STATE OF MICHIGAN
IN THE SUPREME COURT

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,
Appellee,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
Appellant,

and

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

Supreme Court No. 158307

Court of Appeals No. 340600

MPSC No. 00-18197

ENERGY MICHIGAN, INC.,
Appellee,

v

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/

SUPPLEMENTAL BRIEF ON APPEAL OF APPELLANT MICHIGAN PUBLIC SERVICE COMMISSION

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This Court has jurisdiction over all appeals from decisions of the Court of Appeals. Const 1963, art 6, § 4; MCR 7.303(B)(1). Appellant Michigan Public Service Commission (MPSC or Commission) appeals the Court of Appeals' July 12, 2018 decision reversing the Commission's September 15, 2017 Order in Case No. U-18197. (MPSC's App, pp 583–598, *In re Reliability Plans of Electric Utilities for 2017-2021* (*In re Reliability Plans*), 325 Mich App 207 (2018).)

STATEMENT OF QUESTIONS PRESENTED

1. Act 341 of 2016 requires alternative electric suppliers to demonstrate that they have enough capacity to meet their customers' demand (i.e., their capacity obligation). MCL 460.6w(8)(b). Given that these suppliers must meet their capacity obligation, which under MCL 460.6w(8)(c) includes a local clearing requirement, did the Court of Appeals err by holding that the Commission cannot impose a local clearing requirement on these suppliers?

Appellees' answer:	No.
Appellant Consumers Energy Company's answer:	Yes.
Appellant MPSC's answer:	Yes.
Court of Appeals' answer:	No.

STATUTES INVOLVED

MCL 460.6w – Section 6w of 2016 Public Act 341.

(1) If the appropriate independent system operator receives approval from the Federal Energy Regulatory Commission to implement a resource adequacy tariff that provides for a capacity forward auction, and includes the option for a state to implement a prevailing state compensation mechanism for capacity, then the commission shall examine whether the prevailing state compensation mechanism would be more cost-effective, reasonable, and prudent than the capacity forward auction for this state before the commission may order the prevailing state compensation mechanism to be implemented in any utility service territory in which the prevailing state compensation mechanism is not yet effective. Before the commission orders the implementation of the prevailing state compensation mechanism in 1 or more utility service territories, the commission shall hold a contested case hearing pursuant to chapter 4 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.271 to 24.287. The commission shall allow intervention by interested persons, alternative electric suppliers, and customers of alternative electric suppliers and the utility under consideration. At the conclusion of the proceeding, the commission shall make a finding for each utility service territory under consideration, based on clear and convincing evidence, as to whether or not the prevailing state compensation mechanism would be more cost-effective, reasonable, and prudent than the use of the capacity forward auction for this state in meeting the local clearing requirement and the planning reserve margin requirement. The contested case must be scheduled for completion by December 1 before the independent system operator's capacity forward auction for this state, and the commission's decision shall identify which utility service territories will be subject to the prevailing state compensation mechanism. If the commission implements the prevailing state compensation mechanism, it shall implement the prevailing state compensation mechanism for a minimum of 4 consecutive planning years unless such period conflicts with the federal tariff. The commission shall establish the charge as a capacity charge under subsection (3) and determine that charge consistent with the approved resource adequacy tariff of the appropriate independent system operator.

(2) If the appropriate independent system operator receives approval from the Federal Energy Regulatory Commission to implement a resource adequacy tariff that provides for a capacity forward auction, and does not include the option for a state to

implement a prevailing state compensation mechanism for capacity, then the commission shall examine whether a state reliability mechanism established under subsection (8) would be more cost-effective, reasonable, and prudent than the capacity forward auction for this state before the commission may order the state reliability mechanism to be implemented in any utility service territory. Before the commission orders the implementation of the state reliability mechanism in 1 or more utility service territories, the commission shall hold a contested case hearing pursuant to chapter 4 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.271 to 24.287. The commission shall allow intervention by interested persons, alternative electric suppliers, and customers of alternative electric suppliers and the utility under consideration. At the conclusion of the proceeding, the commission shall make a finding for each utility service territory under consideration, based on clear and convincing evidence, as to whether or not the state reliability mechanism would be more cost-effective, reasonable, and prudent than the use of the capacity forward auction for this state in meeting the local clearing requirement and the planning reserve margin requirement. The contested case must be scheduled for completion by December 1 before the independent system operator's capacity forward auction for this state, and the commission's decision shall identify which utility service territories will be subject to the state reliability mechanism. 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). The commission may commence a proceeding before October 1 if the commission believes orderly administration would be enabled by doing so. If the commission implements a state reliability mechanism, it shall be for a minimum of 4 consecutive planning years beginning in the upcoming planning year. A state reliability charge must be established in the same manner as a capacity charge under subsection (3) and be determined consistent with subsection (8).

(3) After the effective date of the amendatory act that added section 6t, the commission shall establish a capacity charge as provided in this section. A determination of a capacity charge must be conducted as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.271 to 24.287, after providing interested persons with notice and a reasonable opportunity for a full and complete hearing and conclude by December 1 of each year. The commission shall allow intervention by interested persons, alternative electric suppliers, and customers of alternative electric suppliers and

the utility under consideration. The commission shall provide notice to the public of the single capacity charge as determined for each territory. No new capacity charge is required to be paid before June 1, 2018. The capacity charge must be applied to alternative electric load that is not exempt as set forth under subsections (6) and (7). If the commission elects to implement a capacity forward auction for this state as set forth in subsection (1) or (2), then a capacity charge shall not apply beginning in the first year that the capacity forward auction for this state is effective. In order to ensure that noncapacity electric generation services are not included in the capacity charge, in determining the capacity charge, the commission shall do both of the following and ensure that the resulting capacity charge does not differ for full service load and alternative electric supplier load:

(a) For the applicable term of the capacity charge, include the capacity-related generation costs included in the utility's base rates, surcharges, and power supply cost recovery factors, regardless of whether those costs result from utility ownership of the capacity resources or the purchase or lease of the capacity resource from a third party.

(b) For the applicable term of the capacity charge, subtract all non-capacity-related electric generation costs, including, but not limited to, costs previously set for recovery through net stranded cost recovery and securitization and the projected revenues, net of projected fuel costs, from all of the following:

(i) All energy market sales.

(ii) Off-system energy sales.

(iii) Ancillary services sales.

(iv) Energy sales under unit-specific bilateral contracts.

(4) The commission shall provide for a true-up mechanism that results in a utility charge or credit for the difference between the projected net revenues described in subsection (3) and the actual net revenues reflected in the capacity charge. The true-up shall be reflected in the capacity charge in the subsequent year. The methodology used to set the capacity charge shall be the same methodology used in the true-up for the applicable planning year.

