

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

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*In re* RELIABILITY PLANS OF ELECTRIC  
UTILITIES FOR 2017-2021

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

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**AMICUS CURIAE BRIEF OF**  
**THE MICHIGAN CHAMBER OF COMMERCE**

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**STATEMENT OF BASIS OF JURISDICTION**

Amicus Curiae adopts by reference the Statement of Basis of Jurisdiction contained in the brief of Appellant Michigan Public Service Commission.

**QUESTION PRESENTED FOR REVIEW**

Was the lower court's interpretation of MCL 460.6w based on an erroneous assumption that the federal government, and not the State, has primary authority and responsibility to ensure Michigan's supply of electricity can meet its demand, and did it thus read the statute to constrain state action when the statute is properly meant to empower such action?

ANSWER: Yes.

The Chamber does not take a position on the other issues identified by this Court or raised by the parties.

**STATEMENT OF INTEREST FOR AMICUS CURIAE**  
**THE MICHIGAN CHAMBER OF COMMERCE**

The Michigan Chamber of Commerce (the “Chamber”) is a nonprofit corporation representing over 6,400 members, all of whom are private enterprises engaged in an array of civic, professional, commercial, industrial, and agricultural activity in Michigan. The Chamber seeks to engage decision-makers at all levels of government to assist with the continual development of law and public policy to keep Michigan economically competitive and make the State attractive as a place to live and work. With this goal in mind, the Chamber has participated in lawsuits to ensure that courts are aware of the impact court decisions have on Michigan’s business operations and economic development.

**INTRODUCTION**

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

<<https://emp.lbl.gov/sites/default/files/doe-natl-trans-grid-papers.pdf>> (accessed October 25, 2016).

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

Adequacy is a foundational need for reliability of the electrical grid. The North American Electric Reliability Council (“NERC”) defines it as “the ability of the system to supply the aggregate electric power and energy requirements of the consumers at all times.” When supply in an area is inadequate to meet demand, a “cascading failure”<sup>1</sup> occurs, like the one that in approximately nine seconds resulted in a multi-day blackout not just in most of Michigan, but throughout much of the northeast United States and Canada. Ehrenberg, *Blackout* (August 18, 2003)

<[http://teacher.scholastic.com/scholasticnews/indepth/blackout/latest\\_news/index.asp?article=what\\_happened](http://teacher.scholastic.com/scholasticnews/indepth/blackout/latest_news/index.asp?article=what_happened)> (accessed October 23, 2018). In order to prevent cascading failures, the electric system must always have the right combination of enough resources generating power, and enough transmission to get the power to the consumers demanding it. See, e.g. Hirst, *Consulting in Electric Industry Restructuring* (January 2003)

<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.446.1348&rep=rep1&type=pdf>> (accessed October 23, 2018).

The generation portion of that vital combination is often referred to as “resource adequacy”<sup>2</sup> or “capacity.” The Chamber’s position is that “Michigan’s energy policy should sustain retail open access programs while guaranteeing sufficient capacity to serve all customers.” Exhibit A, page 1. The Chamber read and understood section 6(w) of 2016 PA 341

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<sup>1</sup> “Cascading results in widespread electric service interruption that cannot be restrained from sequentially spreading beyond an area predetermined by studies.” North American Electric Reliability Corporation, *Glossary of Terms Used in NERC Reliability Standards*, updated July 3, 2018 < [https://www.nerc.com/files/glossary\\_of\\_terms.pdf](https://www.nerc.com/files/glossary_of_terms.pdf) > (accessed October 23, 2018).

<sup>2</sup> “Resource adequacy is the availability of an adequate supply of generation or demand responsive resources to support safe and reliable operation of the transmission grid.” *Sacramento Mun Util Dist v FERC*, 616 F3d 520, 526 (DC Cir 2010).

to fulfill that goal, and supported the legislation accordingly. As interpreted by the lower court, MCL 460.6w would not meet this important element of the Chamber's policy. Thus the Chamber comes to this Court to explain where, as an active participant in the legislative process, it believes the lower court erred in its interpretation of that section.

