STATE OF MICHIGAN
IN THE SUPREME COURT

In re RELIABILITY PLANS OF ELECTRIC UTILITIES FOR 2017-2021

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,
Appellee,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
Appellant, and

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

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

ENERGY MICHIGAN, INC.,
Appellee,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
Appellant, and

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

Supreme Court Case No. 158308
Court of Appeals No. 340607
MPSC Case No. 00-01897

APPELLEE ENERGY MICHIGAN, INC.'S AMENDED SUPPLEMENTAL BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF BASIS OF JURISDICTION

Appellee, Energy Michigan, Inc. ("Energy Michigan")[1] agrees with Appellant Michigan Public Service Commission ("MPSC" or "Commission") that this Court has jurisdiction over appeals from decisions of the Court of Appeals. Const. 1963, art 6, § 4, MCR 7.303(B)(1). Appellee, Energy Michigan disagrees that this Court should grant Appellant's August 23, 2018 Application for Leave to Appeal the Michigan Court of Appeals' July 12, 2018 unanimous and published Opinion reversing the Commission's September 15, 2017 Order in Case No. U-18197 ("September 15 Order"). *In re Reliability Plans of Electric Utilities for 2017-2021*, 325 Mich App 207 (2018) (Docket No. 340600; For Publication) ("*In re Reliability Plans*"). Energy Michigan Requests that this Court deny the MPSC's Application for Leave to Appeal.

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

IDENTIFICATION OF ORDER APPEALED AND RELIEF SOUGHT

The Michigan Public Service Commission's ("MPSC's" or "Commission's") Application before this Court involves a matter of statutory construction of 2016 PA 341 ("Act 341") and the September 15, 2017 Order of the MPSC implementing certain provisions of Act 341. The Orders issued in MPSC Case No. U-18197 on June 15, 2017 ("June 15 Order") and September 15, 2017 ("September 15 Order"), by the Commission found that Section 6w of Act 341 ("Section 6w") authorizes it to determine and implement an individual local clearing requirement ("LCR") as a part of the capacity obligations for electric providers, including Alternative Electric Suppliers ("AESs"). An AES is defined in statute as "a person selling electric generation service to retail customers in this state. Alternative electric supplier does not include a person who physically delivers electricity directly to retail customers in this state. An alternative electric supplier is not a public utility." MCL 460.10g(a). As Energy Michigan discusses herein, the Commission's May 11, 2017 Order in U-18197 ("May 11 Order"), and June 28, 2018 Order in Case No. U-18444 ("Order U-18444") are also relevant to this Application.

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

Energy Michigan disagrees with the MPSC's assertions that the Court of Appeals erred when it held that Section 6w does not grant the MPSC authority to impose an individual LCR on AESs, and that the implementation of an individual LCR as part of AESs' capacity obligations is inconsistent with MISO Requirements. The Court correctly stated that the MPSC has the

authority to determine a local clearing requirement related to determining capacity obligations, noting that: "section 6w(8)(c) requires the MPSC to determine the local clearing requirement in order to determine capacity obligations . . . ." *In Re Reliability Plans*, 325 Mich App at 225. However, the Court found that the Commission was without authority to impose the local clearing requirement on AESs "individually:" ". . . [Section 6w] does not specifically authorize the MPSC to impose the local clearing requirement on alternative electric suppliers individually." *In Re Reliability Plans*, 325 Mich App at 225. This is an important and factual distinction that should be clarified at the outset.

The Commission has the statutory authorization to determine capacity obligations and a LCR for all electric providers, including AESs. However, the Court held that pursuant to the plain reading of Act 341, the manner in which the Commission sets those requirements must be "consistent with" the Midcontinent Independent System Operator's ("MISO's") currently effective Resource Adequacy Tariff ("Tariff"), as will be explained in greater detail herein. This is really the core of the MPSC's complaint. The statutory language that the Commission preferred, that would have allowed the Commission to set an individual LCR, was removed by the House of Representatives immediately preceding the final passage of the bill (SB 437) that became PA 341. As there remains no clear and unmistakable statutory language to support the Commission's implementation of an individual LCR upon AESs, the Commission seeks to infer such a requirement. This was a bridge too far for the Court of Appeals, and thus, the Court of Appeals held that, "We therefore will not interpret the language adopted in MCL 460.6w as authorizing what the Legislature explicitly rejected when enacting that statute." *In Re Reliability Plans*, 325 Mich App at 232.

For all of the reasons stated herein, the MPSC's Application should be denied.

COUNTERSTATEMENT OF QUESTION PRESENTED

1. Did the Court of Appeals correctly find that the Michigan Public Service Commission exceeded its authority granted under Section 6w of Act 341 of 2016 when it imposed a local clearing requirement on individual AESs, including Appellee's members, by means of the September 15, 2017 Order in Case No. U-18197?

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

2. Are the new requirements that the Michigan Public Service Commission imposed on all electric service providers in the state, including Appellee's members, by means of its September 15, 2017 Order in Case No. U-18197, invalid and unenforceable due to the fact that the Commission failed to implement these requirements by means of the Administrative Procedures Act?

   The Court of Appeals found it unnecessary to examine, since it found that the MPSC lacked authority to impose a LCR on individual AESs.

   Appellee Energy Michigan answers: "Yes."
   Appellee ABATE answers: "Yes."
   Appellant MPSC answers: "No."
   Appellant Consumers Energy Company answers: "No."

I. INTRODUCTION

The Commission's seeks review of a July 12, 2018 Opinion of the Michigan Court of Appeals (the "Opinion"), which itself overturned the Commission's actions taken in its September 15, 2017 Order in Case No. U-18197 ("September 15 Order"). In the September 15 Order, the Commission for the first time sought to implement certain requirements under Section 6w of 2016 PA 341 ("Section 6w" and "PA 341," respectively). Case No. U-18197 was neither a contested case nor a rulemaking proceeding undertaken pursuant to Michigan's Administrative Procedures Act of 1969, 1969 PA 306 ("APA"). Instead, it was a docket opened to allow utilities and other load serving entities ("LSEs") to file "an assessment of [their] ability to meet [their] customers' expected electric requirements in the 2017 through 2021 timeframe," and to allow "[o]ther interested persons wishing to file comments in response to the assessments or comment[s] and/or suggestions regarding potential capacity needs in Michigan" to file such comments.[2] No sworn testimony was received and no evidentiary record was compiled.

The Commission's September 15 Order was issued following this informal comment process and a collaborative workgroup process. Nevertheless, it set forth "requirements" that purport to apply to "all electric providers," including members of Energy Michigan. See September 15 Order, pp. 40-41. These new requirements were created and implemented entirely without regard to the APA's rulemaking process.

Nevertheless, the Court of Appeals did not reach the issue of the Commission's failure to follow the APA process because it determined that the Commission had committed the more fundamental error of acting outside of its statutory authority. *In re Reliability Plans*, 325 Mich App at 234-35. Energy Michigan submits that the Court of Appeals correctly found that the

[2] January 12, 2017 MPSC Order in Case No. U-18197, pp. 5-6. Available at: https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t0000001UV9vAAG.

Commission lacked clear statutory authority for the imposition of an individual Local Clearing Requirement ("LCR") on alternative electric suppliers ("AESs"). *In re Reliability Plans*, 325 Mich App at 224. The Court of Appeals' Opinion, which overturned, and eventually stayed, the requirements of the September 15 Order, holding them to be invalid and unenforceable, should not be disturbed. MPSC's Application should be denied.

At the outset, it is important to note that while this case deals with acronyms and statutory provisions specifically involving the state and federal requirements related to the regulation of retail and wholesale sales of electric power, the essential points at issue are neither highly technical nor novel. Rather, the issues in contention are the familiar ones of statutory interpretation, the appropriate deference to be given to administrative agencies implementing new legislative requirements, and the boundaries of an administrative agency's rulemaking authority outside of the APA process. In this case, the primary issue in contention is the MPSC's imposition of a unique, individual LCR upon AESs that operate in the State, and whether that new requirement is authorized by the statute.

As an initial matter, Energy Michigan strongly disagrees with the Commission's opening position that PA 341 "is the legislative roadmap to electric generation resource planning, and <u>all roads lead to a local clearing requirement that compels electric providers to build or purchase at least some local generation</u>." Supplemental Brief on Appeal of Appellant Michigan Public Service Commission, dated August 2, 2019 ("MPSC Supp. Brief") at 1 (emphasis added). The Commission alleges that "all" electric providers, including AESs, have a "local clearing requirement" that "compels electric providers to build or purchase at least some *local generation*." MPSC Supp. Brief, p. 1 (emphasis added). This statement simply assumes the result that the MPSC is required to prove. In the case below they failed to show the Court of

Appeals any explicit language in PA 341 that mandated an individual LCR: "a review of the statute reveals that no provision of MCL 460.6w clearly and unmistakably authorizes the MPSC to impose a local clearing requirement on individual alternative electric providers." 325 Mich App 224. In its Application, the Commission attempts to elide its burden of proof and simply assert its own legal conclusion. Furthermore, the term "local generation," which the Commission asserts is required in the law, is found nowhere in the law itself. Rather, the Commission refers to legislative language that in a previous version of SB 437, the bill that became PA 341, but which was removed before passage of the final bill.