(5) Not less than once every year, the commission shall review or amend the capacity charge in all subsequent rate cases, power supply cost recovery cases, or separate proceedings established for that purpose.

(6) A capacity charge shall not be assessed for any portion of capacity obligations for each planning year for which an alternative electric supplier can demonstrate 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. Any electric provider that has previously demonstrated that it can meet all or a portion of its capacity obligations shall give notice to the commission by September 1 of the year 4 years before the beginning of the applicable planning year if it does not expect to meet that capacity obligation and instead expects to pay a capacity charge. The capacity charge in the utility service territory must be paid for the portion of its load taking service from the alternative electric supplier not covered by capacity as set forth in this subsection during the period that any such capacity charge is effective.

(7) An electric provider shall provide capacity to meet the capacity obligation for the portion of that load taking service from an alternative electric supplier in the electric provider's service territory that is covered by the capacity charge during the period that any such capacity charge is effective. The alternative electric supplier has the obligation to provide capacity for the portion of the load for which the alternative electric supplier has demonstrated an ability to meet its capacity obligations. If an alternative electric supplier ceases to provide service for a portion or all of its load, it shall allow, at a cost no higher than the determined capacity charge, the assignment of any right to that capacity in the applicable planning year to whatever electric provider accepts that load.

(8) If a state reliability mechanism is required to be established under subsection (2), the commission shall do all of the following:

(a) Require, by December 1 of each year, that each 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 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.

(b) Require, by the seventh business day of February each year, 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). If a capacity charge is required to be paid under this subdivision in the planning year beginning June 1, 2018 or any of the 3 subsequent planning years, the capacity charge is applicable for each of those planning years.

(ii) For a cooperative or municipally owned electric utility, recommend to the attorney general that suit be brought consistent with the provisions of subsection (9) to require that procurement.

(iii) For an electric utility, require any audits and reporting as the commission considers necessary to determine if sufficient capacity is procured. If an electric utility fails to meet its capacity obligations, the commission may assess appropriate and reasonable fines, penalties, and customer refunds under this act.

(c) In order to determine the capacity obligations, 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.

(d) In order to determine if resources put forward will meet such federal reliability requirements, request technical assistance from the appropriate independent system operator to assist with assessing resources to ensure that any resources will meet federal reliability requirements. If the technical assistance is rendered, the commission shall accept the appropriate independent

system operator's determinations unless it finds adequate justification to deviate from the determinations related to the qualification of resources. If the appropriate independent system operator declines, or has not made a determination by February 28, the commission shall make those determinations.

(9) The attorney general or any customer of a municipally owned electric utility or cooperative electric utility may commence a civil action for injunctive relief against that municipally owned electric utility or cooperative electric utility if the municipally owned electric utility or cooperative electric utility fails to meet the applicable requirements of subsection (8)(b). The attorney general or customer shall commence an action under this subsection in the circuit court for the county in which the principal office of the municipally owned electric utility or cooperative electric utility is located. The attorney general or customer shall not file an action under this subsection unless the attorney general or customer gives the municipally owned electric utility or cooperative electric utility at least 60 days' written notice of the intent to sue, the basis for the suit, and the relief sought. Within 30 days after the municipally owned electric utility or cooperative electric utility receives written notice of the intent to sue, the municipally owned electric utility or cooperative electric utility and the attorney general or customer shall meet and make a good-faith attempt to determine if there is a credible basis for the action. The municipally owned electric utility or cooperative electric utility shall take all reasonable and prudent steps necessary to comply with the applicable requirements of subsection (8)(b) within 90 days after the meeting if there is a credible basis for the action. If the parties do not agree as to whether there is a credible basis for the action, the attorney general or customer may proceed to file the suit.

(10) The commission shall adjust the dates under this section if needed to ensure proper alignment with the appropriate independent system operator's procedures and requirements. However, any changes to the dates in this section must ensure that providers still meet applicable reliability requirements. The commission shall not permit a capacity charge to be assessed under this section for any year in which it has elected the capacity forward auction instead of the prevailing state compensation mechanism or the state reliability mechanism.

(11) Nothing in this act shall prevent the commission from determining a generation capacity charge under the reliability assurance agreement, rate schedule FERC No. 44 of the independent

system operator known as PJM Interconnection, LLC, as approved by the Federal Energy Regulatory Commission in docket no. ER10-2710 or similar successor tariff.

(12) As used in this section:

(a) "Appropriate independent system operator" means the Midcontinent Independent System Operator.

(b) "Capacity forward auction" means an auction-based resource adequacy construct and the associated tariffs developed by the appropriate independent system operator for at least a portion of this state for 3 years forward or more.

(c) "Electric provider" means any of the following:

(i) Any person or entity that is regulated by the commission for the purpose of selling electricity to retail customers in this state.

(ii) A municipally owned electric utility in this state.

(iii) A cooperative electric utility in this state.

(iv) An alternative electric supplier licensed under section 10a.

(d) "Local clearing requirement" means 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).

(e) "Planning reserve margin requirement" means the amount of capacity equal to the forecasted coincident peak demand that occurs when the appropriate independent system operator footprint peak demand occurs plus a reserve margin that meets an acceptable loss of load expectation as set by the commission or the appropriate independent system operator under subsection (8).

(f) "Planning year" means June 1 through the following May 31 of each year.

(g) "Prevailing state compensation mechanism" means an option for a state to elect a prevailing compensation rate for capacity consistent with the requirements of the appropriate independent system operator's resource adequacy tariff.

(h) "State reliability mechanism" means 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).

INTRODUCTION

Act 341 of 2016 is the legislative roadmap to electric generation resource planning, and all roads lead to a local clearing requirement that compels electric providers to build or purchase at least some local generation. In 2015 and 2016, the Michigan Legislature foresaw an impending energy shortfall and saw the Federal Energy Regulatory Commission (FERC) poised to approve a framework within which states could secure generation resources, especially local resources, to avoid shortfalls. The Legislature recognized that Michigan is primarily responsible for its own energy future and that the Midcontinent Independent System Operator's (MISO) proposal to FERC, if FERC approved it, could only go so far in fulfilling the state's responsibility. So, the Legislature plotted several courses that prepared for every contingency, whether FERC approved MISO's proposal in full or in part or rejected it entirely. In each scenario, the Legislature put the local clearing requirement on the map by giving the Commission options to ensure that it is met. MCL 460.6w(1) & (2).

