STATE OF MICHIGAN

IN THE SUPREME COURT

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

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

CONSUMERS ENERGY COMPANY and MICHIGAN PUBLIC SERVICE COMMISSION, Appellants, v. ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY AND ENERGY MICHIGAN, INC., Appellees.	Supreme Court Nos. 158305, 158306, 158307, and 158308 Court of Appeals Nos. 340600 and 340607 MPSC Case No. U-18197

REVISED[1] AMICUS CURIAE BRIEF OF CHARLES RIVER LABORATORIES, INC.

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[1] Consistent with MCR 7.312(H)(4).

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Statement of Question Presented iii

I. Statement of Interest of Amicus Curiae 1

II. Introduction 2

III. Statement of Facts 3

IV. Standard of Review 7

V. Argument 7

A. The Court of Appeals correctly declined the PSC's invitation to allow it to engage in ultra vires imposition of an LCR on individual LSEs without clear and unmistakable words from the Legislature to support such authority. 7

B. The Court of Appeals based its decision on the language in Act 341. 8

C. The Applicants' arguments do not reach the threshold of "clear and unmistakable" language providing authority for imposing an LCR on individual AESs. 8

D. The PSC's proposed embargo on out of state generation resources relies upon an 'elephant hidden in a mousehole.' 12

VI. Conclusion 13

TABLE OF AUTHORITIES

Cases

Ass'n of Businesses Advocating Tariff Equity v PSC (In re Reliability Plans of Elec Utilities 2017-2021), 325 Mich App 207; 926 NW2d 584 (2018) 11
Donajkowski v Alpena Power Co, 460 Mich 243; 596 NW2d 574 (1999) 11
Enbridge Energy, Ltd P'ship v Upper Peninsula Power Co, 313 Mich App 669; 884 NW2d 581 (2015), lv den 500 Mich 997; 894 NW2d 605 (2017)..... 11, 12
People v Arnold, 502 Mich 438; 918 NW2d 164 (2018) 13
Union Carbide Corp v PSC, 431 Mich 135; 428 NW2d 322 (1988) 8
Whitman v American Trucking Ass'ns, 531 US 457; 121 S Ct 903; 149 L Ed 2d 1 (2001).....13

Statutes

MCL 460.6w ..... *passim*
MCL 460.10(c).....6

Legislation

Customer Choice and Electricity Reliability Act, Public Act 141 of 2000.....2
Public Act 341 of 2016 2

Rules

21 CFR Part 11.....4

PSC Orders

September 25, 2012, Case No. U-17032 6
April 12, 2018, Case No. U-18370 6

STATEMENT OF QUESTION PRESENTED.

Amicus curiae Charles River Laboratories, Inc. adopts as its own the Statement of Question Presented set forth in the answer filed by the Association of Businesses Advocating Tariff Equity ("ABATE") to the applications for leave to appeal filed by the PSC and Consumers Energy and set forth the response brief filed by ABATE in opposition to the PSC and Consumers Energy supplemental briefs.

REVISED AMICUS CURIAE BRIEF OF CHARLES RIVER LABORATORIES, INC.[2]

Charles River Laboratories, Inc. ("Charles River"), through its legal counsel, Gallagher Law, states as follows for its revised amicus curiae brief in opposition to the applications for leave to appeal of the Michigan Public Service Commission ("PSC") and Consumers Energy Company ("Consumers Energy") in these cases:

I. STATEMENT OF INTEREST OF AMICUS CURIAE

Charles River is a global supplier of product-focused solutions to industries ranging from academia to biotechnology to government and foundations to personal care to veterinary medicine, as well as many other industries in between. Charles River's interest in this proceeding stems from (a) the significant electricity consumption at its facility in Mattawan, Michigan ("Charles River-Mattawan"); (b) its global commitment to procuring competitive renewable energy resources for its operations to reduce its carbon footprint; and (c) its desire to continue to be able to access market rates for that renewable power, as allowed for up to 10% of Michigan electric ratepayers by the Customer Choice and Electricity Reliability Act, 2000 PA 141, as amended (the "Electric Choice Act"), with significant cost savings through an alternative electric supplier ("AES") rather than pay exorbitant bundled monopoly rates for power through an incumbent investor-owned utility like I&M.