There are certain fundamental legal principles that limit the authority and jurisdiction of the Commission under Michigan law, and it is the Commission's failure to recognize and honor these which produced Energy Michigan's original petitions for rehearing and then its appeal to the Court of Appeals. This Court has plainly laid out these principles in the past:

> The Public Service Commission possesses no "common law" powers. … As a creature of the Legislature, the commission possesses only that authority bestowed upon it by statute. The Michigan public utilities commission is an administrative body created by statute and the warrant for the exercise of all its power and authority must be found in statutory enactments. *Sparta Foundry Co. v. Public Utilities Comm.*, 275 Mich 562, 564; 267 NW 736 (1936).

Union Carbide Corp v Public Service Comm'n, 431 Mich 135, 146; 428 NW2d 322, 327 (1988). Further, the authority granted by the Legislature may not be simply inferred, but "this Court strictly construes the statutes which confer power on the PSC." *Id.* As this Court explained in *Consumers Power Co v Public Service Comm'n*, 460 Mich 148, 155; 596 NW2d 126 (1999), quoting *Mason Co. Civic Research Council v. Mason Co*, 343 Mich 313, 326-327; 2 NW2d 292 (1955): "The power and authority to be exercised by boards or commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist." Therefore, as this

Court observed, "a determination of the commission's powers requires an examination of the various statutory enactments pertaining to its authority." *Union Carbide*, 431 Mich at 146.

Thus, the Application before the Court presents a simple question of whether or not the Legislature provided the MPSC with the necessary jurisdictional authority in PA 341 to impose on AESs a new individual LCR requirement. Yet, instead of beginning with the statutory enactments and drawing forth where the authority it assumed for itself must lie, the Commission, both in its September 15 Order and here in its Supplemental Brief, begins by assuming the power it seeks, and then proceeds to justify why it believes it should have that power. Indeed, the Commission begins its argument by stating that: "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." But the Commission never establishes first that the statute grants it this "power" of which it is supposedly being "stripped." An agency cannot, of course, be stripped of a power which it was never granted. This almost reflexive assumption of authority to itself, without serious examination of the statutory bases for that supposed authority, is the fault that underlies both the Commission's original error in its Order in U-18197, as noted by the Court of Appeals, and remains still in its responses to the Opinion of the Court of Appeals.

This is the main contention in this proceeding, whether the Commission can compel an AES to "build or purchase at least some local generation" as a form of individual LCR, in addition to having to meet the zonal LCR requirements imposed by MISO under federal law. Most AESs are interstate businesses that operate in the wholesale energy markets to procured generation to serve their electric choice customers, and have done so since the introduction of electric choice in Michigan in 2000 through PA 141. Such wholesale purchases of energy and

capacity may be made from a generator located either within or outside the state of Michigan, or through the regional wholesale market, *i.e.*, the one operated by the Midcontinent Independent System Operator, Inc. ("MISO"). For the reasons stated below, Energy Michigan submits that the Court of Appeals correctly ruled that the Commission exceeded its authority by imposing an individual local clearing requirement on alternative electric suppliers (*i.e.*, the requirement that an AES must "build or purchase at least some local generation").

Energy Michigan also submits that the Commission violated the APA in not conducting a contested case or rulemaking proceeding as a basis for its determinations and the requirements it promulgated in its September 15 Order in U-18197. The Court of Appeals found that because the allegations of inappropriate rulemaking raised by Energy Michigan on appeal primarily related to the MPSC imposing a local clearing requirement on individual electric suppliers, and the Court determined that "the statute does not provide the MPSC the authority to impose a local clearing requirement on individual alternative electric suppliers," it was unnecessary to reach the related issue of whether the MPSC's individual LCR rules were improperly promulgated. To the extent that this Court makes any determinations regarding the imposition of an individual LCR on AESs, or agrees to hear the appeals brought by Appellants, Energy Michigan reaffirms its claims of error regarding the MPSC's lack of adherence to the APA when promulgating its new requirements in its September 15 Order.

II. FACTUAL BACKGROUND

A. ALTERNATIVE ELECTRIC SUPPLIERS – BACKGROUND.

Michigan's Act 341 of 2016 went into effect on April 20, 2017 and includes Section 6w, which adds new resource adequacy requirements on electric service providers in the state, as well as gives new responsibilities to the Commission. An Alternative Electric Supplier ("AES") is one of the "electric providers" that is subject to the new requirements encompassed in Section

6w. The Commission describes an AES as "[t]he name given to certain competitive suppliers of retail electric services in Michigan."[3] Act 141 of 2000, Section 10g(a), defines *AES* as follows: "'Alternative electric supplier' means a person selling electric generation service to retail customers in this state. Alternative electric supplier does not include a person who physically delivers electricity directly to retail customers in this state. An alternative electric supplier is not a public utility." MCL 460.6g(1)(a). Section 10a(2) of PA 141 also authorized the Commission to license AESs, but provided that "[a]n alternative electric supplier is not required to obtain any certificate, license, or authorization from the commission other than as required by this act." MCL 460.10a(2).

As the Court of Appeals stated, PA 141 "permitted customers to buy electricity from alternative electric suppliers instead of limiting customers to purchasing electricity from incumbent utilities, such as appellee Consumers Energy Company (Consumers)." *In Re Reliability Plans*, 325 Mich App at 211. This option to purchase from alternative suppliers (known as "electric choice") was restricted under 2008 PA 286 by means of a 10% cap on the available market, based on the utility's average weather adjusted retail sales from the preceding calendar year. The 10% cap on electric choice was maintained under 2016 PA 341, but new resource adequacy requirements were put in place for all electric providers in the state, including AESs.

There are approximately 23 licensed AESs in Michigan, although only roughly half of these are active suppliers to customers in the State.[4] Electric choice customers primarily consist

[3] MPSC Glossary of Terms on Electric Customer Choice, available at: https://www.michigan.gov/mpsc/0,4639,7-159-16377_17111-42898--,00.html.

[4] Alternative Electric Suppliers – Licensed to Sell Retail Electric Generation in Michigan https://www.michigan.gov/mpsc/0,4639,7-159-16377_17111_17114-413939--,00.html#tab=License.

of industrial and commercial customers, schools and universities. There are few, if any, residential customers participating in electric choice.

The majority of AESs do not own or control electric generation assets in the State. These AESs purchase the generation needed to supply their in-state electric retail choice customers through MISO's federally regulated wholesale energy market. Thus, when one supplier purchases generation from another supplier, which purchase is meant for an ultimate sale to an end-use customer, either within the same state or across state boundaries, this is known as a "sale for resale." Such a transaction is deemed "the sale of electric energy at wholesale in interstate commerce." 16 USC § 824(b)(1). A wholesale sale is defined as a "sale of electric energy to any person for resale." 16 USC § 824(d). The Federal Energy Regulatory Commission ("FERC"), pursuant to the Federal Power Act ("FPA"), has exclusive authority to regulate such sales. See 16 USC § 824(b); *FERC v Electric Power Supply Ass'n*, 136 S Ct 760 (2016) ("The Federal Power Act (FPA) authorizes the Federal Energy Regulatory Commission (FERC) to regulate 'the sale of electric energy at wholesale in interstate commerce,' including both wholesale electricity rates and any rule or practice "affecting" such rates."); *Hughes v Talen Energy Marketing LLC*, 136 S Ct 1288 (2016) ("The Federal Power Act (FPA) . . . vests in the Federal Energy Regulatory Commission (FERC) exclusive jurisdiction over wholesale sales of electricity in the interstate market.").

B. FERC'S REJECTION OF MISO'S CRS PROPOSAL.

Under PA 341, subsection 6w(2), the MPSC is required to establish a state reliability mechanism ("SRM") pursuant to the requirements in subsection 6w(8) if the appropriate independent system operator (in this instance, MISO) does not receive approval from FERC to implement a resource adequacy tariff that provides for a capacity forward auction. MISO's application for such a capacity forward auction, a three-year forward resource auction, embodied

within its "Competitive Retail Solution" ("CRS") proposal, was rejected by FERC in Docket No. ER17-284-000 on February 2, 2017 ("FERC CRS Order"). In large part, FERC rejected MISO's CRS proposal because it would have been at odds with how MISO has historically conducted its capacity auctions, which is on a "zonal" basis. Thus, FERC stated that:

> 8. MISO's proposal bifurcates the MISO capacity market into two distinct market clearing mechanisms held at different points in time. Market-wide clearing processes are typically more efficient than bifurcated clearing processes. Rather than clear the market as a whole for a given Planning Year through a single market-wide auction (i.e., the current practice in all Commission-jurisdictional wholesale capacity markets), MISO's proposed construct will likely result in clearing prices and capacity resource selections that lack the desirable properties associated with a single market-wide clearing process. In general, an auction-based market-wide clearing mechanism for capacity simultaneously co-optimizes zonal capacity requirements subject to the zonal transmission capability constraints and economic supply offers at the time of the auction. The resulting market-wide clearing prices for capacity thus reflect the tradeoffs of satisfying zonal capacity requirements given the same set of transmission capability constraints and supply offers, which is efficient and desirable from a price formation perspective. We are not convinced that the proposed bifurcated market clearing process will result in the efficient and desirable outcomes generally associated with a marketwide clearing process.

Appendix 1 at EM000019b (emphasis added).

C. THE STATE RELIABILITY MECHANISM: 2016 PA 341, SECTION 6W.

Subsection (2) of Section 6W instructs the Commission to impose new requirements – known as a "state reliability mechanism" or SRM – on electric providers in the event that FERC does not approve either the MISO's forward capacity auction or "a prevailing state compensation mechanism" alternative. The SRM is required to be implemented under subsection 6w(8). MCL 460.6w(8). The requirements of 6w(8) direct the Commission to establish a process under which all LSEs in the state demonstrate yearly to the Commission that they own or have contractual rights to sufficient capacity to meet their capacity obligations four years in advance. MCL 460.6w(8)(a)&(b). As discussed below, and at greater length in the response to Consumers'

Application for Leave to Appeal, the Commission has established a successful SRM process that incorporates the MISO zonal LCR.

