

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,

Supreme Court Nos. 158305,
158306, 158307, and 158308

Court of Appeals Nos. 340600 and
340607

v.

MPSC Case No. U-18197

ASSOCIATION OF BUSINESSES
ADVOCATING TARIFF EQUITY
AND ENERGY MICHIGAN, INC.,

Appellees.

AMICUS CURIAE BRIEF OF
ELECTRICITY CONSUMERS RESOURCE COUNCIL

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STATEMENT OF QUESTION PRESENTED

Amicus curiae ELCON adopts as its own the Statement of Question Presented set forth in the answer filed by ABATE to the applications for leave to appeal filed by the PSC and Consumers Energy and that set forth the supplemental response brief filed by ABATE in opposition to the PSC and Consumers Energy supplemental briefs.

I. STATEMENT OF INTEREST OF AMICUS CURIAE

The amicus curiae is the Electricity Consumers Resource Council (“ELCON”).¹ ELCON is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. ELCON members operate hundreds of major facilities and are consumers of electricity in the footprints of all organized electricity markets, including the capacity market operated by the Midcontinent Independent System Operator’s (“MISO”) and other regions throughout the United States. Reliable electricity supply at just and reasonable rates is essential to ELCON member operations.

ELCON’s members are industrial consumers that place a particularly high value on electric reliability and are very sensitive to electricity costs as these represent a large share of total operating costs for ELCON’s membership. Accordingly, ELCON has a strong interest in MISO’s ability to meet its Bulk Electric System (“BES”) reliability needs at least cost. Four ELCON members have facilities in Michigan with a strong financial interest in this case. The interstate

¹ 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.

implications of this case also significantly affect the financial interests of ELCON member facilities outside of Michigan.

II. INTRODUCTION

For ELCON's membership, this case is about maintaining the sufficient function of the federally-regulated MISO and other regional transmission organization capacity markets and avoiding interference in those markets by an unauthorized exercise of administrative agency power. The zonal local clearing requirement ("LCR") mechanism has been sufficient to meet the local reliability needs in Michigan and is standard industry practice, the sufficiency of which is monitored by independent market monitors in MISO and other nearby RTOs, including the New York Independent System Operator ("NYISO"), ISO-New England Inc. ("ISO-NE"), and the PJM Interconnection, LLC ("PJM").

If the sound decision made by the Court of Appeals is disturbed, and local clearing requirements are imposed on individual load serving entities ("LSEs"), then that interference in already-operating competitive marketplace will unnecessarily harm Michigan ratepayers and alternative electric suppliers ("AES"), and undermine the performance of MISO's capacity market. Moreover, imposition of a LCR on individual AESs will cause changes in MISO's capacity market which will in turn affect the operation of capacity markets outside Michigan, thereby interfering with

interstate commerce, violating the dormant Commerce Clause of the United States Constitution, and result in unjust and unreasonable rates under the Federal Power Act.

For the foregoing reasons, and as further stated below, ELCON respectfully requests this Court deny the applications for leave to appeal filed by the PSC and Consumers Energy.

III. STATEMENT OF FACTS

Amicus curiae ELCON adopts as its own the Statement of Facts set forth in answer filed by ABATE to the applications for leave to appeal filed by the PSC and Consumers Energy and the response brief filed by ABATE in opposition to the PSC and Consumers Energy supplemental briefs.

Concerning statements herein regarding the factual underpinnings of ELCON and its experience and perspective to offer to this Court, those have been verified by Devin Hartman, ELCON President and CEO, as signed below based on his personal knowledge, experience, information, and belief.