[2] No counsel for any party to the cases authored this Brief in whole or in part and no counsel or party to the cases made a monetary contribution intended to fund its preparation or submission.

II. INTRODUCTION

The key to the Charles River interests expressed above is retail open access and choice for electric power in Michigan, the future viability of which in Michigan – as intended by the Legislature for up to 10% of electric power service – hangs in the balance here. The Court of Appeals decision honors the Legislature's expressed purpose for the Electric Choice Act which allows Charles River to access market-based regional and wholesale electric markets and construes Section 6w of Public Act 341 of 2016 ("Section 6w") consistent with not only the Electric Choice Act but with Act 341's express language.

This Court should decline to disturb the correctly-decided opinion of the Court of Appeals because that Court correctly concluded that the PSC exceeded the clear and unmistakable statutory authority granted it by the Legislature when the PSC decided it could impose a local clearing requirement ("LCR") on individual load serving entities ("LSE") such as alternative electric suppliers ("AES"). Like the Court of Appeals, this Court should decline the PSC's and Consumer Energy's invitation to engage in "interpretive gymnastics" and should deny leave to appeal.

III. STATEMENT OF FACTS

Amicus curiae Charles River adopts as its own the Statement of Facts set forth in the Association of Businesses Advocating Tariff Equity's ("ABATE") answer to the applications for leave to appeal filed by filed by the PSC and Consumers Energy

and the response brief filed by ABATE in opposition to the PSC and Consumers Energy supplemental briefs.

There are several background points which will provide the Court with an understanding of who Charles River is and how its amicus curiae participation will aid the Court in this case. First, Charles River is the United States presence of a multinational and multidisciplinary set of product-focused business operations on five continents and in over 20 countries, employing over 14,700 individuals worldwide. From its over 80 facilities across the globe, Charles River delivers solutions covering an array of areas, including research, safety, scientific, laboratory, biological testing, and vaccine to its customers in a wide variety of industries, including academia, agrochemical and biocide, biotech and pharmaceutical, chemical, compounding pharmacy, contract manufacturing organization, dialysis, government and foundations, medical device, nutraceuticals and dietary supplements, personal care and cosmetics, and veterinary medicine.

The Charles River facility in Mattawan, Michigan ("Charles River-Mattawan") is a significant component of the Charles River global operations. Charles River-Mattawa performs general toxicology studies and specialized studies such as developmental and reproductive toxicology, ototoxicity, ocular toxicology, and abuse liability, as well as supporting the development of medical devices and gene and cell therapies. Charles River-Mattawan was acquired in 2018 when Charles

River completed the acquisition of MPI Research, LLC, a premier preclinical contract research organization ("CRO") founded in 1995. The Charles River-Mattawan acquisition enhanced Charles River's position as a leading global early-stage CRO by strengthening the ability to partner with clients across the drug discovery and development continuum. Charles River-Mattawan continues under the Charles River safety assessment umbrella, providing critical services, new capabilities, and expanded capacity for the growing biotechnology industry.

Another noteworthy fact is that Charles River-Mattawan maintains the world's largest preclinical laboratory facility, with over one million contiguous square feet, including vivarium, laboratory, and test/control article storage spaces, and employs over 1,800 people which represent over 10% of the Charles River worldwide workforce. From this facility, Charles River-Mattawan operates in a highly-regulated business space, maintaining compliance activities with agencies including the U.S. Food and Drug Administration, U.S. Environmental Protection, U.S. Nuclear Regulatory Commission, U.S. Department of Agriculture, and U.S. Department of Justice Drug Enforcement Administration.