Under subsection 6w(8), the Commission is to determine the format for the resource adequacy demonstration each provider is to make to ensure that it can "meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable." MCL 460.6w(8)(a)&(b). Subsection (8)(c) specifies that "[i]n order to determine the capacity obligations," the Commission must request the assistance of MISO and ultimately must "set any required local clearing requirement and planning reserve margin requirement, consistent with federal reliability requirements." MCL 460.6w(c) (emphasis added). Subsection (8)(d) makes clear that the Legislature intended Michigan's requirements to harmonize with the federal requirements:

> 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.

MCL 460.68(d) (emphasis added). There is not only a presumption that the requirements that should be applied are the "federal reliability requirements" but the Commission is required to defer to MISO's determinations ("shall accept") unless it finds good reason not to. The entire theme of subsection 6w(8) is thus consistency with and deference to the federal requirements, and it does not provide the Commission with any explicit authority to create a state requirement that is different from and inconsistent with the zonal requirement used by MISO.

Subsection (3) of Section 6w requires the Commission to establish a capacity charge. MCL 460.6w(3). Subsection (6) requires that, "[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." MCL 460.6w(6) (emphasis added). The SRM thus includes an LCR, but it must be consistent with MISO's federal reliability requirements (*i.e.*, zonal) and not individual.

The concept of a "local clearing requirement" is defined in Act 341 as follows: "'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)." MCL 460.6w(12)(d).

D. LEGISLATIVE HISTORY OF SB 437 (PA 341).

The Court of Appeals described the legislative history of SB 437, the bill ultimately signed into law that became 2016 PA 341, as follows:

> Here, the legislative process leading to the passage of Act 341 lasted for almost 17 months and involved numerous amendments and bill substitutes. Senate Bill 437 was introduced on July 1, 2015. It proposed substantial amendment of the Michigan Public Service Commission Act, 1939 PA 3, and the Customer Choice and Electricity Reliability Act, as enacted by 2000 PAs 141 and 142. The bill ultimately emerged from the Senate as Senate Substitute 7 (S7), with a new provision that imposed on alternative electric suppliers a capacity obligation and a demonstration process; alternative electric suppliers who were required to own or contract for enough capacity resources to meet a percentage of their proportionate share of the local clearing requirement. For example, S7 provided in proposed § 6w(2)(C), in relevant part:
>
> > An alternative electric supplier . . . shall. . . demonstrate to the Commission, in a format determined by the commission, that for the planning year . . . the alternative electric supplier . . . owns or has contractual rights to sufficient dedicated and firm electric capacity to meet

> the equivalent of 90% of its proportional share of the local clearing requirement.
>
> This version of the bill passed the Senate and was transmitted to the House. On December 15, 2016, the House adopted H4 in place of S7. H4 *removed* the specific language requiring individual alternative electric suppliers to meet a percentage of their proportionate share of the local clearing requirement. H4 also added language to proposed § 6w(6) specifying that an alternative electric supplier could meet its overall capacity obligation with any resource that the appropriate independent system operator [MISO] allows to meet the capacity obligation. The Senate thereafter concurred with H4, and the bill was signed into law. The Legislature thereby rejected statutory language imposing the local clearing requirement on individual alternative electric suppliers in favor of statutory language that adopting the MISO method of not imposing the local clearing requirement on individual electric providers.

In Re Reliability Plans, 325 Mich App at 230-231 (emphasis added). The previous version of the bill, as passed by the Senate ("H4") is available on the State of Michigan's website.[5] The pages constituting Section 6w have been attached to Energy Michigan's Supplemental Brief on Appeal as Appendix 9, EM000216b-EM000227b. It is noteworthy that H4 contained detailed requirements in what was then subsection 6w(5), mandating that the Commission monitor whether market manipulation is occurring through generators withholding capacity from the local market. H4 clearly required a local purchase obligation for capacity and the Legislature was plainly concerned about the market power of a small number of LSEs who control the vast majority of local generation capacity.

Significantly, along with the detailed process in subsection 6w(2) of H4 for determining how much capacity must be sourced locally, the requirements in subsection 6w(5) on market manipulation of local capacity were removed in the final version that became Public Act 341. The reason for this simultaneous removal seems apparent–when the local sourcing requirement

[5] Senate (H4) is available on the State of Michigan's website at: http://www.legislature.mi.gov/documents/2015-2016/billengrossed/Senate/pdf/2015-SEBS-0437.pdf (the "Senate Bill").

was removed from Section 6w(2), the market manipulation control requirements in Section 6w(5) were no longer needed and so were also removed.

E. PROCEDURAL IMPLEMENTATION OF MPSC CASE NO. U-18197.

On May 11, 2017, the Commission issued an order in which it affirmed its intent to proceed with establishing certain of the new requirements of Sec. 6w(8) through a collaborative workgroup process:

> the format for the demonstration required of an electric utility by Section 6w(8)(a) of Act 341, MCL 460.6w(8)(a) that the utility "owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable" for the "planning year beginning 4 years after the beginning of the current planning year" was to be determined through collaborative efforts in the technical conferences. Likewise, it was the Commission's intent that the format for the demonstrations required of AESs, cooperative electric utilities, and municipally-owned electric utilities by Section 6w(8)(b) of Act 341, MCL 460.6w(8)(b) also was to be determined through collaborative efforts in the technical conferences. May 11, 2017 Order in U-18197.[6]

Between April and the end of July 2017, the Commission Staff led an informal workgroup that met several times, generally for purposes of presentations and discussion.[7] On August 1, 2017, the Staff issued their Staff Report with their recommendations for the capacity demonstrations required under subsection (8).[8] Appendix 14, EM000452b-EM000594b. In its September 15 Order in U-18197, the Commission made various determinations based on the Staff Report and imposed a set of new requirements on electric providers under the authority of subsection (8), which is the subject of this appeal.

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[6] http://efile.mpsc.state.mi.us/efile/docs/18197/0052.pdf. The complete docket with all filings is available at: http://efile.mpsc.state.mi.us/efile/viewcase.php?casenum=18197&submit.x=0&submit.y=0.

[7] http://www.michigan.gov/mpsc/0,4639,7-159-80741_80743-406252--,00.html.

[8] http://efile.mpsc.state.mi.us/efile/docs/18197/0100.pdf.

F. THE COURT OF APPEALS' JULY 12 OPINION.

Both Energy Michigan and ABATE timely appealed the Commission's September 15 Order to the Court of Appeals, alleging, in part, that the Commission exceeded its statutory authority under PA 341 to impose an individual LCR on AESs. On July 12, 2018, the Court of Appeals issued its Opinion reversing and remanding the Commission's September 15 Order, finding that "a review of the statute reveals that no provision of MCL 460.6w clearly and unmistakably authorizes the MPSC to impose a local clearing requirement on individual alternative electric suppliers." *In Re Reliability Plans of Electric Utilities*, 325 Mich App at 224. The Court thus found that, "[b]ecause the MPSC has only the authority granted to it by the Legislature by 'clear and unmistakable language,' . . . we must decline the invitation to infer that the MPSC has any additional authority." *Id.* at 225.

Moreover, the Court of Appeals noted that "while not all legislative history is valuable when attempting to ascertain the legislative intent behind statutory language . . . . Our Supreme Court has instructed that 'the highest quality [of] legislative history [is] that [which] relates to an action of the Legislature from which a court may draw reasonable inferences about the Legislature's intent,' including 'actions of the Legislature in considering various alternatives in language in statutory provisions before settling on the language actually enacted.'" *Id.* at 229. Given that the Legislature specifically considered language that would have allowed the Commission to implement a local clearing requirement upon individual AESs, but rejected that language in the final, as passed version that became PA 341, the Court of Appeals thus found that "[w]e therefore will not interpret the language adopted in MCL 460.6w as authorizing what the Legislature explicitly rejected when enacting the statute." *Id.* at 232.

Due to the fact that the Court of Appeals found that the Commission lacked the statutory authority to impose an individual LCR on AESs in its September 15 Order, it found it

unnecessary to address Energy Michigan's claims of error regarding the Commission's alleged violation of the Administrative Procedures Act in implementing the September 15 Order.

G. June 28, 2018 Order No. U-18444

On June 28, 2018, following a contested case hearing, the Commission issued an order in Case No. U-18444 that, in part, imposed an individual LCR on all electric providers, including AESs, finding that such an individual LCR was allowed under 2016 PA 341, Section 6w, for planning years 2022/2023 and 2023/2024 ("U-18444 Order"). In part, the Order required AESs to meet an individual locational requirement of 1.5% of each AES's peak demand that must be supplied by in-zone resources for planning years in 2022/2023 and 3.0% of peak demand for 2023/2024. The percentage was subsequently updated to 2.7% of peak demand that must be supplied by in-zone resources for planning year 2022 in Case No. U-20154. Appendix 10, EM000228b-EM000364b.

