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STATE OF MICHIGAN
IN THE SUPREME COURT

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,
Appellee,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
Appellant,

and

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

Supreme Court No. 158307

Court of Appeals No. 340600

MPSC No. 00-18197

ENERGY MICHIGAN, INC.,
Appellee,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
Appellant,

and

CONSUMERS ENERGY COMPANY, AND MICHIGAN ELECTRIC AND GAS ASSOCIATION,
Appellees.
____/

Supreme Court No. 158308

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MPSC No. 00-18197

SUPPLEMENTAL REPLY BRIEF OF APPELLANT
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INTRODUCTION

If I know that a regulation (for example, no jaywalking) applies to a class of people (e.g., students), and I have a friend who is a member of that class (a student at the local university), it is no uncertain inference to say that the regulation applies to my friend (my friend cannot jaywalk on campus). Rather, it is deductive logic and an inescapable conclusion if there is no exemption that applies. An inference would be assuming that my friend is not a student merely because he lives off campus. In the same way, we know that alternative electric suppliers are required by statute to meet their own capacity obligations or pay a charge to have someone else do it, and we know that these obligations include a local clearing requirement, so it is no inference to say that this requirement applies to individual suppliers. Rather, this interpretation takes the statute as whole and reads related provisions together. Although some have argued that alternative electric suppliers are exempt, they are not.

The Commission's authority under Act 341 of 2016 is not based on inference; it is grounded in the Act's plain language and context. Context is so fundamental to statutory construction that even plain language must be read in context. *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 533 (2005) ("[T]he meaning of statutory language, plain or not, depends on context."). This is because context can change the way we perceive what we read and what we see. Without context, someone might mistake my friend, living off campus, for a teacher.

ARGUMENT

I. The Commission's interpretation of Section 6w is a plain-language, contextual interpretation.

The Commission's authority to require electric providers, including alternative electric suppliers, to show that they can meet a local clearing requirement is found in Act 341 of 2016,

Sections 6w(8)(b) and (c). Section 8(b) requires individual suppliers to demonstrate that they can meet their capacity obligations, MCL 460.6w(8)(b), while Sections 6w(8)(c) clarifies that these suppliers' capacity obligations include a local clearing requirement. MCL 460.6w(8)(c). When read together, these subsections require suppliers to demonstrate that they can meet the local clearing requirement. This conclusion is validated by other provisions in Section 6w requiring alternative electric suppliers to actually meet their capacity obligations, including a local clearing requirement, or to notify the Commission that they cannot meet their capacity obligations and pay a capacity charge. MCL 460.6w(6) and (7). Suppliers' duty to meet the local clearing requirement is also confirmed through other Act 341 provisions that would have led to the same result in different circumstances. MCL 460.6w(1) and (2).

The Commission has consistently relied on the provisions cited above to support its position; yet Energy Michigan argues in its Supplemental Brief that "the MPSC failed to locate any specific language that would give it the authority it was claiming [to impose a local clearing requirement on individual alternative electric providers]." (Energy Mich's Suppl Br, p 18.) ABATE, by the same token, repeatedly characterizes (more than ten times) the Commission's authority as "inferred" or an "inference." (See, e.g., ABATE's Suppl Br, p 29.) But finding authority in Act 341 as a whole, reading each provision in the context of the others, is not the same as inferring authority. When read as a whole, the Act imposes a local clearing requirement on alternative electric suppliers and, indeed, all electric providers.[1]

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[1] Energy Michigan also argues that the Commission "begins by assuming the power it seeks, and then proceeds to justify why it believes it should have that power." (Energy Michigan's Suppl Br, p 4.) This amounts to a complaint about how the Commission organized its supplemental brief. Section II.B of the Commission's supplemental brief discusses its statutory authority to impose a local clearing requirement on alternative electric suppliers.

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A. Under Section 6w's plain language, alternative electric suppliers must demonstrate that they can meet their share of the zone's local clearing requirement.