A summary of Mr. Hartman's background and experience offered to this Court is as follows: Mr. Hartman resides in Washington, D.C. His place of business at ELCON is 1101 K Street NW, Suite 700, Washington, D.C. 20005, where he

serves as President and Chief Executive Officer. He holds a degrees including a bachelor of science in economics and a bachelor of arts in political science and environmental studies from Iowa State University. He holds a master of arts public affairs and master of science in environmental science from Indiana University. Mr. Hartman is a recognized expert on electricity economics and market design. He is a trained economist and policy analyst with particular expertise in MISO and capacity markets. As a former senior analyst at the Indiana Utility Regulatory Commission, Mr. Hartman interfaced with MISO on aligning state capacity procurement processes with MISO's capacity market construct. He also specialized in capacity market design as a former analyst at the Federal Energy Regulatory Commission, where he also served as a liaison to MISO's Independent Market Monitor. As the founder of the R Street Institute's electricity policy program, Mr. Hartman wrote numerous papers evaluating capacity market design. Mr. Hartman has been asked to speak at various industry events, testify before the U.S. Congress and Federal Energy Regulatory Commission, and engage with various other government and non-governmental bodies on issues pertaining to energy and capacity markets and state capacity procurement processes.

IV. STANDARD OF REVIEW

Amicus curiae ELCON adopts 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 supplemental response briefs filed in opposition to the PSC and Consumers Energy supplemental briefs.

V. ARGUMENT

- A. A zonal LCR by itself is a sufficient mechanism to meet local reliability needs in Michigan and is standard industry practice, making an LCR imposed by the PSC on individual AESs without clear and unmistakable Legislative delegation unwise as well as unlawful.**

Among its arguments, the PSC asserts that the Court of Appeals failed to “thoroughly consider” what the Commission asserts as its “legislatively delegated discretion to ensure that electric providers have enough generation to meet demand.” (PSC Suppl Br at 3). Essentially, the PSC asserts “discretion to ensure” reliability.

However, the PSC admits that “Act 341 is silent about the [PSC's] authority to impose the [LCR] on [AESs].” (PSC App at 41, 46-47; ABATE Suppl Br in Response to PSC at 29). This admission – that there are not words in Section 6w of Act 341 of 2016 discussing the PSC's authority to impose an LCR on AESs – should end the analysis. As the Court of Appeals pointed out, in Michigan, “courts determine the Legislature's intent from its *words*, not from its silence.” *In re*

Reliability Plans of Electric Utilities for 2017-2021, 325 Mich App 207, 228 n 9; 926 NW2d 584 (2018) (quoting *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999)). The lack of words supporting the PSC’s asserted power shows the Legislature did not intend to give the PSC the authority to impose an LCR on AESs and did not delegate unfettered discretion to ensure electric providers have sufficient generation to meet demand.²

That said, consideration of the super-regional electric transmission network is worth this Court’s attention when reviewing the question at bar. None of the parties to the case appear to date to have addressed this context in a way which ELCON is suited to do. In addition to MISO, three other regional transmission organizations (“RTOs”) operate organized capacity markets in the United States: the New York Independent System Operator (“NYISO”), ISO-New England (“ISO-NE”), and the PJM Interconnection (“PJM”). NYISO, PJM, and ISO-NE initiated their capacity markets in 2006-2007.³ Transmission constraints may prevent the output of some capacity resources from being deliverable to other parts of an RTO footprint.

² *Union Carbide Corp v PSC*, 431 Mich 135, 146; 428 NW2d 322 (1988).

³ *Staff Report on Electricity Markets and Reliability*, U.S. Department of Energy, August 2017 at 2.
<https://www.energy.gov/sites/prod/files/2017/08/f36/Staff%20Report%20on%20Electricity%20Markets%20and%20Reliability_0.pdf> (accessed August 22, 2019).

Therefore, standard practice among RTOs is to define locational deliverability zones based on RTO studies of transmission constraints.⁴

All four RTOs establish system-wide and locational requirements at the zonal level for capacity procurement.⁵ These requirements determine a minimum amount of capacity that must be procured from a geographic zone based on that zone's projected demands and transmission constraints. This is referred to as the local clearing requirement ("LCR") in MISO, which equals the local resource requirement less the maximum level of capacity imports.⁶ RTOs scrutinize all transmission arrangements to verify the deliverability of capacity between zones.