On July 23, 2018, Energy Michigan filed a claim of appeal in the Court of Appeals of the Commission's June 28 Order in U-18444. Energy Michigan then filed a motion for stay of the Commission's June 28 Order, pending resolution of the appeal in Case No. U-18197. On September 13, 2018, the Commission granted Energy Michigan's motion to stay the effect of the June 28 Order. Appendix 11, EM000365b-EM000383b. Likewise, on November 7, 2018 the Court of Appeals granted the parties' joint motion to hold Energy Michigan's appeal in abeyance until such time as this Court enters an order or opinion fully disposing of the cases pending on application in this matter. Appendix 15, EM000595b.

III. LAW AND ARGUMENT

A. STANDARD OF REVIEW.

This Court has recognized that the Michigan Constitution explicitly provides for judicial review of administrative decisions:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

In re Complaint of Rovas Against SBC Michigan v Public Serv Comm, 482 Mich 90, 99-100; 754 NW2d 259 (2008). This Court has thus held that, "[t]he constitutional provision provides for review to determine: (1) that the decision is authorized by law, and (2) if a hearing is required, that the decision is supported by evidence." *Id.* at 100. These are the two issues presented to the Court in this case: (1) whether or not the Commission's decision in Case No. U-18197 to impose an individual LCR on AESs is authorized by law, and (2) whether or not the Commission should have conducted a rulemaking proceeding before promulgating its requirements for the SRM, and thus provided an evidentiary basis for review of its new requirements. Both of these inquiries involve slightly different standards of review, as this Court has found that "there are different standards of review for different agency functions." *Id*. at 101.

The first inquiry involves the Commission's statutory interpretation of Section 6w. This Court "has uniformly held that statutory interpretation is a question of law that this Court reviews de novo." *Id*. at 102. The second inquiry, regarding Commission hearings, encompasses a different standard of review. As this Court has held, "[t]he primary 'judicial' function exercised by administrative agencies is confined to conducting contested cases . . . . These administrative contested cases resemble trials. Constitutionally and statutorily, these administrative finding exercises are entitled to a degree of deference defined by statute and our constitution. However, fact finding in an administrative contested case, much like in a trial before a circuit court, is a far different endeavor than construing a statute." *Id*. at 99.

As an initial matter, while the Commission seeks the "most respectful consideration" standard of review, first enunciated in the case of *Boyer-Campbell*, courts have found that is not the appropriate legal standard for review of an agency's first interpretations of a new statute. *Attorney General v Public Svc Comm'n*, 269 Mich App 473, 480; 713 NW2d 290 (2006) ("We do not afford the same measure of deference to an agency's initial interpretation of new legislation as we do to a longstanding interpretation."). Furthermore, this Court has held that while the *Boyer-Campbell* standard "requires 'respectful consideration' and 'cogent reasons' for overruling an agency's interpretation . . . when the law is 'doubtful or obscure,' the agency's interpretation is an aid for discerning the Legislature's intent. However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *Rovas*, 482 Mich at 103.

Whether the Commission exceeded the scope of its authority and rendered a decision that was unauthorized by law when it imposed an individual LCR on AESs is a question of legislative interpretation of law that this Court reviews *de novo*. *Consumers Power Co v Pub Service Comm*, 460 Mich 148, 157; 596 NW2d 126 (1999); *Rovas*, *supra*. The Commission possesses only the authority granted to it by the Legislature and has no common law powers. *Consumers Power*, 460 Mich at 156. The statutes that confer power on the Commission are strictly construed. *Id*. Furthermore, "authority must be granted by clear and unmistakable language. A doubtful power does not exist." *Public Svc Comm'n*, 269 Mich App at 480 (citing *Attorney General v Public Service Comm.*, 231 Mich App 77, 78; 585 NW2d 310 (1998)). Thus, this Court must review the Commission's interpretation of Section 6w *de novo*, and can uphold the MPSC's determinations only if it finds "clear and unmistakable" support for those determinations in the statute.

As this Court has held, in reviewing an administrative agency's statutory interpretation, the court may grant "respectful consideration" to the agency's interpretation, "but courts may not abdicate their judicial responsibility to interpret statutes by giving unfettered deference to an agency's interpretation. Courts must respect legislative decisions and interpret statutes according to their plain language. An agency's interpretation, to the extent it is persuasive, can aid in that endeavor." *Rovas*, 482 Mich at 103.

Finally, arguably, the Commission is not entitled to the "most respectful consideration" of its interpretation of Section 6w in its September 15 order in U-18197, as those findings were not made pursuant to a "hearing," *i.e.*, neither in a contested case nor through a rulemaking procedure pursuant to the APA.

As to the Commission's position that it was not required to conduct the proceeding according to either the rulemaking process or a contested case, *i.e.*, under the APA or its own Rules of Practice and Procedure, the courts have observed that "the question whether an agency policy is invalid because it was not promulgated as a rule under the APA is reviewed *de novo* as a question of law." *Michigan Electric and Gas Assoc v Michigan Public Serv Comm*, 252 Mich App 254; 652 NW2d 1 (2002) ("*MEGA*"), citing *Faircloth v Family Independence Agency*, 232 Mich App 391, 401; 591 N.W.2d 314 (1998). In determining whether an agency has engaged in improper rulemaking, the label an agency gives to a directive is not determinative of whether it is a rule or a guideline under the APA. *Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Servs*, 431 Mich 172, 188; 428 NW2d 335 (1988). Instead, this Court must review the "actual action undertaken by the directive, to see whether the policy being implemented has the effect of being a rule." *Id.* (quoting *Schinzel v Dep't of Corrections*, 124 Mich App 217, 219; 333 NW2d 519 (1983)).

B. THE COURT OF APPEALS CORRECTLY RULED THAT THE MPSC DOES NOT HAVE STATUTORILY CONFERRED AUTHORITY TO IMPOSE AN INDIVIDUAL LOCAL CLEARING REQUIREMENT ON ALTERNATIVE ELECTRIC SUPPLIERS.

1. Neither Plain Language, nor Legislative History Support the MPSC's Claims of Statutory Authority.

As it did in the Court of Appeals, the Commission herein asserts that Act 341's plain language and its structure compelled the Commission to impose the individual LCR on AESs. MPSC Supp. Brief at 6. More specifically, the Commission believes that in requiring the Commission to implement the SRM (Section 6w(2)), the statute allowed the MPSC to find that "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." MPSC Supp. Brief at 1-2 (emphasis added). The Commission cites no specific statutory language to support this assertion. However, the Commission argues, that "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." MPSC Supp. Brief at 2. Again, the MPSC fails to locate that requirement in specific statutory language.

The Court of Appeals correctly rejected these same arguments, noting that, "[t]he MPSC and Consumers further reason that because § 6w(8)(b) refers to the capacity obligations with respect to each individual electric provider, it must be inferred that the local clearing requirement was meant to be applied to each alternative electric supplier individually." However, before the Court of Appeals, as here, the MPSC failed to locate any specific language that would give it the authority it was claiming: "[w]e cannot follow the urging of the MPSC and Consumers, however, because a review of the statute reveals that no provision of MCL 460.6w clearly and

unmistakably authorizes the MPSC to impose a local clearing requirement on individual alternative electric providers." *In re Reliability Plans*, 325 Mich App at 224.

The Commission's Application should be denied, as the Commission has continued to fail to either cite a single clear statement or requirement in Act 341 that would authorize the establishment of an individual LCR on AESs. Rather than providing specific language, the Commission's argument focuses policy considerations and the harms that would befall should the Court "interpret Act 341 to strip the Commission of its power to impose a local clearing requirement on individual alternative suppliers." Supp. Brief at 7. Thus, the Commission's arguments primarily focus on what it believes is the proper interpretation of Section 6w for purposes of its policy preferences.

Moreover, the Court of Appeals was correct in finding that the Commission's attempts to infer such authority in the absence of any explicit delegation are too stretched. There is no question that each electric provider – a regulated utility, an electric cooperative, a municipality, and an AES – now has individual capacity obligations, for which it must make the appropriate demonstration to the Commission based on the load that it serves. This is the SRM process, established under subsection 6w(8). Each of these capacity obligations is individual, as it is based on each providers own load; and each is distinct by group as well, because these different types of electric providers operate in distinctly different ways. Thus, for example, electric utilities, cooperatives and municipalities are distinct from most AESs in that most of these providers typically own and/or control local resources in the State. By and large, most AESs operating in the State procure their generation resources through the interstate wholesale energy market. The Legislature clearly understood this distinction, which may explain why the requirement for each electric provider to have some percentage of local resources in the zone

was dropped from the final legislation that became PA 341. The resulting language, which is controlling law, thus has no requirement for an AES to use "local resources" to meet its capacity obligation. Instead, Section 6w(8) allows each electric provider to demonstrate that it "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." MCL 460.6w(8)(a)&(b).

The Commission asserts that this "requires individual electric providers to demonstrate to the Commission that they can meet capacity obligations." *Id.* While this may be true, the Commission fails to apply the statutory definition of "capacity obligation." As the Court of Appeals held, "Section 6w(8)(c) directs that, '[i]n order to determine the capacity obligations,' the MPSC must 'set any required local clearing requirement and planning reserve margin requirement, consistent with federal reliability requirements,' and seek technical assistance from MISO in doing so. But although § 6w(8)(c) requires the MPSC to determine an LCR in order to determine capacity obligations, it does not specifically authorize the MPSC to impose an individual LCR on alternative electric suppliers. Because the MPSC has only the authority granted to it by the Legislature by "clear and unmistakable language," *Consumers Power Co.*, 460 Mich. at 155-156, 596 N.W.2d 126 (quotation marks and citation omitted), and because authority cannot be extended by inference, *Herrick Dist. Library*, 293 Mich. App. at 582-583, 810 N.W.2d 110, we must decline the invitation to infer that the MPSC has any additional authority." *In Re Reliability Plans*, 325 Mich App at 225.