As explained further below, it is the Chamber's position that MCL 460.6w is properly read to empower the Michigan Public Service Commission (the "Commission") to set a Local Clearing Requirement ("LCR"), and to require participation by all load serving entities in meeting that requirement.<sup>3</sup>

## ARGUMENT

### **I. Michigan Has Primary Responsibility for Capacity Resource Planning**

As explained above, in order to have a reliable electric system, we need both adequate generating resources and sufficient ability to transmit that power. Under the Federal Power Act, responsibility for regulating energy is divided between the states and the federal government. States have exclusive jurisdiction over the retail market and "over facilities used for the generation of electric energy"; the federal government has exclusive jurisdiction over the wholesale markets and thus primary responsibility for the transmission of power. 16 USC § 824(b)(1). "The [Federal Power] Act makes federal and state powers "complementary" and "comprehensive," so that "there [will] be no 'gaps' for private interests to subvert the public welfare." *Fed Power Comm v Louisiana Power & Light Co*, 406 US 621, 631; 92 S Ct 1827, 1833; 32 L Ed 2d 369 (1972) quoted by *FERC v Elec Power Supply Ass'n*, 136 S Ct 760, 780; 193 L Ed 2d 661 (2016), as revised (Jan. 28, 2016) ("*FERC v. EPSA*").

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<sup>3</sup> This brief is not intended to take a position regarding the particular method the Commission used in setting the LCR or its precise allocation of those requirements, but simply to support the power of the Commission to set an LCR and apply it to all load serving entities.

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

Capacity resources are made up of facilities used for the generation of electric energy or those that reduce electric demand,<sup>4</sup> and under the Federal Power Act, it is Michigan, not MISO, which has the primary responsibility to plan for those resources. 16 USC § 824(b)(1). MISO’s own statements made in the months following the passage of MCL 460.6w are instructive: “In the MISO region, load serving entities, with oversight by the states as applicable by jurisdiction, are responsible for resource adequacy.” MISO, *Reserves Tighten in the MISO Region; Timely actions needed for continued resource adequacy* (June 10, 2016)

<<https://www.prnewswire.com/news-releases/reserves-tighten-in-the-miso-region-300282963.html>> (accessed October 25, 2018).

In order to understand the construction of MCL 460.6w, it is important to understand the rapidly-evolving legal context surrounding the role of states and the federal government regarding resource adequacy. In 2016, at the time the legislature was considering the new energy law, the U.S. Supreme Court issued not one but two opinions on the question of how the state and federal systems could interact on the issue of resource adequacy. In order to properly

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<sup>4</sup>Programs to pay users to reduce their load at key moments are known as “demand response” programs. In 2016, the U.S. Supreme Court determined that these programs, in which retail customers are paid to reduce their usage in lieu of paying a power plant to generate more power, are permissibly implemented by Regional Transmission Organizations as a “program of cooperative federalism, in which the States retain the last word.” *FERC v EPSA*, 136 S Ct at 780.

interpret the statutory language of MCL 460.6w and its legislative history, it is necessary to understand the peculiar complications Michigan's system presents when it comes to these jurisdictional lines and to understand the tensions that the legislation was intended to reconcile.

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

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

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

With the notable exceptions of Michigan and Illinois, the vast majority of states where MISO operates have traditionally regulated utility systems, in which there are monopoly providers whose rates are regulated by a state commission. Michigan operated entirely under this system until 2000. When states choose to have their utilities operate under a traditional monopoly regulatory system, as Michigan did until 2000, there is little question that states, not the federal government, have the regulatory power and responsibility to ensure the first half of

the reliability equation: adequate generating resources. See, e.g. *Pac Gas & Elec Co v State Energy Res Conservation & Dev Com'n*, 461 US 190, 205; 103 S Ct 1713, 1723; 75 L Ed 2d 752 (1983) (“Need for new power facilities [is an area] characteristically governed by the States.”), cited for this proposition by *Hughes v Talen Energy Mktg, LLC*, \_\_\_ US \_\_\_; 136 S Ct 1288, 1292; 194 L Ed 2d 414 (2016).

With the intention of lowering costs through competition, some states have restructured their electricity markets to allow retail customers “open access” – the ability to choose the company responsible for supplying their energy, as Michigan did from 2000-2008. 2000 PA 141 and 142; see also *Detroit Edison Co v Michigan Pub Serv Comm*, 264 Mich App 462, 464; 691 NW2d 61, 64 (2004). FERC has asserted greater jurisdiction over resource adequacy for those states that have a “retail open access program.” See, e.g., *Legal Analysis of Commission Jurisdiction Over the Rates, Terms and Conditions of Unbundled Retail Transmission In Interstate Commerce* (Appendix G), FERC Stats & Regs ¶ 31,036, 31,635-36 (1996) (Order No. 888), fn 1., available at <<https://www.ferc.gov/legal/maj-ord-reg/land-docs/rm95-8-0ad.txt?csrt=15395056612474611240>> (accessed on October 23, 2018). That is because unlike in a traditionally regulated system, where utilities have a financial incentive to build new power plants, in a restructured market the developer of a power plant does not first receive an assurance that there will be adequate revenue to support it. Therefore, the compensation of these plants through the federal systems has a much greater impact on resource adequacy than they do in traditionally regulated markets. That said, even states with retail access programs retain jurisdiction to achieve resource adequacy goals,<sup>5</sup> as long as they do so through “regulatory