Energy Michigan concedes that the capacity-demonstration process applies to individual alternative electric suppliers but maintains the local clearing requirement does not. It says, "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." (Energy Michigan's Suppl Br, p 19, emphasis added.) Yet, Energy Michigan argues that the local clearing requirement does not apply to individual suppliers even though the local clearing requirement is part of these suppliers' individual capacity obligations. (*Id.*) To justify this disjunction, Energy Michigan relies on language in Section 6w(8)(c) that requires the Commission to "set any required local clearing requirement and planning reserve margin requirement, consistent with federal reliability requirements." (*Id.*, quoting MCL 460.6w(8)(c).)

Energy Michigan does not explore what it means for the local clearing requirement to be "consistent with the federal reliability requirements," MCL 460.6w(8)(c), instead assuming any requirement that is different from a federal requirement is inconsistent with it. (See Energy Michigan's Suppl Br, p 9.) ABATE explores the definition of consistent, arguing that while the term "may not require exact symmetry," it at least "prevent[s] the PSC from applying the LCR in a way that directly contradicts MISO's Tariff." (ABATE's Suppl Br, p 33.) If its interpretation stopped there, it would be a fair interpretation, but ABATE goes on to suggest that the Commission-approved local clearing requirement must adhere to MISO's local clearing requirement. (*Id.* at 33 n26.) ABATE's position demanding strict adherence is at war with its position that exact symmetry is not required.

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To be consistent under Section 6w(8)(c), a Commission-approved local clearing requirement may not directly contradict federal reliability requirements. If, for example, the Commission freed an electric provider from MISO's planning reserve margin requirement or its local clearing requirement (for entities filing a fixed resource adequacy plan), this would violate Section 6w(8)(c) by contradicting federal requirements. But imposing an individual local clearing requirement that strengthens MISO's zonal requirement is consistent with federal reliability requirements. This is particularly true since MISO already imposes a local clearing requirement on certain electric providers (those submitting fixed resource adequacy plans). (MPSC's Suppl Br App, pp 755–756, MISO Tariff § 69A.9.)

Applying the plain meaning of the word "consistent," the Commission-approved local clearing requirement does not need to strictly adhere to MISO's local clearing requirement as ABATE suggests. (ABATE's Br, p 33 n26.) Compatibility is enough. The Commission quoted *Merriam–Webster's Collegiate Dictionary* (2014) to make this point. (MPSC's Suppl Br, p 13.) But some of the language in the American Heritage Dictionary that that ABATE quotes also supports the Commission's interpretation. It defines "consistent" as "[a]greeing; compatible; not contradictory. . . ." (ABATE's Suppl Br, p 33, quoting *American Heritage Dictionary*, New College Edition (1980).) Webster's New World Dictionary also defines "consistent" as "in agreement or harmony; in accord; compatible."[2]

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[2] The full definition of "consistent" in Webster's New World Dictionary is "1 [Rare] holding together; firm; solid [*consistent* soil] 2 in agreement or harmony; in accord; compatible [deeds not *consistent* with his words] 3 holding always to the same principles or practice [*consistent* behavior]." *Webster's New World Dictionary* (2018). The second definition fits best here because "consistent" appears together with the word "with" in Act 341 like the example beside the second definition.

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A Commission-approved local clearing requirement that promotes resource adequacy over four years instead of one and that applies individually instead of zonally is compatible with MISO's resource requirements.[3]

B. Reading Act 341 as a whole confirms the Commission's plain-language interpretation.

The plain language in Sections 6w(8)(b) and (c) of Act 341 should be read together with the contingency plans in Sections 6w(1) and (2) that include a local clearing requirement—plans the Legislature put in place should the Federal Energy Regulatory Commission (FERC) adopt a framework, in full or in part, within which states could secure generation resources for the future. Although FERC did not adopt the proposed framework, Act 341's contingency plans provide insight into the legislative intent. *Ally Fin Inc v State Treasurer*, 502 Mich 484, 493 (2018) ("reading individual words and phrases in the context of the entire legislative scheme" to determine legislative intent and "consider[ing] the entire text, in view of its structure and of the physical and logical relation of its many parts") (quotation marks and citation omitted).