The Court of Appeals correctly found that the Commission failed to cite any "clear and unmistakable language" which would allow it to set a local clearing requirement on individual

AESs. It also found that the Commission cannot extend to itself the authority to do so merely by inference.

It is also worth noting that the Commission fails to recognize that the statutory definition of "local clearing requirement" plainly emphasizes that it is a zonal requirement and makes no mention of an individual requirement. "'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)." MCL 460.6w(12)(d). The Commission's failure to closely examine the statutory language that is the basis for its authority to act is at the root of its failure to act properly within the bounds of its authority in this matter.

The Commission seems to acknowledge that Section 6w(6) is a limiting provision for its attempt to set an individual LCR on AESs. It notes that subsection 6w(6), provides that, "[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 <u>any resource that the appropriate independent system operator allows to meet the capacity obligation of the electric provider</u>." MCL 460.6w(6) (emphasis added). The Commission cites to Section 6w(8)(c), which, it admits, requires that any "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)." MPSC Supp. Brief at 7. But the Commission interprets this as "a low standard that the Commission easily met." It argues that this language gives the Commission "broad discretion to set the local clearing requirement," barring any "disruption" of "MISO's

annual planning resource auction." MPSC Supp. Brief at 8. The Commission thus moves from the statute's obvious requirements in favor of consistency with federal requirements to a position of freedom to do anything that does not positively disrupt the federal process. The Commission's interpretation of subsections 6w(8)(c) and 6w(6) thereby require the type of "interpretative gymnastics" that the Court of Appeals declined to engage in. *In Re Reliability Plans*, 325 Mich App 232.

Importantly, as the Court of Appeals noted, the Commission reaches its broad interpretations of its own authority by purposely overlooking the legislative history that specifically rejected the very exercise of authority that the Commission is seeking to implement. Thus, again, the authority for the Commission to impose an individual LCR on AESs existed in the Senate Bill 437(S)(7) in Section 6w(2)(D), which provided that under certain circumstances, electric providers would have to meet a proportional share of the local requirement through ownership or contractual rights to "any resource, that may include a resource acquired through a 3-year capacity auction, that the appropriate system operator allows to qualify <u>for meeting the local clearing requirement</u>." SB 437(S)(7), p. 81, lines 25-27 (emphasis added). Thus, the Senate Bill version required capacity resources to meet "the local clearing requirement." Nevertheless, the final version, which became PA 341, dropped this language in favor of the provision that requires that they meet "the capacity obligation <u>of the electric provider</u>." (emphasis added). MCL § 460.6w. This change is significant because, as has already been noted, MISO does not impose a locality requirement on individual LSEs, instead accepting all

recognized resources (designated by MISO as Zonal Resource Credits, or ZRCs)[9] in satisfaction of individual capacity obligations.

Thus, the Commission mistakenly claimed in its September 15 Order and on appeal that, "[w]hat changed from the version passed by the Senate to the one ultimately enacted into law is not that a locational requirement went away entirely, but that an explicit methodology was removed and replaced with provisions that leave decisions on the methodology of how to establish the locational requirement up to the Commission." Appendix 5 at EM000102b. In fact, what changed was that the locational requirement in subsection 6w(2) as applied to individual electric providers was removed, along with such supporting requirements as the anti-market manipulation requirements in Section 6w(5). If, as the Commission claims, the standards and restrictions on Commission action in setting a local purchase obligation were removed by the Legislature without removing the Commission's authority to nevertheless create, at its own discretion and without standards, such an obligation, then it does not make sense why the tandem market manipulation protections in subsection (5) should have been removed. They would still be necessary–perhaps even more so–since the Legislature was, under the Commission's interpretation, granting the Commission unbridled authority to create any kind of local purchase obligation it wished.

Thus, the Commission, in its September 15 Order and in its Application, attempts to read language back into the Act that the Legislature deliberately removed, and so attempts to claim for itself the ability to enact requirements that were explicitly considered and rejected by the Legislature. *In re MCI Telecommunications Complaint*, 460 Mich 396, 596 NW2d 164 (1999)

[9] These are "zonal" sources because they have been certified to meet the zonal LCR requirement. Thus, MISO's resource adequacy requirements are met on the zonal level by use of these resources without the necessity for individual shares to be assigned to separate LSEs, as the Commission is attempting to do.

("Where the Legislature has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to explicitly authorize what the Legislature explicitly rejected."); *Rovas*, 482 Mich at 98 ("While administrative agencies have what have been described as 'quasi-legislative' powers, such as rulemaking authority, these agencies cannot exercise legislative power by creating law or changing the laws enacted by the Legislature."). For these reasons, the determinations in the Commission's September 15 Order fail to meet the first *Chesapeake* standard as they are not "within the matter covered by the enabling statute" and so are invalid. *Chesapeake*, 59 Mich App at 98-99.

The Court of Appeals correctly held that the Commission was without either clear, unmistakable, or deferred authority to impose an individual LCR on AESs, and its opinion should be upheld.

C. THE MPSC'S IMPOSITION OF AN INDIVIDUAL LCR ON AESS WOULD VIOLATE THE FOUR-FACTOR TEST ARTICULATED IN *BRANDON SCHOOL DISTRICT V MICH ED. SPECIAL SERVICES ASSOCIATION*.

In its Supplemental Brief on Appeal, the Commission points the Court to the four-factor test recently set forth in *Brandon School District*, which looks simply to whether the action of the agency was authorized by law, and would affirm unless the agency decision "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 School District, et al, v Michigan Education Special Services Ass'n*, 191 Mich App 257, 263; 477 NW2d 138 (1992). The Commission asserts that Energy Michigan is not disputing whether the Commission's decision meets the last two of these four standards. In point of fact, Energy Michigan has not addressed the *Brandon School District* standards directly in its briefing, as this is the first time that a party has asserted their relevance. Nevertheless, Energy Michigan argued at some length that the Commission's decision in U-18197 was "made upon unlawful procedures

resulting in material prejudice." This argument formed the basis for nearly the entirety of its Reply Brief to the Commission filed with the Court of Appeals, where Energy Michigan focused on the Commission's failure to follow the Administrative Procedures Act ("APA") and its attempt to promulgate generally applicable requirements on AESs and customers under the guise of "Guidelines" without going through the formal processes required by the APA. Ultimately, the Court of Appeals found that because the Commission lacked the authority to do what it was attempting to do, it did not have to reach the issue of how it promulgated its requirements, so these issues were never reached. They were, however, most strongly disputed.

Similarly, the standard that requires that the decision not be "arbitrary and capricious" was addressed by Energy Michigan in its Brief on Appeal to the Court of Appeals. It is also worth noting that the *Brandon School District* standards are largely a subset of the six standards for setting aside an agency action under judicial review under the APA found at MCL 24.306(1), and these standards were discussed in some detail in Energy Michigan's Brief on Appeal to the Court of Appeals. So, it is inaccurate to say that Energy Michigan has not argued that the Commission has failed to meet all of the *Brandon School District* standards. Nonetheless, Energy Michigan will briefly recount the ways that the MPSC's decision to impose an individual LCR on AESs fails to meet all four of the requirements of the *Brandon School* decision upon which the Commission now relies.

1. The imposition of an individual LCR on AESs is in violation of statute – violating both state and federal law.

The first of the *Brandon School* standards is that the agency action would violate the statute. As discussed above, the Commission's action violates PA 341's requirements that the Commission's actions be consistent with federal standards and MISO's requirements. Further, if the Commission were allowed to implement an individual LCR on AESs, it would also violate

federal law. The Commission references two recently issued U.S. Supreme Court cases, *Hughes v Talen Energy Mktg, LLC,* 136 S Ct 1288 (2016), and *FERC v EPSA*, 136 S Ct 760 (2016), in its discussion of the "scope and limitations of federal and state authority over retail and wholesale electric markets." MPSC Supp. Brief at 11. The Commission states that, "[t]he Legislature presumably was aware of these decisions, and it did not want to pass a law that would invade the federal government's jurisdiction." *Id*. Presumably this is true, which makes what the Commission is trying to do so problematic. By going beyond the federally approved zonal LCR to an individual LCR (which was rejected by FERC in the FERC CRS Order) the Commission would be telling AESs where and with whom they can engage in wholesale energy contracts. This raises at least two significant federal/state jurisdictional problems.[10]

First, the Commission is correct that the Federal Power Act ("FPA"), 16 USC § 824 *et seq.*, divides jurisdiction over the electricity sector between state and federal regulators. The federal energy regulator, FERC, is vested with jurisdiction to ensure that wholesale sales and transmission of electricity are "just and reasonable." 16 USC § 824d-824e. This includes practices "affecting" such sales. 16 USC § 824d. A wholesale sale is a "sale for resale" – *i.e.*, a sale of electricity from one generation provider – such as a local utility – to another generation provider that will ultimately sell the purchased or contracted electricity to an end-use customer, *i.e.*, "the sale of electric energy at wholesale in interstate commerce." 16 USC §§ 824(b), 824e(a). FERC's jurisdiction includes both wholesale electricity rates and any rule or practice

[10] The Commission leaves the impression that all it needs to do is to clarify that the statutory language would allow it to create its individual LCR, and it has otherwise unbridled authority to do so. This is not the case. While not raised by Energy Michigan in this appeal, we believe that if the Commission proceeds with an individual LCR, it will lead to significant violations of Federal law as well, some of which are raised here only to respond to the Commission's claims and to show that the Commission cannot meet the *Brandon School District* standards.