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<sup>5</sup> Since the passage of 2016 PA 341, there have been two cases regarding challenges to New York’s and Illinois’ recently-passed state laws creating monetary benefits to certain types of electric generation facilities that participate in the wholesale market in restructured states. In

means that [do not] intrude on FERC’s authority of interstate wholesale rates.” *Hughes*, 136 S Ct at 1298.

In 2008, Michigan chose to impose a hybrid of these two systems, with traditionally regulated monopoly utilities supplying a minimum of 90 percent of customers and up to 10 percent of customers able to select an alternative provider of electricity (a “retail open access” program). MCL 460.10a. The 2016 energy laws, consistent with the Chamber’s energy policy, preserved that split.<sup>6</sup> In other words, Michigan is neither a retail open access state nor a traditionally regulated state, but something in between. Michigan’s structure does not fit neatly into either paradigm, and thus the precise contours of Michigan’s jurisdiction are not well explored.

Leading into 2015, the general rule for evaluating possible conflicts between federal and state jurisdictions under the Federal Power Act was to avoid a “diminution of the role Congress reserved to the States while at the same time preserving the federal role.” *Nw Cent Pipeline Corp v State Corp Comm of Kansas*, 489 US 493, 515; 109 S Ct 1262, 1277; 103 L Ed 2d 509

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each case, the argument was that the state’s legislation was in conflict with the federal system, as in *Hughes*. Both the Second and Seventh Circuits upheld the State statutes as proper exercises of state jurisdiction. *Coal for Competitive Elec, Dynergy Inc v Zibelman*, \_\_ F2d \_\_ (CA 2, 2018) (Docket No. 17-2654-cv); *Elec Power Supply Assn v Star*, 904 F3d 518 (CA 7, 2018), reh'g denied (Oct. 9, 2018).

<sup>6</sup> At each point in the evolution of Michigan’s energy law, the Chamber’s energy position was largely congruent with the eventual legislation. The Chamber’s energy policy describes the evolution of its position as follows: “In 1999 the Michigan Chamber Board adopted an energy policy that supported deregulation of Michigan’s electric markets. That position went unchanged until the 2008 energy debate that resulted in the restoration of regulation of 90 percent of electric customers and the creation of the ten percent retail open access cap. The chamber worked to pass a legislative compromise to protect members that wanted to access alternative energy suppliers through the creation of an electric choice grandfather clause along with a ten percent choice cap. When the 2008 energy law was signed, only 3% of customers received service from alternative electric suppliers. As we began energy policy discussions[], the starting point was to work from the compromise that was reached in 2008.” Exhibit A, p. 3.

(1989). In May of 2015, just two months before the first version of SB 437 was introduced, the Supreme Court agreed to hear *FERC v. EPSA*, 92 S Ct 1827. In that case, the petitioners were arguing that the state's role over generating resources prohibited the federal government from allowing certain resources to participate in the wholesale market. *Id.* In October of 2015, after the bill had been introduced but before any formal action by the Senate, the Supreme Court announced it would also hear the case of *Hughes v Talen Energy Mktg, LLC*, 136 S Ct 1288. *Hughes* dealt with the State of Maryland's attempt to encourage more generating resources to be built in its borders, and involved a challenge from those who said Maryland's statute could not be put into effect because it impermissibly interfered with the federal wholesale markets. Thus, just as the Michigan Senate was introducing legislation that would expand the exercise of Michigan's resource adequacy jurisdiction, it was clear that the U.S. Supreme Court intended to pass on these questions in 2016.

