted to the MPSC pursuant to Section 6w of Act 341, which is the same statute which requires AESs to comply with MPSC-established four-year forward capacity obligations, including an LCR. ABATE and Energy Michigan also reference the allowance for capacity aggregation which is afforded to municipal and cooperative utilities in Section 6w(8)(b) of Act 341 for purposes of their ability to meet the applicable LCR. However, the referenced aggregation allowance is not the statutory provision which authorizes the MPSC to impose an LCR on municipal and cooperative utilities. That statutory authorization is contained in Section 6w(8)(c), which applies to all electric providers, including AESs.

ABATE and Energy Michigan contend that the MPSC has authority to "determine" the LCR, but somehow lacks authority to implement the so-determined component of AESs' four-year forward capacity obligations. This conclusion does not make logical sense. There would be no need to "determine" the applicable LCR (or PRMR, for that matter) pursuant to Section 6w(8)(c) of Act 341 if those requirements were purely academic, and could not be actually implemented as part of electric providers' individual "capacity obligations." The MPSC does not set capacity obligations for the entire Zone; rather, Section 6w directs it to establish capacity obligations for each retail electric provider, including AESs. Reading Section 6w as a whole shows that its entire purpose is to require individual electric providers to meet four-year forward capacity obligations as determined by the MPSC. The Legislature's express authorization for the MPSC to establish an LCR "in order to determine the capacity obligations" of the state's retail electric providers means that the Commission is empowered to apply the determined LCR to individual electric providers' capacity obligations pursuant to Section 6w(8)'s SRM. There

would be no reason for the MPSC to "determine" the LCR if it is prohibited from applying the LCR to individual electric providers' capacity obligations. ABATE and Energy Michigan's argument that the MPSC does not have authority to implement the LCR component of capacity obligations on individual AESs is contrary to the text of Section 6w and to the entire purpose of that section - to establish new capacity obligations for individual electric providers, which include AESs. The validity of this statutory authorization is a substantial question, has significant public interest in this case involving the MPSC, and involves legal principles of major significance to the state's jurisprudence. Granting leave to appeal is therefore appropriate pursuant to MCR 7.305(B).

III. This Appeal Does Not Involve Issues Of Federal Preemption

ABATE's Answer to the MPSC's Application[1] (pages 2-4) and Energy Michigan's Answer to Consumers Energy's Application (pages 1-2) discussed the interplay between state and federal jurisdiction over electric resource adequacy, both implying that the State of Michigan's ability to regulate long-term resource adequacy for retail electric providers is constrained by federal jurisdiction over wholesale electric service. No claim of federal preemption has been raised in this proceeding. This matter concerns a straightforward consideration of whether Section 6w of Act 341 authorizes the MPSC to implement an LCR as part of the four-year forward capacity obligations of AESs. Michigan's Act 341 retail electric resource adequacy construct is complementary to the federal wholesale electric resource adequacy construct administered by the Midcontinent Independent System Operator, Inc.

[1] ABATE's Answer to Consumers Energy's Application (at page 2) incorporated by reference pages 2 through 30 of its Answer to the MPSC's Application.

("MISO").[2] The State is not preempted from taking action to ensure long-term retail electric resource adequacy. The Federal Power Act, as amended, 16 USC section 791 *et seq*, and the MISO resource adequacy processes expressly respect the prerogative of the states to determine how to best meet long-term retail resource adequacy requirements. See *Midwest Indep Sys Operator, Inc*., 139 FERC 61,199 (2012). The Michigan Legislature exercised this prerogative in enacting Section 6w of Act 341. As iterated by MISO in the underlying MPSC proceeding, the State's action to pass Act 341 to address long-term resource adequacy is complementary to MISO's short-term single-year planning processes. Such a complementary federal-state regulatory structure is not one in which preemption would apply, even if it were claimed (which it has not been). And regardless, determining a question of the interplay between federal energy regulation and Act 341 raises issues of significant importance, weighing in favor of the Supreme Court granting leave to appeal in this case.

IV. MISO Does Not Establish Capacity Obligations For Any Period Beyond The Current Planning Year, And The MISO Planning Reserve Auction Does Not Govern The Four-Year Forward Capacity Obligations Required by Section 6w of Act 341

ABATE admits at page 5 of its Answer to the MPSC's Application that "the PRA serves as a mechanism to sell and buy capacity in the near-term (i.e. current year) through an auction." Had the Federal Energy Regulatory Commission ("FERC") approved MISO's proposed Competitive Retail Solution ("CRS") tariff, MISO would have had the ability to implement a Forward Resource Auction ("FRA"). If the CRS had been implemented, its FRA could have been used by electric providers for purposes of meeting the state's long-term capacity obligations

[2] ABATE also implies in its Answer to the MPSC's Application (pages 4-5) that MISO is biased in favor of utilities. This allegation is unsupported in fact or law. MISO is regulated by the Federal Energy Regulatory Commission and is comprised of a variety of members. It also has an extensive stakeholder participation process. See https://www.misoenergy.org/about/.

under Section 6w of Act 341.[3] But FERC rejected the CRS. The MPSC was therefore obligated under Section 6w(2) to implement the SRM pursuant to Section 6w(8) of Act 341. The SRM does not allow electric providers to satisfy their forward capacity obligations by simply relying on the current year's MISO Planning Reserve Auction ("PRA"). Had that been the case, there would have been no need or reason to implement an SRM and forward capacity obligations.