Ultimately, FERC rejected MISO's proposal, while recognizing that states are primarily responsible to ensure that they have enough capacity to meet demand. This meant that the Commission was left with only one option: the state reliability mechanism. MCL 460.6w(2). Under this mechanism, the Commission must determine how much capacity electric providers would need to serve their customers over the next four years, including local capacity, and make them show that they would have enough capacity to meet this need. MCL 460.6w(8). Alternative electric suppliers could meet their obligation to purchase local capacity by either buying a

portion of their generation needs from local resources or letting an incumbent electric provider supply the local capacity. If an incumbent provider supplied the local capacity for all or part of an alternative electric supplier's load, then the provider could charge the supplier's customers a Commission-approved state reliability charge to cover its costs.

The Commission rose to the task and attempted to resolve these issues through technical conferences among interested stakeholders instead of a contested case. One issue was the local clearing requirement. Unfortunately, stakeholders could not agree on a local clearing requirement—whether there should be one and, if so, whether it should apply to individual electric providers or to the region as a whole.[1] (MPSC's App, pp 353–354, 6/15/17 Order.) On this issue, after hearing comments and legal arguments from interested parties, the Commission found that Section 6w required it to set a local clearing requirement. (*Id*. at 354–356.) And since capacity obligations are only referred to in the statute in terms of individual obligations, the Commission found that the Legislature must have intended to impose the requirement on individual suppliers. (*Id*.)

The Court of Appeals reversed the Commission's order in a published opinion that could have widespread ramifications, not only for alternative electric suppliers, but for all electric providers in Michigan. The Court of Appeals ruled that because "the MPSC is obligated to apply the local clearing requirement in a manner consistent with MISO" and because Section 6w(8)(c) "does not specifically authorize

[1] MISO Zone 7 encompasses most of Michigan's Lower Peninsula.

the MPSC to impose the local clearing requirement upon alternative electric suppliers individually," the Commission lacked authority to set a local clearing requirement for individual suppliers. *In re Reliability Plans*, 325 Mich App at 225. Although the Court acknowledged that the Commission has authority to set a local clearing requirement encouraging providers to use local resources, it held that the Commission could not apply this requirement to alternative electric suppliers. And the same reasoning could easily be extended to all of Michigan's electric providers, making it impossible to enforce the requirement.

The Court of Appeals did not thoroughly consider the Commission's legislatively delegated discretion to ensure that electric providers have enough generation to meet demand. And the court downplayed Act 341's structure, which is designed to require all electric providers, including alternative electric suppliers, to show that they can meet their planning reserve margin and local clearing requirements. The structure is the roadmap that leads to the local clearing requirement. The Legislature wrote the map so that Michigan does not find itself on the side of the road with a dead battery. The Legislature's map should be followed.

STATEMENT OF FACTS AND PROCEEDINGS

Because the facts have not changed since the Commission filed its application, the Commission adopts the Statement of Facts and Proceedings from its application and does not repeat it here.

STANDARD OF REVIEW

This Court has asked the parties to answer "whether the Court of Appeals erred in holding that 2016 PA 341 does not authorize the Michigan Public Service Commission to impose a local clearing requirement on individual alternative electric suppliers." *In re Reliability Plans*, unpublished order of the Supreme Court, issued June 21, 2019 (Docket Nos. 158307 & 158308). The question, in other words, is whether the MPSC's decision was authorized by law. This is the right question to ask because no evidentiary hearing was required or held in Case No. U-18197, although the Commission accepted comments and heard legal arguments from interested parties. (MPSC's App, pp 388–394, 9/15/17 Order.) In these circumstances, when no hearing is required, agency decisions "are reviewed to determine whether the decisions are authorized by law." *Ross v Blue Care Network*, 480 Mich 153, 164 (2008) (citing Const 1963, art 6, § 28).

Whether the Commission's decision was authorized by law is a question of statutory interpretation, and the Commission's interpretation should be given respectful consideration. While a court may not give "unfettered deference" to an agency's statutory interpretation, an agency's interpretation is entitled to the "most respectful consideration" and should not be overturned without "cogent reasons." *In*

re Rovas Complaint, 482 Mich 90, 93 (2008). As long as an agency's "interpretation does not conflict with the Legislature's intent as expressed in the language of the statute at issue, there are no such cogent reasons to overrule it." *Younkin v Zimmer*, 497 Mich 7, 10 (2014) (citation and quotation marks omitted).

In *In re Rovas*, the Michigan Supreme Court reaffirmed the *Boyer-Campbell Co v Fry*, 271 Mich 282 (1935), standard of review for agencies' statutory interpretations. *Id*. at 103. Under *Boyer-Campbell*, while agency interpretations are not controlling, they are an aid, and courts should give them weight when construing doubtful or obscure laws that the agency administers. *Boyer-Campbell,* 271 Mich at 296–297. The *Boyer-Campbell* Court even held that agency interpretations are "sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature." *Id.*

Because the Commission's interpretation of Act 341 is consistent with the language of the statute and does not conflict with the spirit and purpose of the law, the Court of Appeals had no cogent reasons to overrule it. See *Younkin*, 497 Mich at 857; *Boyer-Campbell*, 271 Mich at 296–297. This is especially true since Section 6w of Act 341 is an intricate statute, *Boyer-Campbell,* 271 Mich at 296–297, and since ABATE and Energy Michigan bear the burden of proof to show by clear and satisfactory evidence that the Commission's decision is unlawful.[2] MCL 462.26(8).

[2] The Commission has focused on the standard of review that courts apply to agencies' statutory interpretations because the question this Court posed to the parties requires statutory interpretation, but the Commission maintains that the more deferential abuse-of-discretion standard afforded to its legislative ratemaking

ARGUMENT

I. Act 341's plain language and its structure compelled the Commission to impose the local clearing requirement on individual alternative electric suppliers.

This Court has asked the parties whether Act 341 authorizes the MPSC to impose a local clearing requirement on individual alternative electric suppliers. "[T]he proper test for determining whether a final decision, finding, ruling, or order is authorized by law is the four-factor test articulated in *Brandon Sch. Dist. v. Mich. Ed. Special Servs. Ass'n*, 191 Mich. App. 257, 263, 477 N.W.2d 138 (1991)." *Henderson v Civil Serv Comm*, 503 Mich 978 (2019) (CAVANAGH, J., concurring in order denying application for leave).[3] Under this test, an agency "decision *must be affirmed unless* it is in violation of statute, in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious.") *Brandon Sch Dist*, 191 Mich App at 263 (emphasis added). This standard "focuses on the agency's power and authority to act rather than on the objective correctness of its decision." *Nw Nat'l Cas Co v Ins Comm'r*, 231 Mich App 483, 489 (1998).

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decisions should apply to the ratemaking aspects of its decision. (See Commission's Reply Br to ABATE, pp 8–9.)