Binding zonal transmission constraints are a regular occurrence in capacity markets and yet all have cleared sufficient capacity to meet their zonal requirements in full. For example, NYISO regularly has import-constrained capacity zones in New

⁴ For more information on general capacity market elements, see FERC Commission Staff Report, *Centralized Capacity Market Design Elements*, U.S. Department of Energy, August 23, 2013. <<https://www.ferc.gov/CalendarFiles/20130826142258-Staff%20Paper.pdf>> (accessed August 22, 2019).

⁵ Bushnell, Flagg, and Mansur, *Electricity Capacity Markets at a Crossroads*, UC Davis Energy Economics Program, April 2017, at 32, <http://deep.ucdavis.edu/uploads/5/6/8/7/56877229/deep_wp017.pdf> (accessed August 22, 2019).

⁶ Potomac Economics, Independent Market Monitor for the Midcontinent ISO, *2018 STATE OF THE MARKET REPORT FOR THE MISO ELECTRICITY MARKETS*, June 2019 ("2018 MISO Market Monitor Report") at 72 <<https://cdn.misoenergy.org/2018%20State%20of%20the%20Market%20Report364567.pdf>> (accessed August 22, 2019).

York City and Long Island, which typically have more severe transmission constraints than MISO.⁷ PJM regularly experiences binding transmission constraints, especially in eastern Pennsylvania, New Jersey, Delaware, and Maryland.⁸ Zonal capacity requirements, including the MISO LCR, have proven sufficient to satisfy local reliability needs throughout the electric power industry for over a decade. They are standard industry practice and require no additional requirements on LSEs to satisfy locational capacity needs.

Each RTO has an independent market monitor (“IMM”) responsible for identifying defects in capacity market performance. The IMMs, including the MISO IMM, do not express concern that locational reliability is at risk by continuing use of zonal capacity requirements concepts. The MISO IMM flags specific market design adjustments, all within MISO’s control, to address any system-wide or local reliability concerns related to capacity procurement.⁹

⁷ Potomac Economics, Market Monitoring Unit for the New York ISO, *2018 STATE OF THE MARKET REPORT FOR THE NEW YORK ISO MARKETS*, May 2019, at 53 <<https://www.nyiso.com/documents/20142/2223763/2018-State-of-the-Market-Report.pdf/b5bd2213-9fe2-b0e7-a422-d4071b3d014b?t=1557344025932>> (accessed August 22, 2019).

⁸ Monitoring Analytics, LLC, 2019 *Quarterly State of the Market Report for PJM: January through June*, at 266. <https://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2019/2019q2-som-pjm-sec5.pdf> (accessed August 22, 2019).

⁹ 2018 MISO Market Monitor Report at 78-79.

The geographic definition of capacity zones is based on RTO modeling of transmission system constraints, which RTOs may alter annually based on changing system conditions, as electrons do not respect state political boundaries. In MISO, only six of 10 capacity zones are confined within a single state border, and no zone spans the entire footprint of a single state. As such, any requirements for in-state capacity procurement are fundamentally misaligned with industry reliability practices.

B. Imposing an LCR on individual LSEs would unnecessarily harm Michigan electricity consumers, competitive AESs, undermine performance of MISO's capacity market, and is inconsistent with the Electric Choice Act's purposes.

Imposing an LCR on individual LSEs would raise costs, undermine risk management, and stunt signals for the efficient retention, development, and operation of capacity resources on MISO's system. The design of any capacity market is intended to let decentralized forces creatively determine the least-cost way to meet an RTO's system-wide and locational reliability requirements, including MISO's zonal LCRs. LSEs have different competitive advantages for accessing capacity within and outside the zone in which they serve load. This results in LSEs procuring different shares of capacity within and outside their zone, which minimizes the cost of satisfying system and zonal capacity requirements.

Importantly, restricting access to out-of-state electric resources is inconsistent with the purposes of the Customer Choice and Electricity Reliability Act, 2000 P.A. 141 (the “Electric Choice Act,”), which include “[t]o **provide this state’s electric suppliers and generators an opportunity to access regional sources of generation and wholesale power markets** and to ensure a reliable supply of electricity in this state.” MCL 460.10(c) (emphasis added). Allowing the PSC to impose an LCR on individual AESs would frustrate purpose of the Electric Choice Act, which provides suppliers like AESs the opportunity to access regional sources of generation and wholesale power markets.