ABATE mistakenly claims that Sections 6w(1) and (2) do not advance the Commission's interpretation. It argues that when the Legislature gave the Commission the option between a capacity forward auction or a prevailing state compensation mechanism (both were options that FERC was considering when Act 341 was signed into law), it let the Commission decide which option was better "*for this state* in meeting the [LCR] and [PRMR]." (ABATE's Suppl Br, p 37,

[3] ABATE argues that the Commission did not preserve this argument. (ABATE's Suppl Br, p 32.) But for an argument that "involves a question of law," like how to define a term in a statute, where "the parties have presented all facts necessary for its resolution," courts have found that they may review the issue. *Farmers Ins Exch v Farm Bureau Ins Co*, 272 Mich App 106, 118 (2006).

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quoting MCL 6w(1) and (2), emphasis altered.) According to ABATE, referring to the entire state "makes sense where MISO applies the LCR in the aggregate or zonally and not individually." (*Id*. at 38.) ABATE is wrong for two reasons:

1. The language ABATE relies on describing the Commission as the decisionmaker who decides which option is best "for this state" has nothing to do with whether the local clearing requirement applies zonally or individually and everything to do with the Commission's responsibility to the entire state. The Commission was tasked with determining which option "would be more cost-effective, reasonable, and prudent . . . for this state." MCL 460.6w(1) and (2). The Commission's choice (one it ultimately did not have to make) would have had ramifications for the entire state no matter how the individual local clearing requirement was classified.

2. By ABATE's reasoning, the planning reserve margin requirement would not apply individually either—since it was part of the statewide analysis—but not even ABATE has argued this.

Sections 6w(6) and (7) are also relevant. These Sections require alternative electric suppliers to meet their capacity obligations, including the local clearing requirement, that they demonstrate they can meet. If these suppliers cannot meet their obligation or any portion of it, they may notify the Commission and pay a capacity charge to have an incumbent utility provide the capacity. MCL 460.6w(6) and (7). The phrase "capacity obligations" in Sections 6w(6) and (7) include the Commission approved local clearing requirement, like all references to "capacity obligations" throughout Section 6w, because Section 6w(8) says that the local clearing requirement is one of two components of an electric provider's obligations.[4]

ABATE argues that "[b]y replacing the term 'capacity obligation' in 6w(6) with the term 'LCR,' the PSC renders the sentence irreconcilably at odds with MISO's Tariff." (ABATE's Suppl Br, p 41.) It points to language in Section 6w(6) that refers to the "capacity obligations of

[4] Although Section 6w(8)(c) does not technically define "capacity obligations," for all practical purposes it does. (See MPSC's Suppl Br, p 20 n13.)

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the electric provider," MCL 460.6w(6), and claims that interpreting the phrase "capacity obligations" as referring to the local clearing requirement does not makes sense because "there is no such thing as 'the [LCR] of the electric provider.' " (*Id.*) Rather, "There is only 'the [PRMR] of the electric provider' and the LCR for the Zone." (*Id.*) This partially misconstrues the Commission's position and, in any case, is not always true.

The Commission did not suggest that "capacity obligations" and "local clearing requirements" are synonymous. Rather, under Section 6w(8)(c), capacity obligations include *both* the planning reserve margin and local clearing requirements, so ABATE is wrong when it claims that the Commission read "the term 'capacity obligation' in the first sentence of 6w(6), as meaning *only* the LCR."[5] (ABATE's Suppl Br, p 41, emphasis added.) Even setting this aside, however, it is incorrect to say that there is no such thing as an electric provider's individual local clearing requirement; electric providers that file a fixed resource adequacy provider must show that they have met their share of the local clearing requirement.

Although ABATE and Energy Michigan appear to read Section 6w(6) as an exception to the local clearing requirement for alternative electric suppliers, it actually incorporates the local clearing requirement, and the Commission has explained why it cannot be interpreted as an exception in this case. (See MPSC's Suppl Br, pp 15–16.)