From an infrastructure and operations perspective, Charles River-Mattawan utilizes a computer system approach which maintains compliance with 21 CFR Part 11 supporting a robust electronic data and electronic signature validation process, sound electronic data archival procedures, strong direct database update processes,

streamlined study data audits for quality assurance, access to all systems used to collect data, and electronic data review and audits which include audit trails and metadata.

Charles River-Mattawan uses a large amount of energy to power its operations. Charles River-Mattawan uses over 32,000,000 kWh of electricity each year, the large majority of which is consumed by the facilities' temperature, humidity, and ventilation equipment, in addition to digital data management computer systems.

Charles River-Mattawan is situated in the electric service territory of the Indiana Michigan Power Company ("I&M"). The I&M service territory where Charles-River Mattawan takes electric service is part of PJM Interconnection, LLC rather than Midcontinent Independent System Operator, Inc. ("MISO"), the latter of which is the regional transmission organization territory for the instant matters. While Charles River does not take electric service in the MISO territory, Charles River offers the perspective to this Court of a Michigan employer and competitor on the global stage which has recently achieved long-sought access to electric choice, allowing it to save significantly on its overhead business costs while continuing to employ Michiganders and simultaneously meeting its global policy initiative of procuring renewable electric power.

The history of electric choice in the I&M territory is checkered. In September 2012, in Case No. U-17032, the Michigan Public Service Commission set the capacity charge payable to I&M by AESs at such a high level that it made the economics of electric choice service uneconomic to a degree that no AES was able to offer electric choice service in that service territory at competitive rates. From 2013 to 2019, Charles River-Mattawan – like all I&M customers – was unable to access market-based power AES because promise of electric choice was frustrated in the I&M territory during that period.

In 2019, that situation changed, after the PSC issued an April 12, 2018 Order – recently affirmed on appeal to the Michigan Court of Appeals – in Case No. U-18370 which set the capacity charge in the I&M territory at a level ($288/MW-day) which allowed AESs to offer competitive power, fulfilling the promise of electric choice in that territory beginning in February 2019 when the electric choice 'cap' re-set to 10% of the weather-adjusted load of I&M in 2018. It thus came to pass in February 2019, after six years, the first I&M ratepayers again began accessing market-priced power through retail open access electric choice, and Charles River-Mattawan is one of those ratepayers.

Not only has Charles River-Mattawan begun to access market-based pricing on power through its AES, but has been able to contract with its AES for renewable wind power to serve its facility, fulfilling its global commitment to responsible

power usage which reduces its carbon footprint. The renewable wind power which Constellation obtains via bilateral contract comes from outside of Michigan to serve Charles River-Mattawan.

IV. STANDARD OF REVIEW

Amicus curiae Charles River adopt as its own the Standard of Review set forth in ABATE's answer to the applications for leave to appeal filed by the PSC and Consumers Energy and ABATE's response brief filed in opposition to the PSC and Consumers Energy supplemental briefs.

V. ARGUMENT

A. The Court of Appeals correctly declined the PSC's invitation to allow it to engage in ultra vires imposition of an LCR on individual LSEs without clear and unmistakable words from the Legislature to support such authority.

Despite the complex regulatory regime in at issue in this case with Act 341 of 2016's Section 6w, this case boils down to a simple question of the boundary of the power granted to an administrative agency by the Legislature: Did the Legislature give the PSC the power by clear and unmistakable language to impose an LCR on individual LSEs, such as AESs?

In a word? No.

If the PSC or Consumers Energy were able to point to express statutory language in Section 6w to support the imposition of an LCR on individual LSEs or AESs, then they would certainly have done so before the Court of Appeals and this

case might have reached a different result in that tribunal. The PSC and Consumers Energy simply cannot point to words giving that authority because they don't exist in the statutory language adopted by the Legislature. Without clear and unmistakable language support its asserted authority, the arguments of the PSC and Consumers Energy fail, and this Court should deny leave. *Union Carbide Corp v PSC*, 431 Mich 135, 146; 428 NW2d 322 (1988).