Requiring LSEs to have a proportionate share of LCR commitments would cause market function problems. It would also undermine procurement flexibility and force procurement of higher cost resources. It would also change competitive relationships between LSEs, which explains why those with ample self-supply within Michigan would welcome the restriction to drive out their competitors. The more procurement flexibility is unnecessarily removed from market participants, the higher the costs to satisfy reliability requirements. Permitting LSEs and consumers procurement flexibility is a fundamental rationale for pursuing a market-based approach to capacity procurement.

The translation of *cost* effects into *price* effects illustrates the broad implications of LSE procurement restrictions. The capacity market selects the lowest *cost* resources needed to satisfy both system and zonal requirements. If the least-cost mix of resources cannot be obtained system-wide without violating transmission constraints, then the market clears the incremental amount of least-cost zonal resources needed to satisfy zonal requirements. The marginal cost of capacity then varies between a zone with a binding transmission constraint and the rest of the system. Capacity *prices*, which reflect marginal costs, then separate between a constrained capacity zone and the rest of the system to accurately reflect the value of capacity resources based on their location on the transmission system. As noted by MISO's IMM, price signals play an essential role in driving capacity investment and retirement decisions for generators and transmission.¹⁰

An import-constrained zone, which is sometimes the case in Michigan, will have higher prices to reflect the incremental cost of procuring resources within the zone than would be achieved if no transmission constraints existed. This price separation between zones provides an accurate signal to suppliers to build or retain generation and to consumers seeking to alter their consumption or hedging practices.

¹⁰ 2018 MISO Market Monitor Report at 69.

Imposition of an LCR on individual LSEs would artificially increase demand for Michigan capacity and decrease demand for out-of-state capacity, thus distorting the price signals for capacity in Michigan and other states. This would translate into higher rates for Michigan consumers by forcing procurement of uneconomic Michigan capacity above MISO's LCR and underutilize more economic capacity resources outside of Michigan.

LSEs make capacity arrangements through self-supply and bilateral purchases as well as the organized capacity market. These arrangements can be substituted, and thus conditions in the organized capacity market affect self-supply and bilateral arrangements. In MISO, this has been particularly evident in capacity zones that face binding transmission constraints, including zones 4 (Illinois) and 7 (Michigan). For example, LSEs will often pay a premium for bilateral arrangements to hedge their exposure to potential spikes in a capacity market zone or to lock-in longer-term rate stability, which translates into more economic retail offerings for consumers. This is especially important for Michigan ASEs, who are able to provide a variety of retail offerings to consumers at different price levels, fixed-price durations, and other terms and conditions that are customized to individual consumers or tailored to consumer classes.

Imposing an in-state purchase obligation on an LSE would dramatically reduce its bilateral options. This would gut risk management options available to LSEs and, by extension, restrict retail products available to consumers. For ASEs the effect would be especially severe, as self-supply is not an option and the in-state bilateral market in Michigan is dominated by incumbent firms with financial incentive to exercise market power. As a result, requiring much or all of ASE capacity to be sourced in-state may completely devastate the retail choice market in Michigan that industrial consumers want to see expand, not contract.

C. Imposing an LCR on individual LSEs would interfere with interstate commerce, is preempted by the Supremacy Clause of the United States Constitution, and would result in unjust and unreasonable rates under the Federal Power Act.

Beyond the lack of statutory language in Act 341 to support imposition of an LCR on individual AESs and the inconsistency with the Electric Choice Act's purposes to allow ratepayers access to regional and wholesale markets for electricity, the PSC's asserted power to impose an LCR on individual AESs raises several other legal concerns, including interference with interstate commerce, preemption, and resulting unjust and unreasonable rates.