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

MISO's rules regarding what resources can count to meet the applicable Zone's LCR remain relevant to determining whether an electric provider meets the four-year forward capacity

[3] In addition, depending upon whether the CRS had included an option for states to implement a PSCM or not, the MPSC would have been required (pursuant to Sections 6w(1) and 6w(2) of Act 341) to determine whether the PSCM or SRM "would be more cost-effective, reasonable, and prudent than the capacity forward auction" for Michigan in meeting the LCR and PRMR.

obligations as determined by the MPSC as part of the SRM. The MPSC addressed the issue of what resources can be counted toward meeting the LCR as a component of an electric provider's capacity obligation under the SRM. The MPSC determined that "all resources that MISO currently counts towards meeting MISO's LCR, count towards meeting Michigan's forward locational requirements," and noted that "this is consistent with federal reliability standards as required by Section 6w(8)(c)." MPSC Case No. U-18444, June 28, 2018 Order, pages 125-126, attached hereto as Appendix A. The MPSC further determined that it "agrees to adopt any changes in eligibility criteria for a resource to count toward the MISO zonal LCR unless the Commission determines otherwise in a future contested case." *Id.* at 126.

Act 341's institution of a state long-term resource adequacy planning process, including the requirement of complying with an LCR as determined by the MPSC, does not prohibit electric providers from continuing to use the MISO PRA for the current planning year. However, the obligations for the PRA and the SRM, while complementary, are not the same. Section 6w(8)(b) requires AESs to meet the SRM capacity obligations with resources which are either owned or under the AES's existing contractual rights. An AES who intends to use the PRA for the current planning year does not have ownership or contractual rights to those resources until after the auction has concluded, which happens in April of each year, well after the AES is required to demonstrate compliance with four-year forward capacity obligations to the MPSC in February of each year with capacity resources that are owned or under contract at the time of the capacity demonstration. This illustrates that the PRA is not the same as "ownership" or "contractual rights" to a capacity resource four years in advance of using that resource to serve retail customers. Contrary to the positions of ABATE and Energy Michigan, an electric provider's potential to avoid meeting a share of the Zone's total LCR when using the

MISO PRA does not mean that the rules for the residual, current-year PRA apply as the "capacity obligation" as that term is used in the four-year forward planning process set forth in Section 6w of Act 341. The Supreme Court should reject the contention that compliance with MISO's rules for the current year PRA constitutes compliance with an AES's four-year forward capacity obligation for purposes of Act 341's SRM. To do otherwise would render the SRM effectively meaningless. The question of whether Act 341's provisions regarding LCR have practical effect is an issue which meets the standards for granting leave to appeal set forth in MCR 7.305(B).

V. The Legislative History Of Act 341 Supports The Position That The MPSC Has Authority To Determine And Implement An LCR On AESs

The Supreme Court should also reject ABATE's and Energy Michigan's arguments regarding the legislative history of Section 6w of Act 341. It is inappropriate for a court to rely on legislative history when the language of the statute at issue is not ambiguous. *In re Certified Question from US Court of Appeals for Sixth* Circuit, 468 Mich 109, 113; 659 NW2d 597 (2003). In this case, Section 6w of Act 341 authorizes the MPSC to implement an LCR as a component of all individual electric providers' capacity obligations, including those of an AES. In any event, the change to Senate Bill 437 (S-7)'s prescriptive language regarding the required proportional amount of the Zone's LCR required to be borne by AESs in favor of a direction for the MPSC to consult with MISO and to determine the appropriate LCR to apply to electric providers' capacity obligations did not, as argued by ABATE and Energy Michigan, constitute an elimination of the authority to include an LCR as one element of the capacity obligations of AESs. The MPSC's decision to implement an extremely modest LCR for electric providers in the June 28, 2018 Order in Case No. U-18444 (attached hereto as Appendix A) is consistent with the statute's direction for the MPSC to consult with MISO and to determine the appropriate LCR

to apply as part of electric providers' individual capacity obligations.[4] The language which was enacted as Section 6w of Act 341 reflects the statutory allowance for the MPSC to exercise its administrative expertise, in consultation with the expertise of MISO, in determining the LCR necessary to ensure long-term system reliability.