B. The Court of Appeals based its decision on the language in Act 341.

The Court of Appeals based its decision on the language in Act 341. The PSC would have this Court disturb that decision based on a lack of conflict with the "spirit and purpose" of that statute, (PSC Suppl Br at 1-5, 24), while the PSC admits "Act 341 is silent about the [PSC's] authority to impose the [LCR] on [AESs]." (PSC App at 41, 46-47). As discussed at length by ABATE, (ABATE Suppl Br Response to PSC at 24-27, 29-30), Michigan law does not support the PSC's position, and in fact undercuts it at every turn.

C. The Applicants' arguments do not reach the threshold of "clear and unmistakable" language providing authority for imposing an LCR on individual AESs.

In its Supplemental Brief, Consumers Energy's arguments encircle the concept of clear and unmistakable language allowing the PSC to impose an LCR on individual AESs, but those arguments do not ever cross that critical threshold. Consumers Energy first argues that "Section 6w…Authorizes the MPSC to

Determine the LCR Which Will Apply to Individual Electric Providers" and that "[t]here would be no need to determine the LCR as part of capacity obligations if the MPSC is prohibited from applying it as part of each electric provider's capacity obligations, including those of an individual AES."[3] This argument implicitly admits that "clear and unmistakable" language does not exist to support applying an LCR to individual LSEs and AESs. The argument also ignores the possibility that the Legislature gave express authority to determine the LCR but stopped short of allowing it to be imposed on individual LSEs and AESs. The fact that the Legislature stopped short of allowing the LCR to be imposed on individual AES is best illustrated by the removal of that language from the final version of the legislation.

This "no need to determine" argument falls short of identifying "clear and unmistakable" language in the statute affording the PSC the power it desires.

The next argument offered by Consumers Energy is that the "layered structure" of Section 6w "further demonstrates" Legislative authorization to implement an LCR as part of AESs capacity obligations.[4] First, there has been no demonstration to "further" with this argument. Second, this argument also fails to identify "clear and unmistakable" words which give the PSC the authority which Consumers Energy insists exists by virtue of "layered structure."

[3] Consumers Energy Supplemental Br at 26-27.
[4] *Id.* at 36.

The next Consumers Energy argument is that the aggregation of capacity resources by cooperatives and municipal utilities "supports the Commission's statutory authority to include an LCR for all individual electric providers capacity obligations under Act 341, including AESs."[5] The flaw in this 'support' argument is that the language of Act 341 does not state that such statutory authority for the Commission exists.

Consumers Energy's arguments continue with another 'support' argument,[6] a 'consistent with' argument concerning MISO,[7] and an 'inconsistent with' argument concerning authority of another Court of Appeals panel.[8] None of these arguments provides sufficient 'boot-strap' to reach the threshold of "clear and unmistakable" language from the Legislature.

The last argument offered by Consumers Energy is that removal of individual LCR imposition language does not diminish the Commission's authority.[9] However, this argument, too, is unpersuasive, Consumers Energy has failed to demonstrate that such authority exists by "clear and unmistakable" words.

The PSC has demonstrated an interest in recent years in testing, if not pushing the limits of, the authority delegated to it by the Legislature. See, e.g., *Enbridge*

[5] Consumers Energy Supp Br at 38.
[6] *Id.* at 39-41.
[7] *Id.* at 41-46.
[8] *Id.* at 46-47.
[9] *Id.* at 47-49.

Energy, Ltd P'ship v Upper Peninsula Power Co, 313 Mich App 669, 678; 884 NW2d 581 (2015) (PSC exceeded clear statutory authority when it approved revenue decoupling mechanism based on settlement agreement, which agreement did not transform an ultra vires act into a legal one), lv den 500 Mich 997, 997; 894 NW2d 605 (2017). Like *Upper Peninsula Power Co* case, this is another where the PSC has overstepped its bounds in pursuit of ultra vires action.