"affecting" such rates. *Id.* The FPA vests in the FERC exclusive authority to regulate such wholesale sales. See 16 USC § 824(b); *FERC v Electric Power Supply Ass'n*, 136 S Ct 760 (2016) ("The Federal Power Act (FPA) authorizes the Federal Energy Regulatory Commission (FERC) to regulate 'the sale of electric energy at wholesale in interstate commerce,' including both wholesale electricity rates and any rule or practice "affecting" such rates."); *Hughes v Talen Energy Marketing LLC*, 136 S Ct 1288 (2016) ("The Federal Power Act (FPA), … vests in the Federal Energy Regulatory Commission (FERC) exclusive jurisdiction over wholesale sales of electricity in the interstate market.").

FERC's exclusive federal jurisdiction over facilities used to transmit electric power to interstate markets includes sales for resale that occur *intrastate* – within a state's own borders. In other words, it is not necessary for the transmission of electric energy to cross state lines to be considered an interstate sale for resale under the Federal Power Act, subject to exclusive federal jurisdiction. The U.S. Supreme Court has recognized the importance of even wholly in-state sales of energy on the wholesale market, due to the potential for monopoly utilities to engage in price-fixing to the detriment of out-of-state utilities. Thus, the Supreme Court reasoned that "if intervening companies might purchase from producers in the state of production, free of federal control, cost would be fixed prior to the incidence of federal regulation and federal rate control would be substantially impaired, if not rendered futile." *Jersey Central Power & Light Co v FPC*, 319 US 61; 71-72 (1943). AESs, whether located in or out of the State, are wholesale purchasers of electric supply whose purchases for energy and capacity are regulated by FERC or FERC's designated Regional Transmission Organization ("RTO"), such as MISO. By attempting to require an AES to purchase "local" capacity – whether from a regulated utility, such as Consumers Energy, an electric cooperative or municipal electric utility, or even another "local"

AES or third-party that owns generation in the state, the Commission is attempting to usurp exclusive federal jurisdictional authority that the FPA reserves for FERC and/or MISO. Such "sales for resale" are "wholesale" transactions outside of the Commission's retail rate jurisdiction, even if the transaction occurs completely within the state of Michigan. *New York v FERC*, 535 US 1,7 (2002) ("any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce"). The Commission's individual LCR would therefore violate the FPA.

Moreover, the Commission's individual LCR requirement on AESs would violate the dormant Commerce Clause. The Commerce Clause gives Congress the exclusive authority to "regulate commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3. The Supreme Court has held that in granting Congress this power, the Constitution implicitly prohibits states from taking certain actions that interfere with interstate commerce. Under this implied (*i.e.*, "dormant") prohibition, a state may not enact a law that "directly regulates or discriminates against interstate commerce" or whose "effect is to favor in-state economic interests over out-of-state interests." *Lebamoff Enterprises, et al*., *v Snyder, et al*, 347 F Supp 3d 301, 305 (ED Mich, 2018) ("*Lebamoff Enterprises*"), citing *Dep't of Revenue of Ky v Davis*, 553 US 328, 338 (2008) and *Int'l Dairy Foods Ass'n v. Boggs*, 622 F3d 628, 644 (6th Cir 2010).

Again, the Legislature, in constructing Section 6w, must have been cognizant of the dormant Commerce Clause, because it allowed AESs, most of whom are out-of-state electric providers, to satisfy their capacity obligations "through owned or contractual rights to any resource that the appropriate independent system operator [*i.e.*, MISO] allows to meet the capacity obligation of the electric provider." MCL 460.6w(6). As the Court of Appeals noted, "[t]he parties acknowledge that MISO permits an alternative electric supplier to meet its capacity

obligations, including the local clearing requirement, by owning or contracting for capacity resources located outside the applicable local resource zone, and does not require each alternative electric supplier to demonstrate a proportionate share of the local clearing requirement." *In Re Reliability Plans*, 325 Mich App at 10. Such a non-discriminatory contracting and purchasing requirement respects the jurisdictional limitations on Commission authority in regulating AESs.

Rather than respect the Legislature's clear rejection of an individual LCR requirement for AESs, the Commission seeks to require AESs to purchase a "small" percentage of local generation from in-state generators. See MPSC Supplemental Brief at 45 ("the local clearing requirement the Commission approved is a small percentage of a supplier's total load"). The Commission argues that at this time, since it is only requiring this "small" percentage of local purchases, it "should not overburden suppliers" who "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." MPSC Supp. Brief at 29. The size of the prohibition on interstate contracting, be it 2.7% or 94.7%, is not the relevant standard. Any mandated local generation purchase requirement placed on an AES's ability to engage in wholesale energy transactions is a classic violation of the dormant Commerce Clause. Likewise any *prohibition* of an electric provider's use of available wholesale imports to meet any reliability requirement the state may have, no matter how small the percentage of the prohibition. This is why the statute requires that if it meets the federal reliability requirements, the Commission must accept it.

Importantly, federal courts have already spoken about the State's attempts to restrict of out-of-state energy capacity in favor of in-state capacity, and found such attempts to violate the commerce clause. Judge Posner, in 2012, noted that, "Michigan's first argument – that its law

forbids it to credit wind power from out of state against the state's required use of renewable energy by its utilities – trips over an insurmountable constitutional objection. Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out of state renewable energy." *Illinois Commerce Commission, et al., v FERC*, 721 F3d 764, 776 (7th Cir 2012) (emphasis added).

Similarly, the Eighth Circuit Court of Appeals struck down the Minnesota Public Utilities Commission's implementation of a state statute that prohibited the importation from outside the state of power from a new large coal facility. The Court affirmed the federal District Court's conclusions that the prohibition of the imports was "impermissible extraterritorial legislation" and therefore "a per se violation of the dormant Commerce Clause." *State of North Dakota v Heydinger, et al*., 825 F3d 912, 913-914 (8th Cir 2016).

Finally, the U.S. Eastern District Court of Michigan has recently invalidated a Michigan statute that prohibited out-of-state wine retailers from distributing wine directly to consumers in Michigan, due to the fact that it violated the dormant Commerce Clause. The Court held that, "The governing question, therefore, is whether Michigan is permitted to enforce a statute that explicitly denies out-of-state retailers a privilege available to their in-state competitors. The answer at this stage must be no, for '[s]tate laws that discriminate against interstate commerce face a virtually per se rule of invalidity.'" *Lebamoff Enterprises*, 347 F Supp 3d at 306.

Energy Michigan believes that concerns such as these over the interaction of federal and state jurisdiction, and a desire to ensure that the Commission navigate carefully within those narrow straights, is what caused the Legislature to bind the Commission's ability to act in Section 6w within what MISO allows. By doing so, they ensured that violations of the dormant

Commerce Clause would not arise. They have now only threatened to because of agency overreach.

2. The imposition of an individual LCR on AESs would exceed the MPSC's authorized jurisdiction.

The second *Brandon School* standard is that the agency action is in excess of statutory authority or jurisdiction of the agency. As discussed above, the imposition of an individual LCR on AESs would cause the Commission to trespass on reserved federal authority and powers. It would also, as discussed above, be acting in excess of the express statutory grants in PA 341. For these reasons, the Commission's actions in its September 15 Order violate the second *Brandon School* standard as well.

3. The MPSC's September 15 Order That Imposed An Individual LCR On AESs Was Made Upon Unlawful Procedures That Resulted In Material Prejudice To AESs And Their Customers.

Although Energy Michigan raised claims of error regarding the Commission's lack of adherence to APA in rendering its decisions contained in its September 15 Order in Case No. U-18197, the Court of Appeals declined to review the merits of that claim, because it found that the Commission lacked statutory authority to impose an individual LCR on AESs. See, *In Re Reliability Plans*, 325 Mich App at 223-24.

Energy Michigan respectfully reiterates its claims of error with respect to the Commission's violations of the APA in promulgating the requirements attached to its September 15 Order. As Energy Michigan stated before the Court of Appeals, there is no question that Public Act 341 of 2016 imposes new responsibilities on the Commission and new requirements on all electric providers in the State, including AESs. Michigan's APA provides a well-established process for promulgating new rules under this precise situation. See MCL 24.231, *et seq*. The Commission completely ignored that required process, eschewing either a rulemaking

process or an evidentiary, contested case proceeding in favor of a "technical conference" that denied the legal and procedural protections of the APA and the Commission's Rules of Practice and Procedure.

The Commission's September 15 Order, in part, requires AESs, cooperative electric utilities, municipally owned electric utilities, and fully regulated electric utilities (collectively, "electric providers") to make a demonstration to the Commission, "in a format determined by the Commission, that the load serving entity (electric provider) owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator (ISO), or by the Commission, as applicable." Appendix 5 at EM000068b (citing MCL 460.6w). These are new responsibilities for the Commission, causing the Commission to have to determine not only the format of the demonstration that all electric providers must make, but also to set the "capacity obligations" that must be demonstrated to have been met. As the Commission notes later in its September 15 Order, "Section 6w established a new framework for resource adequacy in Michigan." *Id*. at EM00071b.