Moreover, the public policy arguments about whether an LCR is necessary to ensure reliability put forth by ABATE and Energy Michigan do not diminish the MPSC's statutory authority to determine and include an LCR as one part of electric providers' capacity obligations under the SRM. The policy arguments regarding whether an LCR is necessary to ensure reliability are irrelevant to the question of whether the MPSC has authority to implement an LCR as part of AESs' capacity obligations under Section 6w of Act 341.[5] Moreover, the MPSC Staff ("Staff") positions in the underlying Case No. U-18197 and in Case No. U-18444 were policy positions, not legal positions. Staff's positions in underlying Case Nos. U-18197 and U-18444 did not contend that the MPSC lacks statutory authority to implement an LCR. Rather, Staff's positions were policy arguments about what level of LCR should be adopted to ensure reliability. In any event, Staff does not speak for the Commission, and its statements do not alter the law. Policy arguments in favor of implementing or not implementing an LCR, or implementing a very

[4] In the June 28, 2018 Order in Case No. U-18444, the MPSC approved an LCR to apply on an extremely incremental, gradual basis. The LCR which would apply for AESs' capacity obligations under the U-18444 approach would be 2.7% of their load-ratio shares of the MISO Zone 7 LCR for Planning Year 2022, and 5.3% for Planning Year 2023, compared to the 90% load ratio share which would have applied for individual AESs under the prescriptive formula which was specified in Senate Bill 437 (S-7).

[5] The allegations of ample capacity in the MISO market also do not address the practical need for an LCR in order to ensure reliable electric service. An LCR recognizes scientific reality that a certain portion of electric generation needs to be located close to the load to be served in order to ensure the long-term reliability of electric service. The practical need for an LCR exists regardless of the amount of generating capacity which may or may not exist outside the Zone in which the electric provider's customer load is located.

incremental LCR, are irrelevant to the issue in this appeal, which is whether the MPSC has authority under Section 6w of Act 341 to include any LCR in the four-year forward capacity obligations of an AES. Act 341 provides the he MPSC such legal authority. The question of the MPSC's authority under Act 341 meets the standards for granting leave to appeal set forth in MCR 7.305(B).

VI. Section 6w of Act 341 Does Not Violate The Non-Delegation Doctrine

The Supreme Court should reject ABATE's suggestion (Answer to MPSC's Application, pages 43-44) that the authorization for the MPSC to implement an LCR as part of AESs' capacity obligations contained in Section 6w of Act 341 violates the non-delegation doctrine.

In cases involving claims of violation of the non-delegation doctrine with respect to administrative agencies, the Court must determine "whether the limits (on the exercise of discretion conferred on the administrative official) are sufficiently defined to avoid delegation of legislative powers." *State Conservation Dept v Seaman*, 396 Mich 299, 308; 240 NW2d 206 (1976), quoting *Argo Oil Corp v Atwood*, 274 Mich 47, 52; 264 NW 285 (1935). The authorization to the MPSC to determine and implement an LCR for electric providers as part of capacity obligations pursuant to Section 6w of Act 341 satisfies the nondelegation doctrine. The legislative authority granted to the MPSC by Act 341 is neither absent of standards nor devoid of administrative due process. Subsection 6w (12)(d) of Act 341 defines "local clearing requirement," and this definition provides a standard by which the MPSC will make its determination of LCR. The MPSC has the expertise to make this determination. Moreover, Section 6w(8)(c) requires the MPSC to obtain additional technical assistance from MISO in determining the LCR. The MPSC conducted a contested case (Case No. U-18444) in which obtained additional evidence to determine the LCR. That contested case afforded interested

parties a multitude of due process protections. The determination required by the MPSC is complex and involves consideration of specialized factual determinations necessary to accomplish the clear legislative intent of Section 6w of Act 341. See, *State Conservation Dept v Seaman, supra.* The non-delegation doctrine requirements are satisfied. ABATE's non-delegation claim could put Act 341 and other administrative acts in jeopardy, and weighs in favor of granting leave to appeal pursuant to MCR 7.305(B).

VII. Request For Relief

WHEREFORE, Consumers Energy Company respectfully requests the Michigan Supreme Court to grant leave to appeal the Court of Appeals' July 12, 2018 Opinion in consolidated Docket Nos. 340600 and 340607, reverse that decision, and find that the Michigan Public Service Commission has authority to implement a local clearing requirement as part of alternative electric providers' capacity obligations under Section 6w of Act 341.

Respectfully submitted,

CONSUMERS ENERGY COMPANY

Dated: October 25, 2018

By: Kelly M. Hall Digitally signed by Kelly M. Hall Date: 2018.10.25 12:05:17 -04'00'

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