Importantly, the express words which would have granted the authority to impose an LCR on individual LSEs was *removed from the proposed legislation before it was finally adopted*. This act, in conjunction with adoption of the legislation *without* that language plainly supports the correct result reached in the Court of Appeals. On this point, the Court of Appeals articulated a critical principle of Michigan law: the law is what the Legislature states with words, not what the Legislature is silent upon. *Ass'n of Businesses Advocating Tariff Equity v PSC (In re Reliability Plans of Elec Utilities 2017-2021)*, 325 Mich App 207, 227 n 9; 926 NW2d 584 (2018) ("Michigan courts determine the Legislature's intent from its words, not from its silence") (citing *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999)). The attempt by the PSC and Consumers Energy to conjure from the Legislature's silence that which the Legislature failed to express with its words (and, in fact, struck and removed those words before adopting

legislation) simply fails to support the requirement of "clear and unmistakable" language supporting delegation of power.

No amount of legal wrangling changes the plain fact that the Legislature did not use words in Section 6w which grant the authority the PSC (and the utilities, like Consumers Energy) wants to exercise. For that reason, the PSC's assertion that it can exercise such authority is an assertion of the ability to exercise ultra vires conduct. This Court has made clear to the PSC in the past that ultra vires conduct is disallowed by Michigan law. *Upper Peninsula Power Co*, 325 Mich App at 678. The Court should reach a similar result here to that in *Upper Peninsula Power Co* and decline to grant leave to appeal.

D. The PSC's proposed embargo on out of state generation resources relies upon an 'elephant hidden in a mousehole.'

The PSC argues that the Court of Appeals "could redefine how courts treat agencies" and could "erode other agencies' discretionary authority," arguing that the Legislature delegated "broad authority" to impose an LCR which ultimately includes imposing an LCR on individual AESs. (PSC Suppl Br at 25-26).

Allowing the PSC the power to implement an embargo on electrons generated outside Michigan would frustrate the purpose of the Electric Choice Act, and could one day prevent businesses like Charles River from accessing renewable generation resources located outside of Michigan. Such a broad grant of fundamental authority to upend the purposes of the Electric Choice lacking express language delegating

that authority by the Legislature would fail to meet the transparency required of such a critical policy determination.

As this Court has recognized, Michigan's Legislature "does not, one might say, hide elephants in mouseholes." *People v Arnold*, 502 Mich 438, 490 n 18; 918 NW2d 164 (2018) (quoting *Whitman v American Trucking Ass'ns*, 531 US 457, 468; 121 S Ct 903; 149 L Ed 2d 1 (2001)). It seems unlikely that, after having considered potential legislation with express language reflecting authority to impose LCRs on individual AESs, and then removing that language before adopting legislation, the Legislature would have nonetheless hidden such an elephantine grant of "broad authority" in a mousehole in Section 6w. Charles River submits that the Legislature did no such thing, and this Court should therefore deny the applications for leave filed by the PSC and Consumers Energy.

VI. CONCLUSION

For the above-stated reasons, Charles River Laboratories, Inc. respectfully requests that this Court deny the Applications for Leave to Appeal of the PSC and Consumers Energy. The unanimous and published decision of the Court of Appeals is correct, preserves the status quo of Michigan's limited competitive electric market, and should not be disturbed by this Court.

September 5, 2019

Respectfully submitted,

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Being duly sworn, I verify the foregoing factual assertions are true and correct to the best of my personal knowledge, experience, information, and belief.

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Verifications subscribed and sworn before me this 5th day of September 2019
Signed: Bonnie K Stuut

Printed: Bonnie K. Stuut,
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Van Buren County
Acting in Van Buren County,
Michigan
My commission expires 8/26/2021

BONNIE K STUUT NOTARY PUBLIC My Comm. Exp. Aug 26, 2021 Van Buren County, MI