[3] Besides Justice Cavanagh, three other Justices also appeared to agree that the *Brandon School District* test was the proper test for determining whether an agency decision is authorized by law. Chief Justice McCormack joined in Justice Cavanagh's statement, and Justice Bernstein would have remanded the case to apply the *Brandon School District* factors. *Henderson*, 923 NW2d at 598. Justice Markman also appeared to agree that the test applies but wrote separately to note that the Court did "not decide that an 'arbitrary and capricious' review *does* comport with the 'authorized by law' standard." *Id.* at 596.

Interpreting Act 341 to strip the Commission of its power to impose a local clearing requirement on individual alternative electric suppliers would stretch the statutory limitations on the Commission's authority beyond their breaking point. ABATE and Energy Michigan argue, and the Court of Appeals agreed, that the Commission violated Act 341 and exceeded its statutory authority by imposing a local clearing requirement on individual suppliers.[4] (Energy Michigan's Response to MPSC's Appl, pp 7–8; ABATE's Answer to MPSC's Appl, pp 40–42.) They argue that MCL 460.6w(6) and MCL 460.6w(8) require the Commission to allow suppliers to meet their capacity obligations with any resource that MISO would allow them to use, consistent with federal reliability requirements. And MISO, they say, only applies the local clearing requirement to its regional zones as a whole, not to individual providers, so anything more is inconsistent. That interpretation does not honor Act 341's plain language.

Act 341 does not require the Commission to adopt a carbon copy of MISO's local clearing requirement; the Act requires only that the Commission-established capacity obligations and local clearing requirement not "conflict with federal resource adequacy tariffs" and be "consistent with federal reliability requirements." MCL 460.6w(6) & (8)(c). This is a low standard that the Commission easily met. To not "conflict with" and be "consistent with" federal resource adequacy tariffs and reliability requirements, the Commission's local clearing requirement needs only to

[4] They do not appear to argue that the Commission's decision failed to meet the other two factors of the *Brandon School District* four-factor test: that it resulted in material prejudice or was arbitrary and capricious.

be compatible with MISO's tariffs and federal reliability requirements. Given the state's responsibility to ensure that there are enough generation resources to power homes and businesses, Act 341 should not be interpreted to tie the Commission's hands and restrain it from fulfilling its duty when the text does not require it. If the Commission imposes the local clearing requirement on electric providers in a way that somehow disrupts MISO's annual planning resource auction, this would be a problem. But short of this or some other disruption, the Commission is given broad discretion to set the local clearing requirement with MISO's help and should be allowed to exercise this discretion.

By linking Act 341 too closely to MISO's local clearing requirement—more than the statute required—the Court of Appeals undermined the Act's structure. It did not have to do this. Act 341 requires electric providers, including alternative electric suppliers, to show through a capacity demonstration that they will have enough capacity to meet their customer's demand over the next four years. MCL 460.6w(8)(b). This demand is the electric provider's capacity obligation, and Act 341 specifies that it includes a local clearing requirement. MCL 460.6w(8)(c). If an alternative electric supplier has demonstrated that it can meet its capacity obligations or a portion of them, then the supplier must do so. MCL 460.6w(7). If not, its customers will pay a capacity charge and another electric provider will be called on to provide the capacity. *Id*. Arguments about who sets the local clearing

requirement and how—on a zonal or an individual basis—nibble at the edges of this statutory construct but do not erode its foundation.[5]

The Court of Appeals' opinion could have widespread ramifications. As the Commission explained in its application, the court's interpretation threatens to undermine the local clearing requirement as it applies to alternative suppliers *and* regulated utilities. (See Commission's Appl, pp 25–26.) More than this, if the Court of Appeals' decision stands and is followed in other agencies' cases, it would redefine these agencies' authority. Agencies like the Liquor Control Commission and the Tax Tribunal may find it more difficult to deliver the vital services to Michigan residents if courts do not respect their clearly delegated authority.

A. The Commission exercised its authority over state resource planning without departing from Act 341's plain language.

Because FERC rejected MISO's proposal to encourage states to address resource adequacy, (MPSC's App, pp 338–340, *In re MISO*, Docket No. ER17-284-000, 158 FERC ¶ 61,128 (2017)), the Legislature required the Commission to establish a state reliability mechanism. MCL 460.6w(2). But the Legislature gave the Commission broad discretion to carry out this mandate. Under Act 341, the Commission has discretion to: 1) set suppliers' capacity obligations, MCL

[5] The legislative history behind Act 341 supports the Commission's statutory interpretation. (See Commission's Appl, pp 28–30.) The Court of Appeals analyzed but did not rely on the legislative history as support for its decision. See *In re Reliability Plans*, 325 Mich App at 229. The Commission agrees that it is not necessary to consider the legislative history to interpret Act 341's unambiguous provisions, so it does not revisit the history in this supplemental brief.

460.6w(8)(c); 2) determine whether a supplier has met its capacity obligations, MCL 460.6w(7); and 3) impose a capacity charge on the supplier's customers if the supplier cannot meet its obligations. MCL 460.6w(6) & (8)(b)(i). These powers are subject to guidelines designed to ensure that the Commission does not have unbridled authority or infringe on federal jurisdiction, but this is as far as the limitations go. Within these limits, the Commission has broad discretion to set the local clearing requirement if it does so with MISO's help or, if not, the Commission abides by federal reliability requirements. MCL 460.6w(8)(c).

When the Legislature delegates authority, it can use a broad directive as long as it "invokes a body of guidelines" like MISO's resource adequacy tariffs. *Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 53 (1985) ("The only direction given to the health care corporations is that 'sound actuarial practices' shall be used. Yet this apparently broad, general directive in fact invokes a body of guidelines."). The Legislature adopted as its guidelines the federal reliability requirements—i.e., MISO's resource adequacy tariffs—when delegating authority to the Commission to set the local clearing requirement. MCL 460.6w(8)(c). MISO's tariffs also serve as guidelines when evaluating the resources that can be used to meet a provider's capacity obligations. MCL 460.6w(8)(d).

These guidelines ensure that the Commission does not have unbridled authority, but they also free the Commission from legislative handholding. That is, because the Legislature delegated discretionary authority to the Commission, subject to guidelines, the Legislature no longer needs to tell the Commission every

factor it must consider in exercising its discretion. See *Ranke v Mich Corp & Sec Comm*, 317 Mich 304, 309–10 (1947) ("It would be quite impossible for the legislature to enumerate all the specific acts which would constitute dishonest or unfair dealing upon the part of those engaged in the sale of real estate.") Moreover, as the Chamber of Commerce explained in its amicus curiae brief, the guidelines the Legislature imposed on the Commission should be viewed in light of events unfolding when Act 341 was passed.[6] (Chamber's Amicus Br, p 13.)