The PSC asserts that allowing the decision by the Court of Appeal to stand would undermine the delegation doctrine and "could erode other agencies'

discretionary authority.” (PSC Suppl Br at 25-26). However, allowing the PSC unfettered discretion to artificially restrict or impose a *de facto* embargo on out-of-state resources will disrupt interstate commerce and undermine years of progress in liberalizing the electricity system. Consideration of reversing that progress is a concern over and above allowing three unelected officials to upend Michigan’s competitive market with an embargo on out-of-state resources. (See ABATE Suppl Br in Response to PSC at 28-29). The importance of such a delegation, which ABATE identifies “a critical policy question deserving of transparent delegation,” were it to be made by the Legislature – and it has not been – is challenging to overstate.

By way of further background, a core benefit of the adoption of MISO and other RTOs was to facilitate gains from trade across state borders. Trade was greatly constrained previously because incumbent utilities denied transmission access to alternatives suppliers and consumers. In 1996, following amendments to the Federal Power Act, the Federal Energy Regulatory Commission (“FERC”) issued Order No. 888, which set the requirement for non-discriminatory, open access to the wholesale transmission system.¹¹ RTOs grew under this paradigm to facilitate open access,

¹¹ FERC Order No. 888 at 3-7. <<https://www.ferc.gov/legal/maj-ord-reg/land-docs/rm95-8-00w.txt>> (accessed August 22, 2019).

where FERC deems the rates for energy and capacity as “just, reasonable, and not unduly discriminatory or preferential” if they are consistent with competitive market outcomes.¹² The free exchanges of services in RTO systems has resulted in markedly more efficient use of the transmission system, especially across state boundaries. This has reduced costs by billions of dollars per year¹³ without sacrificing reliability. Imposing artificial restrictions on these exchanges would lead to underutilization of the interstate transmission system and distort capacity market prices. Such rate effects would be inconsistent with competitive market outcomes and, therefore, violate at least the spirit and perhaps the legal precedent of non-discriminatory or preferential treatment under the Federal Power Act. State actions to deny Michigan ASEs access to out-of-state resources is fundamentally discriminatory, anti-competitive, and poses a direct challenge to the dormant Commerce Clause.

Under the Supremacy Clause, federal law “shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, and Thing in the

¹² FERC Order No. 888 at 668; see also FERC Order No. 2000 at 130 (authority and responsibility of the Commission) and 202 (efficient operation).
<<https://www.ferc.gov/legal/maj-ord-reg/land-docs/RM99-2A.pdf>> (accessed September 5, 2019).

¹³ See, e.g., Cicala, *Imperfect Markets versus Imperfect Regulation in U.S. Electricity Generation*, May 9, 2019, at 28.
<http://home.uchicago.edu/~scicala/papers/elec_gov_v_mkt/elec_gov_v_mkt_draft_2.pdf> (accessed August 22, 2019).

Constitution or Laws of any State to the Contrary notwithstanding.”¹⁴ Congress may expressly preempt state law, but even absent an express preemption clause, state law is preempted if federal law so thoroughly occupies a legislative field that can be reasonably inferred that Congress did not intend the states to supplement it.”¹⁵ Likewise, state law is preempted if it “actually conflicts with federal law,”¹⁶ or if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁷ Even if state and federal laws share the same “ultimate goal,” a “state law ... is “pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal.”¹⁸ State law is preempted not only when it conflicts with statutes passed by Congress, but also when it conflicts with regulations and orders issued by federal agencies, including the FERC.¹⁹

¹⁴ US Const, Art VI, Cl 2.

¹⁵ *Walker v Johnson & Johnson Vision Products*, 217 Mich App 705, 710 (1996); see *Michigan S Cent Power Agency v Constellation Energy Commodities Grp, Inc*, 466 F Supp 2d 912, 924 (WD Mich. 2006) (“Conflict preemption exists ‘if there is an actual conflict between federal and state law, or where compliance with both is impossible.’ (quoting *Pub. Util. Dist. No. 1 of Grays Harbor Cty Wash v IDACORP Inc*, 379 F.3d 641, 649 (9th Cir. 2004)).