In January of 2016, the U.S. Supreme Court issued its opinion in *FERC v. EPSA*, which seemed to affirm a strong jurisdictional role for states over resources on the retail side. That case, which involved what resources the federal government could allow to participate in the federal market, affirmed the inclusion of certain resources in federal markets in part because of the federal government's "notable solicitude toward the States" in allowing states to take actions that would prohibit certain resources that the federal government would otherwise allow to participate from entering the federal auction. 136 S Ct at 779. Therefore, at the start of 2016, the Court appeared to be endorsing a strong role for states to control the functional equivalent of generating resources vis a vis the federal wholesale markets.

In April of 2016, the U.S. Supreme Court issued its decision in *Hughes*. 136 S Ct 1288 (2016). It simultaneously affirmed Maryland's continuing jurisdiction over resource adequacy,

while striking down that state's law which attempted to incentivize locally-sited generation, because the Court found its precise method of financial incentive conflicted with the federal jurisdictional authority over wholesale markets. Specifically, the opinion made clear there was a new potential limit for states in the exercise of their jurisdiction over resource adequacy (at least for states with a restructured system). When a state's statute essentially adjusted the wholesale price for generation set by Regional Transmission Organizations, that infringed on federal jurisdiction and thus the statute could not be enforced. *Id.* at 1297.

Therefore, just at the time that Michigan's legislature was considering bills regarding these questions, new opinions issued from the Supreme Court that indicated that potential interaction with the federal system would create jurisdictional questions. Given that Michigan's electric structure made the application of either of these precedents in its unique system, these decisions offered a clear warning and opportunity: the state still had a clear and strong role to play in resource adequacy and cooperative state/federal regimes were likely to be favored, but there were some new types of interaction between federal and state systems that could render a state statute unenforceable.

Approximately four months after the Supreme Court issued *Hughes*, Governor Snyder announced that Michigan and MISO had developed a proposed framework for handling resource adequacy, describing a cooperative way in which both entities would exercise their respective jurisdictions to avoid any conflicts. MISO indicated its intent to submit that proposal to FERC for approval in November of 2016, which it subsequently did. Michigan Agency for Energy, *Michigan and MISO develop solution to electric capacity* (September 19, 2016) <[https://www.michigan.gov/energy/0,4580,7-364-85452\\_72070-395705--,00.html](https://www.michigan.gov/energy/0,4580,7-364-85452_72070-395705--,00.html)> (accessed on October 25, 2018).

Under the proposal, MISO would have chosen to create a market and requirements to buy capacity three years in advance. When it created that forward capacity market, Michigan would have had an option to elect to move forward under a “State Compensation Mechanism” for procuring electrical resources. Under that mechanism, MISO would have set requirements for companies supplying retail customers with electricity (called “load serving entities”) to procure their share of both local and overall capacity necessary for reliable operation of the electric grid. *Id.* The State would have cooperatively exercised its jurisdiction to set a requirement to allow (for a fair price) the use of local resources owned by traditionally regulated utilities by alternative electric providers, so that alternative electric providers would have access to facilities to meet their federally-set requirements. The Commission would also be able to use its power to approve capacity plans to ensure that there were enough plants to serve all customers, regardless of their provider. In short, the State Compensation Mechanism proposal to FERC laid out a plan for a cooperative exercise of State and federal jurisdictions to ensure resource adequacy that worked with Michigan’s unique electric structure.

In December of 2016, when the legislature passed PA 341, the structure of 460.6w reflected the clear intent by the State to cooperate with the federal government to achieve reliability, in line with the Chamber’s energy policy. See Exhibit A. Under 460.6w(1), if FERC approved the proposal that included the State Compensation Mechanism, Michigan and MISO would proceed as described, with each exercising their jurisdiction and an end result that there would be a requirement and mechanism for each load serving entity to procure its share of local resources. There were also instructions about what to do if FERC approved a forward market in MISO without the State Compensation mechanism, and what to do if it approved neither - the world in which we now find ourselves. 460.6w(1) and (2). In each of those scenarios, the plan

provided for cooperative exercises of jurisdiction and powers by the Commission and MISO. The legislation is properly understood as a way to achieve the same end result, but with a stronger State exercise of jurisdiction since the role of the federal system is narrower than it would have been in the other possible scenarios.