The Legislature passed Act 341 shortly after the United States Supreme Court issued two seminal opinions defining the scope and limitations of federal and state authority over retail and wholesale electric markets. The Act is best understood with these opinions in mind. In these decisions, the Court struck a balance that preserves a role for both federal and state governments over resource planning. In *Hughes v Talen Energy Mktg, LLC*, 136 S Ct 1288 (2016), for example, the U.S. Supreme Court rejected Maryland's efforts to sidestep FERC's interstate wholesale rate, but it also held that "[n]othing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures untethered to a generator's wholesale market participation." *Id*. at 1299 (citation and quotation marks omitted).[7]

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[6] This Court has held that "when interpreting a statute, our purpose is to ascertain and effectuate the legislative intent *at the time it passed the act*." *Reardon v Dep't of Mental Health*, 430 Mich 398, 407 (1988) (emphasis added).

[7] In the other decision issued at the time, *FERC v Elec Power Supply Ass'n*, 136 S Ct 760, 776 (2016), the Court held that 16 USC § 824(b) limits FERC's jurisdiction to wholesale rates and "reserv[es] regulatory authority over retail sales (as well as intrastate wholesale sales) to the States" and that "FERC cannot take an action

The Legislature presumably was aware of these decisions, and it did not want to pass a law that would invade the federal government's jurisdiction. This explains why the Legislature chose federal standards to use as guidelines defining the scope of the Commission's delegated authority. Through these guidelines, the Legislature prevented the Commission from imposing a capacity charge that would "conflict[ ] with a federal resource adequacy tariff" and required the Commission to confirm that an electric provider's capacity obligations and the resources used to meet those obligations are "consistent with federal reliability requirements." MCL 460.6w(6), (8)(c), and (8)(d). The Court of Appeals appeared to believe that if the Commission adopted a different local clearing requirement than MISO or applied it in a different way, then it would conflict with MISO's requirement, but this is not what Act 341 says.

The standards in Sections 6w(6) and (8), which are intended to prevent the kind of jurisdictional turf wars being fought in other states,[8] do not require the Commission to adopt MISO's local clearing requirement or apply it exactly like MISO does—they need only be compatible. These sections require that the Commission's local clearing requirement be "*consistent with* federal reliability

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transgressing that limit no matter how direct, or dramatic, its impact on wholesale rates."

[8] These turf wars are still being fought in other states. Just last month the National Association of Regulatory Utility Commissions appealed a FERC decision preventing states from regulating certain energy storage resources. National Association of Regulatory Utility Commissions, *NARUC Petitions Court to Review FERC Order 841* (July 16, 2019) <https://www.naruc.org/about-naruc/press-releases/naruc-petitions-court-to-review-ferc-order-841/> (accessed July 19, 2019).

requirements" and not conflict with MISO's tariffs. MCL 460.6w(8)(c) (emphasis added). When defining a common word like "consistent," which does not have a unique legal meaning, courts often consult a lay dictionary. *Brackett v Focus Hope, Inc*, 482 Mich 269, 276 (2008). "Consistent," as it is used in this context, means "marked by agreement: COMPATIBLE — usu. used with *with*." *Merriam–Webster's Collegiate Dictionary (11th ed)*.[9]

A local clearing requirement that the MPSC establishes and applies with MISO's technical assistance, which helps to ensure that the MISO-established local clearing requirement is met over the long term, is compatible with federal reliability requirements. This is particularly true since the state, not MISO or the federal government, is primarily responsible for resource planning. The Court of Appeals disagreed, noting that "MISO's functions include capacity resource planning" without distinguishing between MISO's annual resource auction and long-term resource planning and without acknowledging the state's role in long-term resource planning. *In re Reliability Plans*, 325 Mich App at 212–13. But, in

[9] The full definition of "consistent" is "1 a *archaic*: possessing firmness or coherence 2 a : marked by harmony, regularity, or steady continuity : free from variation or contradiction <a ~ style in painting> b : marked by agreement : COMPATIBLE — usu. used with *with* <statements not ~ with the truth> c : showing steady conformity to character, profession, belief, or custom <a ~ patriot> 3 : tending to be arbitrarily close to the true value of the parameter estimated as the sample becomes large <a ~ statistical estimator>." Definition 2(b) is the best fit in this context because "consistent" appears together with the word "with" in Act 341.

reality, states and their regulatory commissions are primarily responsible for resource planning. Even MISO and FERC concede as much.[10]

MISO's local clearing requirement and the Commission's local clearing requirement cover different periods. Under MISO's resource adequacy tariffs, its local clearing requirement covers electric capacity for the next planning year only. (MPSC's App, p 727, MISO Tariff § 69A.7.) By contrast, the Commission is charged with setting the local clearing requirement in the context of four-year capacity demonstrations. The Commission's forward-looking local clearing requirement is compatible with MISO's short-term outlook; indeed, it complements and reinforces the federal construct. Considering that the local clearing requirement the Commission set in Case No. U-18444 does not even take effect until the 2022 planning year, which runs from June 1, 2022 to May 31, 2023, it could not possibly conflict with MISO's local clearing requirement for next year. (See MPSC's App, p 581, *In re Forward Locational Requirement*, MPSC Case No. U-18444, 6/28/18 Order.)

[10] In its comments in Case No. U-18197, MISO said, "*State and local regulatory authorities continue to be responsible for reviewing the prudence of resource decisions* that are subject to their individual jurisdictions, including investment in generation facilities to meet long-term planning reserve requirements." (MPSC's App, p 362, MISO's Comments, emphasis added.) FERC likewise recognizes that "state and local authorities play an active role in ensuring resource adequacy" and that this is even true in states with retail competition. (MPSC's App, pp 437–438, *In re MISO*, FERC Docket No. ER18-462-000, 162 FERC ¶ 61176 (February 28, 2018).)

Language in Section 6w(6), which suggests that an alternative electric supplier may meet the Commission's capacity obligations with resources used to meet MISO's resource requirements, does not free suppliers from the Commission's four-year forward local clearing requirement as ABATE contends. (See ABATE's Answer to the MPSC's Appl, p 39.) MISO's resource requirements apply to the next planning year only, while Act 341's capacity obligations apply four years in advance. MISO has no forward capacity auction (FERC expressly rejected it) and no capacity demonstration process that looks four years ahead like the Legislature created. MCL 460.6w(8)(a) and (b). As a result, resources used to meet MISO's annual resource requirements do not satisfy Act 341's four-year, forward-looking capacity obligations. Moreover, MISO generally does not allow out-of-zone resources to be used to meet its annual local clearing requirement, (see MISO Tariff §§ 68A.6 and 69A.7.1), so Section 6w(6) would not require the Commission to count out-of-zone resources toward the Commission's local clearing requirement either.