¹⁶ *Id.*

¹⁷ *Crosby v Nat’l Foreign Trade Council*, 530 US 363, 373 (2000) (quotation marks omitted).

¹⁸ *Int’l Paper Co v Ouellette*, 479 US 481, 494 (1987).

¹⁹ See, e.g., *Mississippi Power & Light Co v Mississippi ex rel Moore*, 487 US 354, 370-71 (1988); *Nantahala Power & Light Co v Thornburg*, 476 US 953, 966 (1986).

Here, the Commission's order squarely conflicts with FERC's lawful orders. FERC has *already* set forth the locational capacity requirements applicable to LSEs, such as an AES, that participate in the transmission system operated by MISO.

In particular, the amount of capacity that an LSE is required to procure in a particular zone (i.e., LCR) is set by MISO pursuant to its FERC-jurisdictional Open Access Transmission Tariff. Some LSEs/AESs procure their capacity through the MISO Planning Resource Auction ("PRA"). For these LSEs/AESs, "[MISO] enforce[s] the LCRs, final Capacity Import Limits and Capacity Export Limits for each [Local Resource Zone]."²⁰ Other LSEs/AESs opt out of the PRA via a Fixed Resource Adequacy Plan ("FRAP"). They, too, are required to demonstrate that they have met their share of the MISO-calculated LCR:

The FRAP must include the LSE's forecasted Coincident Peak Demand for each LRZ for a Planning Year and also identify the ZRCs that the LSE owns, or has contractual rights to, in order to provide Planning Resources to meet its total PRMR and also its load ratio share of the LCR for each LRZ. The Transmission Provider will evaluate each LSE's FRAP to determine if it meets the LSE's PRMR and the LSE's share of LCR and the Transmission Provider will notify the LSE via the MECT prior to March 15th before a Planning Year of the extent that an LSE's PRMR or share of LCR for each LRZ is not covered by a

²⁰ See MISO Tariff, Module E-1, Section 69A, <<https://cdn.misoenergy.org/Module%20E-1108026.pdf>> (accessed September 6, 2019).

submitted FRAP. The LSE will have until the PRA offer window opens to remedy any deficiencies in their FRAP.^[21]

Through these mechanisms, MISO establishes the LCR that all LSEs must procure within its footprint, pursuant to MISO's FERC-approved Tariff.

The Commission's order is preempted because it sets requirements for the very product that FERC regulates—wholesale capacity, in markets administered by MISO—yet establishes *different* LCRs from those that MISO has designated and FERC has approved. Where MISO's tariff requires capacity to be procured one year in advance, the Commission's order would require procurement five years in advance. Where MISO's tariff designates which geographic regions that LSEs/AESs can look to in order to satisfy their LCR requirements, the Commission's order compels a different choice—requiring LSEs/AESs to rely on only Michigan resources, even if MISO's tariff would permit them to satisfy their obligations via out-of-state resources. This is an “actual[] conflict[]” between the Commission's order and controlling federal law,²² and it renders the Commission's order preempted under the Supremacy Clause.

²¹ See MISO OATT, Module E-1, Section 69A.9.

²² *Walker*, 217 Mich App at 710.

Indeed, the Commission’s order conflicts not just with MISO’s FERC-approved Tariff, but also with FERC’s express reasons for rejecting MISO’s proposed “Competitive Retail Solution,” which would have added to MISO’s existing one-year forward Planning Resource Auction (the “Prompt Auction”) a three-year forward capacity auction (the “Forward Auction”) applicable only to Competitive Retail Areas.²³ FERC rejected the proposal because it “bifurcate[d] the MISO capacity market into two distinct market clearing mechanisms held at different points in time.”²⁴ “Market-wide clearing processes,” FERC explained, are “more efficient than bifurcated clearing processes.”²⁵ A single clearing process is “efficient and desirable from a price formation perspective” because it “reflect[s] the tradeoffs of satisfying zonal capacity requirements given the same set of transmission capability constraints and supply offers.”²⁶ Indeed, a single market-wide capacity auction is the current practice in all FERC jurisdictional capacity markets. A bifurcated mechanism that singled out Competitive Retail Areas, by contrast, could yield “price volatility” that did not represent “underlying supply and demand fundamentals.”²⁷ In particular, a bifurcated mechanism could result in

²³ *In re Midcontinent Independent Sys Operator, Inc*, 158 FERC ¶ 61,128, at 1 (2017).