The Commission explained that this new framework involves determining capacity obligations, establishing a process for electric providers to demonstrate to the Commission that they have met these new obligations, and then assigning a capacity charge if those obligations are not met. Appendix 5 at EM000075b-EM000076b. The Commission notes that "[t]he application of charges under the SRM is limited to areas with retail electric choice (choice), but is reliant on the capacity demonstration requirements and processes applicable to all areas and energy providers in the state." Appendix 5 at EM000076b (emphasis added).[11] The Commission

[11] It is noteworthy that the development of the capacity charge was done in a series of contested cases (e.g., U-18239 for Consumers Energy), while the requirements associated with

goes on to note that, "[u]nder this capacity demonstration framework, the Commission must determine the capacity obligations for individual providers over a four-year period and create a process to evaluate whether such obligations are met." *Id.* These statutory requirements may be found in Section 6w(8), MCL 460.6w(8). However, nowhere in subsection (8) does the Legislature specify the mechanisms by which the Commission is to establish the obligations under the new capacity demonstration framework, or the process for determining when those obligations are met. These obligations and processes are applicable to all electric providers in the state, that is to say, they are of general applicability, they prescribe the procedure to be followed by the agency, and they impose legal requirements on electric providers.

The Commission admits that it did not conduct a contested case, or otherwise promulgate the new capacity obligations initially established in the September 15 order by a rulemaking proceeding. In its Supplemental Brief on Appeal, the Commission states that:

> 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. (MPSC's App. Pp. 353-354, 6/15/17 Order).
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> * * *
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> . . . 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.)

Supp. Brief on Appeal at 2, 4.

It is plain that the determinations the Commission made, and the requirements it sought to impose in its September 15 Order, are what the APA and Michigan courts would define as

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the LCR and capacity demonstration were created put into place without a contested case or a rule promulgation process in U-18197.

rules. In its September 15 Order, the Commission asserted that it is implementing a law administered by the agency, and that it has the authority to impose a methodology on all electric providers active in the state. These were "substantive standards implementing a program," *i.e.*, the capacity demonstrations that each electric provider would have to make, and how each electric provider would help meet a local clearing requirement. *Family Independence Agency*, *supra*. Because the Commission purported to make the determinations in its September 15 Order binding on existing and future third parties, the determinations were of general applicability and therefore constituted rules under the APA.

The Commission gives no coherent reasons why it believes that "no evidentiary hearing was required or held in Case No. U-18197." MPSC Supp. Brief at 4. Nowhere in subsection 6w(8) does the Legislature empower the Commission to impose these new obligations and implement the new process by means of a either a collaborative workgroup or a contested case. Had the Legislature intended for the Commission to implement these new requirements by means of either a workgroup or a contested case, it could plainly have said so. In fact, in subsection 6w(3), the Commission is required to establish a new "capacity charge" and the Commission is explicitly instructed that "[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." MCL 460.6w(3). The Legislature clearly knew how to specify an alternative process to rulemaking in Act 341 where it intended such to apply. No such explicit grant of authority is provided in subsection 6w(8).

Moreover, the Commission's statements that it "accepted comments and heard legal arguments from interested parties" through its "technical conferences among interested stakeholders instead of a contested case" serves as a deflection for what this Court has called the APA's "elaborate procedure" for rulemaking. *Detroit Base Coalition*, 431 Mich at 177-178. The Commission imposed rights and obligations on all electric providers in the state – most of whom were the "interested parties" to which the Commission refers. However, because these new rights and obligations carry legal and financial consequences, and they would apply to not only current electric providers, but to new electric providers (such as a newly licensed AES) in the future, they are meant to apply as "general standards," applicable to current and future electric providers.

Michigan Courts have previously spoken to the importance of the Commission's adherence to the APA before instituting rules of general applicability. In *Michigan Electric and Gas Assoc v Michigan Public Serv Comm*, the Court of Appeals was asked to determine whether the "guidelines" the Commission issued by means of a contested case to govern affiliate transactions between regulated and nonregulated affiliates of utilities were valid. *Michigan Electric and Gas Assoc v Michigan Public Serv Comm*, 252 Mich App 254; 652 NW2d 1 (2002). The Court's concluding statements are instructive and so are quoted here in full:

> Invoking the public interest and the need for policy that is responsive to a changing industry, the PSC eschewed the procedural mandates of the APA in favor of its own course of action. By choosing to implement "guidelines" by order in a contested case against unnamed parties, yet with the force and effect of law, the PSC culled elements of rulemaking, adjudication, and general policy formulation, with little regard for the dictates of the APA. While we do not doubt the PSC's legitimate concerns of lack of access to the accounts and records of a utility's nonregulated affiliates and subsidiaries, and the potential for "cross-subsidization of nonutility investments through utility rates," . . . the process utilized by the PSC constituted a rather heavy-handed rebuke of established APA procedures, and accordingly, we are compelled to invalidate that process.

Id. at 267-268 (emphasis added). This Court thereby vacated the Commission's order and should do the same here.

Similarly, when Act 141 of 2000 ("Act 141") went into effect, subsection 10a(4) required the following of the Commission:

> Within 180 days after the effective date of the amendatory act that added this section, the commission shall establish a code of conduct that shall apply to all electric utilities. The code of conduct shall include, but is not limited to, measures to prevent cross-subsidization, information sharing, and preferential treatment, between a utility's regulated and unregulated services, whether those services are provided by the utility or the utility's affiliated entities. The code of conduct established under this subsection shall also be applicable to electric utilities and alternative electric suppliers consistent with section 10, this section, and sections 10b through 10bb.

Just as with PA 341, Section 6w(8), Act 141 provided no explicit instructions for how the Commission was to develop and implement the new requirements. In the case of the code of conduct required under Act 141, the Commission attempted to implement the new requirements by means of a contested case. An appeal was brought on various grounds, and Section II(B) of that appeal dealt explicitly with the sufficiency of the Commission's actions under the APA. See *Detroit Edison Co v Michigan Public Serv Comm*; 261 Mich App 1, 680 NW2d 512 (2004), *vacated in part by* 472 Mich 897, 695 NW2d 336 (2005). While the Court of Appeals agreed with the Commission that it could use a contested case process to create new rules of general applicability, that holding was explicitly vacated by the Supreme Court, which said:

> we VACATE only Part II(B) of the March 2, 2004 Court of Appeals opinion, in which the Court of Appeals erroneously concluded that a generally applicable industry code of conduct may be promulgated through a contested case proceeding. The conclusion by the Court of Appeals in Part II(B) is contrary to M.C.L. §§ 24.203(3) and 24.207 as well as existing case law, e.g., *Detroit Base Coalition for the Human Rights of the Handicapped v. Dep't of Social Services*, 431 Mich. 172, 428 N.W. 2d 335 (1988); *Michigan Electric & Gas Assoc. v. Public Service Comm.*, 252 Mich.App. 254, 652 N.W.2d 1 (2002).

Detroit Edison Co v Michigan Public Serv Comm, 472 Mich at 897.

The present case is an even more egregious violation of the APA process than those presented in *Detroit Edison* and *Michigan Electric & Gas Association*. In both those instances, the Commission sought to replace the rulemaking process with the contested case process.[12] But in its September 15 Order, the Commission wholly abandoned all processes recognized by the APA, and acting through its own self-created "technical conference" process, it violated every requirement of MCL 24.306(1): it acted in violation of its authorizing statute; it exceeded its statutory authority; it relied upon an unlawful procedure; its decisions lacked a record of competent, material, and substantial evidence to support them; its actions were an unwarranted exercise of discretion; and its decisions were affected by other substantial and material errors of law, as discussed below. MCL 24.306(1). Any <u>one</u> of these violations of the requirements of the APA is sufficient to make the requirements the Commission purports to impose under the September 15 Order invalid and unenforceable. Energy Michigan thus submits that the Commission's determinations under the September 15 Order have been made under unlawful procedures resulting in material prejudice to Appellees, and thus are in violation of the third of the *Brandon* Schools standards.

[12] The Commission's subsequent contested case proceeding in Case No. U-18444, that resulted in a June 28, 2018 order, which took the next step of implementing the determinations made in Case No. U-18197 by determining the applicable standards for the appropriate <u>*allocation*</u> of the forward locational requirement, not only would not redeem the Commission's failure to conduct a rulemaking procedure in Case No. U-18197, but would also violate the APA, in that the generally applicable standards for electric providers' individual share of the LCR that the Commission determined in that proceeding should have been conducted according to a rulemaking – not a contested case – proceeding. *See Detroit Edison Co v MPSC*, 472 Mich 897; 695 NW2d 336 (2005); *Michigan Electric and Gas Assoc v Michigan Public Serv Comm*, 252 Mich App 254; 652 NW2d 1 (2002); and *Detroit Edison Co v MPSC*, 261 Mich App 1, 680 NW2d 512 (2004), *vacated in part by* 472 Mich 897, 695 NW2d 336 (2005).

4. As there exists no implicit delegation of authority, the MPSC's imposition of a LCR on individual AESs is arbitrary and capricious.

The fourth and final *Brandon Schools* standard would find an agency action unlawful if it was arbitrary and capricious. The Court of Appeals found that the Commission's interpretation of Section 6w "conflicts with the Legislature's intent when enacting MCL 460.6w." *In Re Reliability Plans*, 325 Mich App at 229. Nonetheless, the Commission seeks "broad deference" from this Court to allow its interpretation Section 6w to include the imposition of an individual LCR on AESs. That the Commission has failed to appreciate the limited nature of its jurisdiction is clear in its discussion on page 21 of its Supplemental Brief, where it compares its own discretionary reach to that of the Circuit Courts. Thus, the Commission states that, "[l]ike 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." MPSC Supp. Brief at 21. This assumption of broad and implied deference runs counter to settled law in the State and reflects the arbitrary and capricious exercise of the Commission's authority in this matter.