When determining which resources count toward MISO's requirements under Section 6w(6)—resources that alternative electric suppliers may also count toward the Commission's capacity obligations—the planning reserve margin and the local clearing requirements must be distinguished. This is because resources used to meet the planning reserve may come from nearly anywhere, while resources used to meet the local clearing requirement "must come from within the zone in question." (MPSC's App, p 401, 9/15/17 Order.) So to determine which resources count toward MISO's under Section 6w(6), "it must be determined which MISO capacity

obligation is being referred to – when it is MISO's LCR, then resources sourced from anywhere within MISO will not necessarily count." (*Id*. at 401–402.) And if resources do not count toward MISO's annual capacity obligations, they do not have to count toward the Commission's four-year forward capacity obligations.

Another aspect of MISO's local clearing requirement that is sometimes overlooked is its potential, in practice, to raise prices for individual alternative electric suppliers and all providers. If providers in the zone do not collectively meet the zone's local clearing requirement, those who bought capacity in the planning resource auction will not pay the auction clearing price but will pay the cost of new entry, (MPSC's App, p 736, MISO Tariff § 69A.7.1(c)(x)), which has historically been vastly higher. These higher charges will be assessed based on each provider's pro rata share of capacity in the zone. (MPSC's App, p 749, MISO Tariff § 69A.7.7(d).) Providers who opt out of the auction and instead submit fixed resource adequacy plans are assigned their proportional share of the local clearing requirement. (MPSC's App, pp 755–756, MISO Tariff § 69A.9; MPSC's Appl, pp 8, 33.)

Because MISO's zonal local clearing requirement ultimately affects individual providers—either through auction results or direct assignment for providers who opt out of the auction—there is no conflict between MISO's zonal requirement and the Commission's individual requirement. If MISO Zone 7 fails to meet the local clearing requirement, it will not matter whether the requirement is zonal or individual; failure to meet the requirement will impact all providers. This is another reason why the Court of Appeals erred by overemphasizing MISO's

general practice of "imposing local clearing requirements on a zonal, not individual, basis."[11] *In re Reliability Plans*, 325 Mich App at 226.

B. Act 341 is structured to apply the local clearing requirement to individual alternative electric suppliers.

When interpreting Act 341, or any statute, this Court's goal is to determine the Legislature's intent, as discerned from the Act's plain language. *Madugula v Taub*, 496 Mich 685, 696 (2014). In doing so, context matters. *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 533 (2005) ("[T]he meaning of statutory language, plain or not, depends on context."). This Court has emphasized context on countless different occasions, each more forceful than the last. For example, "In interpreting the statute at issue, we consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " *Sun Valley Foods Co v Ward*, 460 Mich 230, 237 (1999) (quotation omitted). Also, this Court "examine[s] the statute as a whole," *Madugula*, 496 Mich at 696, and it "consider[s] the entire text, in view of its structure and of the physical and logical relation of its many parts." *Ally Fin Inc v State Treasurer*, 502 Mich 484, 493 (2018) (quotation marks and citation omitted).

Act 341 is structured to require all electric providers, including alternative electric suppliers, to show that they can meet the local clearing requirement. This

[11] The Commission went to great lengths in its application to explain how Act 341 is consistent with MISO's current resource adequacy construct. The Commission explained that MISO gives electric providers several options to meet their capacity obligations and that each option incorporates a local clearing requirement in one way or another. (MPSC's Appl, pp 32–34.)

is not some invented inference or long leap of logic; this interpretation is simply a straightforward reading of the statute as a whole. Act 341's plain language requires this result:

1. Act 341 requires individual suppliers to demonstrate that they can meet their capacity obligations. MCL 460.6w(8)(b).

2. These suppliers' capacity obligations include a local clearing requirement. MCL 460.6w(8)(c).

3. Thus, these suppliers must demonstrate that they can meet this local clearing requirement.

This is the statutory map to the local clearing requirement. Since suppliers must meet the requirement, whether it is labeled a zonal requirement or an individual requirement, the requirement applies to them. No other statutory interpretation honors Act 341's structure and purpose.[12]

The Court of Appeals recently confirmed that Section 6w requires alternative electric suppliers to show that they can meet their capacity obligations. In *In re Implementing Section 6w of 2016 for Cloverland Electric Cooperative* (*In re Cloverland*), the court affirmed a Commission order imposing a state reliability charge on Cloverland's full-service customers. (MPSC's App, pp 614–625, *In re Cloverland*, ___Mich App ___ (2019) (Docket No. 342552).) In doing so, the court noted that an alternative electric supplier must "demonstrate that it has sufficient capacity to meet its capacity obligations" or pay a state reliability charge. *Id*. at 616.

[12] The Commission focused a large portion of its application on Act 341's purpose and thus need not reiterate that analysis in this supplemental brief.

In other words, the Court of Appeals agrees with the first numbered point above (i.e., alternative electric suppliers must *individually* demonstrate that they can meet their capacity obligations). And since Section 6w plainly states that a supplier's capacity obligation includes a local clearing requirement, see MCL 460.6w(8)(c), the natural conclusion is that a supplier must also *individually* meet the local clearing requirement.

1. The local clearing requirement must be viewed in the context of electric providers' and alternative suppliers' capacity obligations.

When considering terms in complex regulatory regimes, this Court places special emphasis on context. In one recent case, this Court held that context is critical to uncovering the meaning of the term "repossessed property" in MCL 205.54i, which is "nestled within an intricate tax scheme." *Ally Fin Inc*, 502 Mich at 493. Although *Ally Fin Inc* is factually distinct, it has at least one thing in common with the present case: they both involve complex statutory schemes. Like the "repossessed property" in MCL 205.54i, the "local clearing requirement" in Section 6w is nestled within an intricate regulatory scheme, and the statutory context is critical to understanding how the local clearing requirement applies to alternative suppliers.

In Section 6w, the local clearing requirement is buried in repeated references to electric providers' capacity obligations. As part of providers' capacity obligations, the Commission is charged with setting, with or without MISO's help, a local clearing requirement and planning reserve margin requirement. MCL 460.6w(8)(c).

Because providers' capacity obligations include a local clearing requirement, every mandate directing electric providers to meet or show that they can meet their capacity obligations is a mandate to meet or show that they can meet the local clearing requirement. And since all electric providers, including alternative electric suppliers, are required to make capacity demonstrations, they all must meet the local clearing requirement.