²⁴ *Id.* at 8.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 9.

capacity pricing that “does not truly reflect the physical limitations of the system or the locational need for capacity” and could “prevent load serving entities in the Prompt Auction from procuring lower-cost capacity.”²⁸

The Commission’s order attempts to override FERC’s express rejection of MISO’s proposed Competitive Retail Solution and, in so doing, creates the same problems that FERC sought to avoid. It, too, yields bifurcation and singles out one area—Michigan—from the rest of MISO. MISO LSEs/AESs subject to the Commission’s order will have to procure capacity five years ahead, and from Michigan, whereas other MISO LSEs may procure capacity through the Prompt Auction.]

The Commission’s order is also plainly unconstitutional under the dormant Commerce Clause. The dormant Commerce Clause “invalidate[s] local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State.”²⁹ In particular, “laws discriminating against interstate commerce on their face are virtually per se invalid.”³⁰ Such facially

²⁸ *In re Midcontinent Independent Sys Operator, Inc*, 158 FERC ¶ 61,128, at 10.

²⁹ *C & A Carbone, Inc v Town of Clarkstown, NY*, 511 US 383, 390, 114 S Ct 1677, 1682, 128 L Ed 2d 399 (1994).

³⁰ *Camps Newfound/Owatonna, Inc v Town of Harrison, Me*, 520 US 564, 575 (1997) (quotation marks omitted).

discriminatory laws can escape invalidation only if the state carries the “extremely difficult burden” of showing that the law “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”³¹

Under this rule, the Commission’s order is invalid. It requires LSEs and AESs to procure capacity five years in advance, but it only allows them to satisfy this obligation with capacity in Michigan—notwithstanding the judgment of MISO and FERC that non-Michigan capacity can satisfy the capacity needs of Michigan utilities. For this reason, too, the Commission’s order cannot be defended as necessary to advance any legitimate local purpose. The purpose of Section 6w is to ensure that Michigan LSEs/AESs obtain adequate capacity, but MISO and FERC—which oversee the federal capacity markets—have determined in their expert judgment that non-Michigan capacity can satisfy LSEs/AESs’ reliability needs. Accordingly, the Commission’s requirement that Michigan LSEs/AESs “buy local” violates the Commerce Clause.³²

³¹ *Camps Newfound/Owatonna, Inc.*, 520 US at 575 (quotation marks omitted).

³² See *Wyoming v Oklahoma*, 502 US 437 (1992) (Commerce Clause violated by Oklahoma requirement that a certain percentage of coal used to fire Oklahoma power plants be mined in Oklahoma).

VI. CONCLUSION AND REQUESTED RELIEF

For the above-stated reasons, ELCON 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.

Respectfully submitted,

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September 6, 2019

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Verification

I verify the foregoing Brief's factual assertions are true and correct to the best of my personal knowledge, experience, and belief.



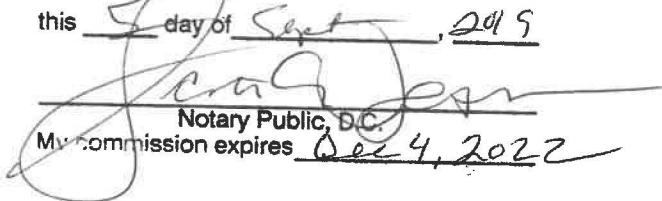
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Verification subscribed and sworn before me this 5 day of September 2019

Signed: 

Printed: Scott Jean Notary Public
Washington, D.C.
Acting in Washington, D.C.
My commission expires 12/04/2022

District of Columbia : SS
Subscribed and Sworn to before me
this 5 day of Sept, 2019


Notary Public, D.C.
My commission expires Dec 4, 2022