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

In its “background and facts” section of its opinion in this case, the lower court stated “MISO’s functions include capacity resource planning.” *In re Reliability Plans of Elec Utilities for 2017-2021*, \_\_Mich App\_\_ (2018) (Docket No. 340600) at \_\_; slip op at 1. As described above, this is an error. MISO itself notes that resource adequacy planning is a function of the states. “MISO recognizes and supports the independent authority of state regulators over generation resource investment and long-term resource adequacy. This longstanding recognition is acknowledged in MISO’s resource adequacy processes, which respect the rights of states by allowing regulatory authorities to decide how to best meet long-term resource adequacy requirements.” MISO Comments, Case No. U-18197, Letter from Melissa Seymour to Mary Jo Kunkle, August 15, 2017, at 1-2, available at <<https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t0000001UVSAAA4>> (accessed October 25, 2018).

Unfortunately, this error underpins the lower court’s statutory analysis and its review of the legislative history. Simply put, the lower court appears to read MCL 460.6w as a state action that is being inserted into an existing and ongoing federal role and responsibility. Instead, the law needs to be read in the proper legal context, namely as the effort of Michigan to fulfill its responsibility to assure electric resource adequacy without interfering with the federal

government's responsibility to regulate the operation of the interstate electric transmission system. Therefore, the lower court read the Michigan statute as laying out a path to complement whatever actions the federal government would take on an area that is really its to decide, instead of properly understanding it as an attempt by Michigan to fulfill its primary responsibility for resource adequacy in different ways depending on the actions of the federal government.

The lower court's misunderstanding of the jurisdictional lines is directly related to its interpretation of the statute. It notes that the statute as a whole has a preference for an application consistent with MISO's rules. This is true, but the court's error is to assume this is because the legislature was deferring to a primary federal action, it intended to limit instead of maximize the Commission's exercise of the state's authority. In *Hughes*, the Supreme Court had made clear that the main threat to state exercises of jurisdiction is when they interfered with the federal system. Instructions to carry out the jurisdiction in a manner consistent with the federal tariff in that context are best understood as akin to a savings clause. Specifically, if the precise way the Commission exercised its jurisdiction was found to conflict with the federal system, then the way forward would be to find another way to reach the statute's aims within the state's jurisdiction, instead of risking a wholesale pre-emption of the statute as Maryland had suffered in *Hughes*. Such instructions also would preserve the Commission's ability to preserve its jurisdictional exercise by altering its manner of exercise in the event that MISO rules changed.

The statement that "reaching this conclusion requires the inference that section 6w permits the MPSC to establish a capacity obligation that includes a local clearing requirement *contrary to that imposed by MISO*," mischaracterizes the absence of a federal rule as a prohibition against state action, instead of a gap which the State is expected to fill. *In re Reliability*, \_\_Mich App at \_\_; slip op at 8 (emphasis added). What the statute is better

understood to permit, and in fact encourage and authorize, is the imposition of additional obligations, so long as they do not impermissibly interfere with the operation of the federal system.

Similarly, the evolving legal context illuminates the legislative history as well. The court reads the removal of particular language requiring a percentage of the local clearing requirement as an intent to remove any such requirement in any future draft. The replacement of an inflexible single requirement with no potential for adjustment given the potential for change, with language endorsing a cooperative exercise of jurisdiction with the federal government, is entirely consistent with what a legislature wishing to preserve the state's ability to create such a requirement would do following *Hughes*. Moreover, understanding that context makes more sense in reading the statute as a whole: if the state legislature wished to support and facilitate the requirement for all companies to procure local resources when the federal government would do it, why would it stop those attempts just when the federal government presented the least possible impediment to the State's action?

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

### **CONCLUSION**

Recognizing the need for the federal and state governments to work cooperatively in this area, the Chamber's energy policy states: "Michigan needs a supply adequacy plan, coordinated with electric regional transmission organizations, to prevent energy capacity shortages that could

create reliability issues. Such a plan should include uniform standards over a multi-year period required of all energy providers. Planning and financial requirements should not be costly or burdensome.” Exhibit A at 3. The Chamber believes the law that resulted from the process, 460.6w, met these objectives. As interpreted by the Appeals Court, however, it would not.

On the fundamental question of whether the Michigan Legislature intended to require all providers to procure local resources if needed to assure reliability, the Chamber believes the answer is yes.<sup>7</sup> 2016 PA 341 is best understood as attempting to ensure state and federal exercises of jurisdiction resulted in that outcome regardless of what course of action the federal government chose to pursue.

Dated: October 26, 2018

Respectfully submitted,

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<sup>7</sup> This brief should not be read endorse any particular application the MPSC has made of its powers under 2016 PA 341 or endorse the position of any party regarding the proper methodology, process, or specific requirements the Commission has utilized.