The broad deference sought by the Commission here amounts to *Chevron* deference. Yet, this Court has rejected for Michigan agencies the *Chevron* deference doctrine,[13] which federal courts use to review federal agency interpretations. Therefore, this Court has held that:

> While the *Chevron* inquiries are comparatively simple to describe, they have proven very difficult to apply. This Court has never adopted *Chevron* for review of state administrative agencies' statutory interpretations, and we decline to adopt it now. The vagaries of *Chevron* jurisprudence do not provide a clear road map for courts in this state to apply when reviewing administrative decisions. Moreover, the unyielding deference to agency statutory construction required by *Chevron* conflicts with this state's administrative law jurisprudence and with the separation of powers principles discussed above by compelling delegation of the judiciary's constitutional authority to construe statutes to another branch of

[13] *Chevron USA Inc v National Resources Defense Council, Inc*, 467 US 837 (1984).

> government. For these reasons, we decline to import the federal regime into Michigan's jurisprudence.

Rovas, 482 Mich at 111 (citations omitted). Given that the Commission can cite to no specific authority in Section 6w that would allow it to implement an individual LCR on AESs, it seeks broad, implied authority for the very type of interpretative "road map" that this Court and the Court of Appeals have declined to embark upon. Thus, the following statements from the Commission's Supplement Brief are nothing more than the Commission's attempts to have this Court apply the *Chevron* doctrine and allow it to broadly imply legislative authority that is simply not explicitly present in Section 6w:

- "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."

- "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."

MPSC Supp. Brief at 1 and 3 (emphasis added).

The Commission ultimately argues that it must be deferred to as having broad delegated or implied authority, or this Court risks undermining the delegated authority of all administrative agencies. MPSC Supp. Brief at 26. This argument turns on its head the legal standard applied to agency grants of authority under Michigan law. It would require the Legislature to specifically prohibit actions or else the agency would be free to do anything it wished – in effect anything not prohibited would be allowed. Instead, the standard, as this Court has noted, is that power must be "conferred by clear and unmistakable language." This is the standard that the Court of Appeals

correctly used in overturning the September 15 Order. The Commission's concerns over limitations on its delegated authority properly reside with the Legislature, not the courts.

Finally, the Commission's reliance on the Michigan Court of Appeals' recent decision in *In re Implementing Section 6w of 2016 PA 341 for Cloverland Electric Cooperative*, Slip Opinion for Publication July 23, 2019 (Court of Appeals Docket No. 342552). ("*Cloverland*") as yet another example of implied authority should fail. In the *Cloverland* case, the Court 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" (i.e., between full service customers and customers on electric choice). The Commission states that this Court should interpret the *Cloverland* case, "[i]n 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." MPSC Supp. Brief at 28.

There are two important points to make here. First, the *Cloverland* case was an action brought by an electric cooperative that challenged the Commission's ability to implement a state reliability mechanism ("SRM") and assess the capacity charge, which is required to be paid when an AES fails to make the required capacity demonstration, upon an electric cooperative's full-service retail member/customers. At the outset of the Opinion, the Court of Appeals noted that in its Opinion in *In Re Reliability Plans,* it had stated that, "[t]he parties agree that because the FERC did not put into effect the MISO-proposed tariff, the PSC is required by § 6w(2) to establish a state reliability mechanism." See *In Re Reliability Plans*, 325 Mich App at 213; *Cloverland* at 3. There is therefore no dispute among the parties over the Commission's authority to institute an SRM, so long as the SRM is consistent with the statutory requirements

and contains an LCR that is consistent with MISO's requirements – *i.e.*, is zonal rather than individual.

Second, the Commission simply uses the *Cloverland* decision to try yet again to "infer" authority that is simply not in the decision itself. Thus, the Commission tries to extrapolate the fact that the Court in *Cloverland* held that after review, the MPSC "necessarily must have the authority to set the SRM," to mean that the Commission "necessarily must have the authority" to impose an individual local clearing requirement upon AESs "under Sections 6w(6), (7) and (8)(b)." MPSC Supp. Brief, pp. 27-28. The logic for this connection is simply not there. The provisions and requirements for an SRM in 6w(2) are quite different from an AES's capacity obligations under Section 6w(6), or any of the electric providers' demonstrations under Sec. 6w(8). The Commission's reasoning and actions here are "arbitrary and capricious" in that they appear to be designed to enable the Commission to achieve its own ends rather than to be rooted in the language of the Commission's statutory authority.

D. THE MPSC FAILS TO PRESENT ANY EVIDENCE THAT "BLACKOUTS" ARE POSSIBLE, SHOULD THE MPSC NOT BE GIVEN THE RIGHT TO IMPOSE AN INDIVIDUAL LCR ON AESS.

The Commission raises the specter of alleged electric reliability problems for the State if it is not allowed to impose an individual LCR on AESs. In part, the Commission cites to DTE's dire predictions 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." MPSC Supp. Brief at 29. The Commission states that "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." *Id.* Other than these alarmist predictions produced for this litigation, the MPSC provides no evidence, either from the proceedings below, or in its periodic assessments of the State's electric grid and resources, that that there is any reliability crisis that would be precipitated by the Court of Appeals requiring the MPSC to implement Act 341 in accordance with the statute's plain language.

In fact, the recent history of all electric providers' capacity demonstrations, as made annually by law without the restrictions of an individual LCR requirement, shows that there continues to be ample in-state supplies and import capacities available. Thus, the Commission in its June 28, 2018 order in Case No. U-20444 stated that, "[t]he Staff stands by its position that an individual LCR is not necessary to secure reliability, provided that the 10% cap on electric choice continues and effective import capabilities remain at or better than the levels that exist today." Appendix 10, EM000228b-EM000364b. More specifically, the Commission stated that:

> The Staff has gone to great lengths in this proceeding to stress that rate-regulated utilities have financial incentives to own capacity resources within their service territories, and that given the amount of capacity resources currently owned by DTE Electric and Consumers, as well as the 10% cap on choice load, the Staff does not believe there is a necessity from a *reliability* standpoint for AESs to contribute to the forward locational requirement.

Id. at EM000350b-EM000351b (emphasis in original).

More recently, On August 8, 2019, in Order No. U-20154, the Commission accepted Staff's findings that all electric providers, including AESs, met their respective capacity demonstrations for requisite levels of planning resources for planning year 2022/23. Appendix 8 at EM000200b. As to reliability in Zone 7, the Commission stated that:

> The Staff concludes that MISO LRZ 7 will have sufficient resources to meet its LCR for the prompt PY (2019/2020), and that LRZ 7 is projected to exceed its LCR by more than 1,300 megawatts (MW) in PY 2022/2023. Id., pp. 7-8. LRZ 7 comprises the Lower Peninsula of Michigan (with the exception of the southwest corner, which is discussed separately). The Staff projects that LRZ 7 will have

> more than 700 MW of surplus capacity available relative to its PRMR in PY 2022/2023.

Id. at EM000199b. Therefore, the Commission's dire predictions of reliability catastrophes, including imminent blackouts, that it threatens this Court with if it is not allowed to implement an individual LCR on AESs stands in stark contrast to the determinations that both it and its Staff have made outside the litigation context in the most recent capacity demonstration docket, U-20154. In fact, the MPSC concluded its recent, August 8, 2019 Order by remarking that it "looks forward to the continued robust review of capacity resources for future planning years." *Id* at EM000201b. Thus, contrary to the litigation position adopted by the MPSC in this proceeding, the position of the MPSC when it is making determinations about the SRM process in its official capacity is that it is a "robust review of capacity resources for future planning years" even without the individual LCR (which it has not used for the past two cycles of review).

Nor can the broad and discretionary authority to implement its preferred individual LCR that the MPSC is attempting to delegate to itself be justified simply by a policy argument in these pleadings that the state's electric reliability would be better off if the Legislature had granted the MPSC such sweeping authority, and therefore that it must surely have intended to do so. As the Commission details in its Application, the Legislature was engaged in an extended process of hearings, drafting amendments, rehearings, and the like before Act 341 was finally passed and signed into law. In that process, issues of reliability of the state's electric grid featured prominently. So the Legislature was well aware of the issues that the Commission now seeks to invoke, it weighed them, and it found that the existing language provided all the assurance of reliability that the state needs at this time.

Although the MPSC now seeks this Court's support in allowing it to implement requirements that the Legislature ultimately rejected, the proper recourse is not to seek inferred

authority through the courts, but to obtain plain delegated language through the legislative process. For this reason, this Court has remarked that, "[i]n construing the statutes empowering the PSC, this Court does not weigh the economic and public policy factors that underlie the action taken by the PSC. … The Legislature, not this Court, is the body that must consider these questions and weigh the economic and social costs and benefits of restructuring." *Consumers Power Co v Public Service Comm'n*, 460 Mich 148, 156; 596 NW2d 126 (1999).

Because the Commission has failed to demonstrate that there is any explicit statutory language supporting its claim to authority to require an individual LCR for AESs, because it fails all of the *Brandon School* standards, and because its other arguments are attempts to allow the Commission and this Court to replace the Legislature as the body which establishes state policy, Energy Michigan respectfully requests that this Court reject the Commission's Application for Leave to Appeal.

IV. RELIEF REQUESTED

Wherefore, Energy Michigan respectfully requests that the Michigan Supreme Court reject the Commission's Application for Leave to Appeal and uphold the Court of Appeals' July 12, 2018 unanimous and published Opinion as correct in all regards.

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