Section 6w is peppered with references to electric providers' capacity obligations. Section 6w(6), for example, prevents the Commission from charging a supplier's customers a capacity charge if the supplier demonstrates that it can meet its capacity obligations. Section 6w(7), in turn, requires the supplier "to provide capacity for the portion of the load for which [it] has demonstrated an ability to meet its capacity obligations." Finally, through Section 6w(8)(b)(i),(ii), and (iii), the Legislature established enforcement mechanisms, remedies, and penalties for electric providers that do not meet their capacity obligations. All of these references include, by definition, the Commission-established local clearing requirement.[13]

This context is not only critical in its own right; it may even eclipse other considerations. In *Madugula*, for example, this Court recognized that "the inclusion

[13] Although Section 6w(8)(c) does not technically define "capacity obligations," for all practical purposes it does. Section 6w(8)(c) describes who sets providers' capacity obligations, how they are set, and what they include. See MCL 460.6w(8)(c). ("In order to determine the capacity obligations, request that the appropriate independent system operator provide technical assistance in determining the local clearing requirement . . . . If the appropriate independent system operator declines . . . the commission shall set any required local clearing requirement . . . consistent with federal reliability requirements.").

of a damages remedy in a statute [the Business Corporation Act] . . . may be an indication that the Legislature intended to provide a right to a jury trial." *Madugula*, 496 Mich at 701. But when considering the statute as a whole, this Court concluded that the damages remedy alone did not prove that "the Legislature intended to attach a statutory right to a jury trial to a claim for damages." *Id.* at 701–702. Other language in the statute giving the circuit court wide discretion to fashion remedies, as well as a historical analysis of the law, convinced this Court that the Legislature did not intend to "introduce a right to a jury into the statute" when it added damages to a list of available relief. *Id.* at 703.

Like circuit courts who have discretion under the Business Corporation Act to fashion remedies, the Commission has wide discretion under Act 341 to set the local clearing requirement for alternative electric suppliers. To determine a supplier's capacity obligations, the Commission must either ask for MISO's help to develop the planning reserve margin and local clearing requirements or set these requirements "consistent with federal reliability requirements." MCL 460.6w(8)(c). In the second scenario, the only limitation on the Commission's discretion to set the local clearing requirement is that it be done consistent with federal requirements. This gives the Commission broad, although not unbridled, discretion.

If the Commission cannot exercise this discretion to apply a local clearing requirement that it has specific authority to set, as part of capacity obligations that all electric providers are explicitly required to meet, then the discretion is meaningless. This would violate an inviolable rule of statutory construction that

"[e]very word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible." *Altman v Meridian Twp*, 439 Mich 623, 635 (1992), as modified on denial of reh'g.

2. The local clearing requirement should be viewed in the context of contingency plans in the law.

MCL 460.6w(1) and (2) also show that the Legislature meant the local clearing requirement to apply to alternative electric suppliers. Sections 6w(1) and (2) create three contingency plans to achieve electric reliability. The three plans were designed to cover every possible contingency arising out of MISO's proposal to facilitate states' long-term resource planning. Specifically, MISO proposed to FERC what it called a competitive retail solution, which would have revised MISO's resources adequacy tariffs to give electric providers and states options to ensure they have enough resources to meet demand. One option was to let load in competitive retail areas buy capacity three years in advance through a forward resource auction. (MPSC's App, p 78, *In re MISO*, FERC Docket No. ER17-284-000, 11/1/16 MISO Transmittal Letter, Tab B.) Another option was for states to opt their load out of the auction and require alternative electric suppliers to either: 1) demonstrate that they have enough resources to meet their portion of the zone's overall demand, including the local clearing requirement; or 2) subject their retail customers to a capacity charge for any shortfall. (MPSC's App, p 24, *In re MISO*, 11/1/16 Transmittal Letter; MPSC's App, pp 271–274, Tab D § 69A.12.1.2.) This option was called the prevailing state compensation mechanism.

When the Legislature passed Act 341, it was not clear how FERC would react to MISO's proposal, so the Legislature prepared for every contingency. Whether FERC adopted MISO's proposal in full, adopted it in part, or rejected it altogether, the Legislature had a plan for it. And each plan included a local clearing requirement. Specifically, Section 6w(1) was the Legislature's plan should FERC approve MISO's proposal in its entirety, giving states the option to adopt a capacity forward auction or a prevailing state compensation mechanism that would give the state more control over long-term resource adequacy. In this scenario, the Commission was charged with deciding which option would "be more cost-effective, reasonable, and prudent . . . [for] meeting the local clearing requirement and the planning reserve margin requirement." MCL 460.6w(1).

The Legislature also prepared for the possibility that FERC would reject MISO's proposal in part or in full or not act on it at all, retaining the local clearing requirement in these scenarios as well. Should FERC reject MISO's proposal in part—namely, the prevailing state compensation mechanism—the Legislature preserved the Commission's choice between a capacity forward auction and more state control, but it substituted the state reliability mechanism for the prevailing state compensation mechanism. MCL 460.6w(2). Again, both choices were intended to ensure that Michigan "meet[s] the local clearing requirement and the planning reserve margin requirement." *Id*.

Should FERC reject MISO's proposal in full or not act on it by September 30, 2017, the Legislature required the Commission to "establish a state reliability mechanism

under subsection (8)." MCL 460.6w(2). In this scenario, which is where we find ourselves now, the Commission has no options to meet the local clearing requirement but is forced to adopt a state reliability mechanism to meet the requirement. MCL 460.6w(2). This explains why the Legislature did not mention the local clearing requirement when describing this scenario, as it did for the other scenarios, since the Commission does not have to decide which option best meets the requirement. Instead, there is a single mandate: establish a state reliability mechanism.[14]

This structure leaves little doubt that the state reliability mechanism was intended to be a substitute for the prevailing state compensation mechanism and to fulfill the same purpose should FERC reject MISO's proposal, like it ultimately did. This is borne out in the definition of the "state reliability mechanism," which is defined 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) (emphasis added). Also, the state reliability mechanism and the competitive retail solution shared a common goal: they were both aimed at ensuring reliability.[15]

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[14] The relevant language reads: "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) (emphasis added).

[15] MISO witness Jeffrey Bladen testified at FERC that the competitive retail solution, which included the prevailing state compensation mechanism, would "enhance reliability, the benefits of which all Market Participants share on an equal basis." (MPSC's App, p 62, *In re MISO*, FERC Docket No. ER17-284-000, 11/1/16 MISO Transmittal Letter, Tab B.)

Given that these mechanisms were interchangeable, shared a common goal, and appeared in the same statute, their interpretations should be harmonized if possible. See *Macomb Cty Prosecutor v Murphy*, 464 Mich 149, 160 (2001) ("[T]he interpretation to be given to a particular word in one section [is] arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole."). Since the prevailing state compensation mechanism would have allowed states to apply the local clearing requirement to individual suppliers, the state reliability mechanism should be interpreted the same way if possible.