C. The statutory provisions that ABATE and Energy Michigan rely on do not undermine the Commission's interpretation.

Section 6w(8)(b) allows cooperative and municipal utilities to aggregate their resources to meet their capacity obligations. The Commission held that this "clearly implies that these

[5] On the contrary, the Commission explained how Section 6w(6)'s "capacity obligations" should be read to incorporate the terms local clearing requirement *and planning reserve margin requirement*. (MPSC's Reply to Energy Michigan's Answer to MPSC's Appl, p 4.)

utilities would otherwise be required to meet the requirements on an individual basis." (MPSC's Suppl Br App, p 403, 9/15/17 Order.) And if these utilities are bound on an individual basis, it stands to reason that regulated electric utilities and alternative electric suppliers are individually bound as well. ABATE, however, attempts to differentiate cooperate and municipal utilities from other electric providers by noting that "[i]t is not until the fourth sentence that the Legislature imposes an LCR on Co-ops and Munis" and that this sequence shows that the Legislature imposed the local requirement on them "because Coops and Munis may aggregate their resources . . . ." (ABATE's Suppl Br, p 36.)

Aggregation is relevant because it gives cooperative and municipal utilities more flexibility than alternative electric suppliers to meet their capacity obligations, which likely prompted lawmakers to specifically reaffirm that the local clearing requirement is still a limit on this flexibility. While the Legislature expanded the universe of resources that cooperative and municipal utilities could use to meet their capacity obligations to include aggregated resources, it simultaneously restricted the universe of resources. It did so by clarifying that all cooperative and municipal resources must still be used to help meet the zone's local clearing requirement and by clarifying that certain auction payments could not be used to satisfy the "resource adequacy requirements of this section unless [MISO] can directly tie that provider's payment to a capacity resource that meets the requirements of this subsection." MCL 460.6w(8)(b).

In the fourth sentence of Section 6w(8)(b), the Commission reaffirmed that the local clearing requirement applies to resources aggregated by cooperative and municipal utilities, but this does not mean, as ABATE suggests, that the requirement does not apply to other resources or alternative electric suppliers. (See ABATE's Suppl Br, p 36.) In the first sentence of Section 6w(8)(b), the Commission applied the requirement to these suppliers and their resources by

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requiring cooperative and municipal utilities, *as well as alternative electric suppliers*, to demonstrate that they can meet their capacity obligations. And by virtue of Section 6w(8)(c), a supplier's capacity obligations include a local clearing requirement.

The definition of "local clearing requirement" in Act 341 does not change the Commission's position. Although the definition speaks in zonal terms when it refers to the "capacity resources required to be in the local resource zone . . . as determined by [MISO] . . . and the commission under subsection 8," MCL 460.6w(12)(d), the Commission does not deny that MISO has a zonal local resource requirement as well as an individual one. The question has always been whether the Commission may require individual providers to meet their share of the zone's overall requirement, and Section 6w(12)(d) helps answer that question by referring the reader back to Section 6w(8) as the subsection that controls how the local clearing requirement is set.

In sum, when read as a whole, the Act imposes a local clearing requirement on alternative electric suppliers and, indeed, all electric providers.

II. ABATE's and Energy Michigan's other arguments fall short.

Both ABATE and Energy Michigan argue that the legislative history supports their interpretation of Act 341's local clearing requirement. And Energy Michigan argues that the Commission September 15th order was based on unlawful procedures because it did not promulgate rules for the capacity-demonstration process for electric providers. These arguments fail for simple reasons:

- The legislative history does not save ABATE's and Energy Michigan's flawed textual analysis for two reasons. First, as the Court of Appeals said, Act 341 is not ambiguous, so there is no need to "look outside the plain words of the statute." *In re Reliability Plans,* 325 Mich App 207, 228 (2018). Second, although early versions of Senate Bill 437, which later became Act 341, included detailed methods to determine

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how much of an electric provider's capacity must come from local generation. These methods were not removed without a substitute; they were removed and replaced with language that gave MISO and the Commission discretion to establish the local clearing requirement. (See MPSC's Appl, pp 28–30.)

- As for Energy Michigan's unlawful-procedures argument, the Court of Appeals declined to address this issue because it held that the Commission lacked authority to set a local clearing requirement. This Court has declined to address issues that lower courts have not yet addressed, e.g., *Taxpayers of Michigan Against Casinos v State*, 471 Mich 306, 333 (2004), and it should do so here. If this Court chooses to address the issue, the MPSC and Consumers Energy should have an opportunity to address the issue in more detail than this reply brief allows.

CONCLUSION AND RELIEF REQUESTED

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

Respectfully submitted,

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