While this comparison alone is not the last word on the subject, when considering this comparison together with Act 341's basic structure and other language evincing a legislative intent to apply the local clearing requirement to individual suppliers, the cumulative effect is overwhelming. Combine this with the burden of proof that ABATE and Energy Michigan bear to show that the Commission's decision was unlawful, MCL 462.26(8), and it becomes clear that their burden is insurmountable.

C. The Court of Appeals' decision, if allowed to stand, could redefine how courts treat agencies.

When the Legislature gives an agency a task and discretion to carry out its task, within guidelines that govern the agency's actions, courts should treat this as clear and unmistakable authority to act without the need for step-by-step instructions for every stride that an agency takes toward its goal. This case is the

perfect example. The Legislature delegated broad authority to the Commission to set electric providers' capacity obligations, including a local clearing requirement, and to require providers to meet these obligations. Concluding that this is not clear and unmistakable authority to apply the local clearing requirement to individual suppliers undermines the delegation doctrine by not allowing the Commission to exercise the "many facets" of the legislative power delegated to it. See *People v Turmon*, 417 Mich 638, 649–650 (1983) (describing how many facets of legislative authority are exercised by administrative agencies).

If the Court of Appeals' decision stands and is followed in other agency cases, it could reach beyond the utility realm and erode other agencies' discretionary authority. Agencies like the Liquor Control Commission and the Michigan Tax Tribunal may find it more difficult to deliver vital services to Michigan residents if courts refuse to respect discretionary authority delegated to them. Consider the Liquor Control Commission. In upholding its licensing decisions, courts have frequently relied heavily on its discretionary authority. E.g., *Ron's Last Chance, Inc v Liquor Control Comm*, 124 Mich App 179, 185 (1983) ("This Court allows a significant degree of discretion to an administrative agency acting within the scope of its authority."). Without this discretion, far more licensing decisions are likely to be challenged and perhaps needlessly overturned.

The Michigan Tax Tribunal could likewise find itself without authority to reduce an unconstitutional increase in the taxable value of property in certain circumstances. In *Mich Props, LLC v Meridian Township*, 491 Mich 518 (2012), in a

unanimous decision, this Court held that because the General Property Tax Act gives the Tribunal "authority to enforce [i.e., affirm, reverse, or modify] a March board of review's error corrections," the Tribunal also "has the authority to carry out a March board of review's duty to correct a previous erroneous taxable value." *Id.* at 543–544. But the authority to enforce a decision correcting an error and the authority to make the decision in the first place are two different things. If this Court had followed the Court of Appeals' reasoning, it would have held that the Tribunal could enforce a decision by the March board correcting an error but did not have clear and unmistakable authority to correct an error (i.e., reduce an unconstitutional increase) on its own. That was not the correct outcome in *Mich Props* and it is not the correct outcome here.

In *In re Cloverland*, the Court of Appeals used reasoning similar to the *Mich Props* Court to conclude that Section 6w authorizes the Commission to set a state reliability charge for a cooperative electric utility. Section 6w lays out a specific formula for the state reliability charge and requires the Commission to ensure that the charge "does not differ for full service load and alternative electric supplier load." MCL 460.6w(3). The Court of Appeals held that "[i]n order to follow the

statutory requirements, the PSC necessarily must have the authority to set the SRM charge for both types of customers."[16] (MPSC's App, p 623 n5, *In re Cloverland*, ___Mich App at ___.)

In the same way, in order for the Commission to ensure that alternative electric suppliers can meet their capacity obligations under Sections 6w(6), (7), and (8)(b), which include a local clearing requirement, the Commission "necessarily must have the authority" to apply the requirement.

D. The local clearing requirement should not overburden alternative electric suppliers, but not enforcing it could overload the electric grid.

In the Commission's June 28, 2018 order in Case No. U-18444, the Commission set the local clearing requirement for Zone 7 at 1.5% of a load serving entity's (like an alternative electric supplier's) peak demand for the 2022 planning year and 3.0% of peak demand for the 2023 planning year. (MPSC's App, p 541, *In re Forward Locational Requirement*, MPSC Case No. U-18444, 6/28/18 Order.) This was later updated to be 2.7% for the 2022 planning year and 5.3% for the 2023 planning year. (MPSC's App, p 599, *In re Forward Locational Requirement*,

[16] Concerning the language ensuring that the capacity charge "does not differ for full service load and alternative electric supplier load," MCL 460.6w(3), the Court of Appeals also said that it "clearly and unmistakably authorizes the PSC to set an SRM charge . . . for full-service members-customers . . . and for choice or ROA [retail open access] customers of an AES." (MPSC's App, p 623, *In re Cloverland*, ___Mich App at ___). Likewise, the language in Section 6w(8) requires alternative electric suppliers to show they can meet their capacity obligations, including a local clearing requirement, so it clearly and unmistakably requires them to show they can meet the requirement.

8/1/2018 Memorandum from Roger Doherty, Engineer in the MPSC's Resource Adequacy and Retail Choice Section, to the MPSC and Resource Adequacy Stakeholders on the Updated Capacity Demonstration Process.) As a percentage of an alternative electric supplier's total load, a 2.7% or 5.3% local clearing requirement should not overburden suppliers. They can still buy 97.3% of their capacity from out-of-state resources in the 2022 planning year and 94.7% from out-of-state resources the following year.

While the local clearing requirement the Commission approved is a small percentage of a supplier's total load, failing to impose any requirement on suppliers could have large repercussions. This is particularly true if the capacity import limit continues to decline. As the DTE Electric Company has said, "Today the capacity import limit is about 17.6% of total load, but capacity import limits are steadily declining." (DTE Electric's Amicus Br, p 3.) DTE Electric warned that "[w]hen the capacity import limit falls to less than 10% of total Michigan load, as experts project it will by 2032, if AESs are permitted to buy all their power from out-of-state, Michigan will be in grave danger of blackouts, even if the utilities procure 100% of their capacity in-state." (*Id.*)

DTE Electric is right. Blackouts are possible if electric providers refuse to use any in-state resources to supply capacity to their load, causing imports to exceed steadily declining capacity import limits. Should this happen, the system would begin to shed load, resulting in blackouts that affect everyone whether they contributed to the problem or not.

Although these policy considerations should not influence the legal analysis, they do underscore the importance of this case.

CONCLUSION AND RELIEF REQUESTED

The Michigan Public Service Commission respectfully asks this Court to grant leave to appeal and reverse the Court of Appeals' July 12, 2018 opinion and instead affirm the Commission's September 15, 2017 order.

Respectfully submitted,

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