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.	Michigan Supreme Court No. 158307 Court of Appeals No. 340600 MPSC No. 00-18197
ENERGY MICHIGAN, INC., Appellee, v MICHIGAN PUBLIC SERVICE COMMISSION, Defendant-Appellant, and CONSUMER ENERGY COMPANY and MICHIGAN ELECTRIC AND GAS ASSOCIATION, Appellees.	Michigan Supreme Court No. 158308 Court of Appeals No. 340607 MPSC No. 00-18197

BRIEF OF AMICI THE MICHIGAN CHEMISTRY COUNCIL AND THE GRAND RAPIDS AREA CHAMBER OF COMMERCE IN SUPPORT OF AFFIRMANCE

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[1] Although Aaron Lindstrom's name appears on the MPSC's application for leave to appeal as a result of his former position as the Michigan Solicitor General, he did not have any personal or substantial involvement in the application or in the matter. Counsel for the MPSC on this matter have confirmed that he did not have any personal involvement in the matter. Accordingly, his representation of the amici in this brief does not conflict with Michigan Rule of Professional Conduct 1.11.

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STATEMENT OF QUESTION PRESENTED

1. Whether the Court of Appeals erred in holding that 2016 PA 341 does not authorize the Michigan Public Service Commission to impose a local clearing requirement on individual alternative electric suppliers.

Amici curiae's answer:	No.
Appellant MPSC's answer:	Yes.
Appellees' answer:	No.
Court of Appeals' answer:	No.

INTEREST OF AMICI CURIAE[2]

The Michigan Chemistry Council is a non-profit trade association representing chemical manufacturers in Michigan, many of whom are among the state's largest electric ratepayers. The cost of electricity significantly affects its members' ability to be competitive in the market.

The Grand Rapids Area Chamber of Commerce represents nearly 2,400 member businesses, 80% of which are small businesses employing fewer than 50 employees. All of these businesses are affected by electricity costs, but this is an especially significant cost of doing business for those engaged in manufacturing.

Electric choice in particular is important to the amici's members, as many manufacturing facilities use the electric-choice market. Indeed, the amici's members—like all Michigan taxpayers—have paid for Michigan's existing electricity capacity. Since retail electric choice began in 2002, they have compensated incumbent utilities like Consumers Energy and DTE, through securitization and payments for stranded costs (i.e., debts from past infrastructure investments), for the ability to access electric choice. For example, according to the MPSC, Consumers Energy has collected roughly $82 million from customers, including amici's members, through a stranded-cost recovery surcharge, and DTE has collected has collected roughly $43 million. MPSC Order, p 2, *In re Consumers*

[2] Counsel for a party did not author this brief in whole or in part and did not make a monetary contribution intended to fund the preparation or submission of the brief. No person other than the amici curiae and their members made such a monetary contribution. MCR. 7.312(H)(4).

Energy Co, No. U-17235 (May 15, 2013);[3] MPSC Order, pp 96–97, *In re Detroit Edison*, No. U-13808 (Nov 23, 2004).[4]

Consistent with the importance of electric choice, both the Council and the Chamber have consistently urged the Legislature to ensure that their members have opportunities to access a viable, cost-effective retail electric-choice program. Indeed, the Council and the Chamber were directly and actively involved in the legislative debates during the passage of the act at issue in this case. Most importantly for this case, when the amici learned that the Senate bill contained a provision—known as the local clearing requirement—that would have required alternative electric suppliers to source a fixed proportion of their capacity from within the state, they specifically advocated that this local clearing requirement should be removed from provisions that would have applied it individually to alternative electric suppliers. As Representatives Afendoulis and VerHeulen explained in a 2017 letter to the MPSC, the substitute legislation that removed the individual local clearing requirement as to alternative electric suppliers was "a compromise" that resulted from "extensive deliberation with constituents, stakeholders and [legislators]." Letter from C. Afendoulis & R. VerHeulen to MPSC (July 25, 2017) (attached). And after the Legislature in fact removed that provision when the law was enacted, the amici also participated in the MPSC contested-case

[3] Available at https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t0000000wgX1AAI.

[4] Available at https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t0000000vMvwAAE.

proceedings to preserve the legislative compromise that removed the local clearing requirement from alternative electric suppliers.

The Chamber, the Council, and their members are interested in this case because imposing an individual local clearing requirement on alternative electric suppliers will unjustifiably impose costs on consumers without beneficially increasing Michigan's electric reliability. The MPSC's own staff advised "against introducing a new requirement in 2018 for [load-serving entities] in Michigan that would allocate some percentage of the locational clearing requirement, or effectively allocate a portion of the capacity import limit on an individual entity basis." MPSC Staff Comments, p 4, MPSC Case No. U-18197.[5] It made this recommendation because "[d]oing so would not improve reliability in the short term . . . ." *Id.* Similarly, in a 2018 MPSC order, the MPSC conceded that imposing a local clearing requirement on alternative electric suppliers would not affect reliability: "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." MPSC Order, p 123, *In re Alpena Power Co*, No. U-18444 (June 28, 2018).[6]

Imposing the individual local clearing requirement on alternative electric suppliers would impose higher costs on all Michigan consumers. Instead of using

[5] Available at https://mi-psc.force.com/s/filing/a00t0000005pOUGAA2/u181970068 (linking to PDF).

[6] Available at https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t00000023GMHAA2.

existing generation facilities, alternative electric suppliers would have to build new *in-state* sources for generation, which is an expensive endeavor and impractical given a limited and competitive market. In instances where alternative electric suppliers cannot meet the requirement or afford to build new in-state facilities, their customers could then be forced to return to the default utility service at significantly higher rates. As noted by MPSC staff in their August 1, 2017 report on § 6w of Public Act 341, the individual local clearing requirement "could lead to an estimated 5% increase in planning reserves in Michigan that would be over and above the minimum reliability requirements at additional costs to Michigan customers." MPSC Staff, *Staff Report & Recommendations for Capacity Demonstrations re Public Act 341 Section 6w*, p 15.[7] And if Michigan's incumbent utilities have to build new in-state generation facilities to meet these demands for increased reserves, they will pass those costs on to ratepayers.

ARGUMENT

I. This Court should not read MCL 460.6w to authorize what the Legislature explicitly rejected.

As the Court of Appeals correctly held, the "language of MCL 460.6w is unambiguous" and "contains no clear and unmistakable language granting the MPSC authority to impose a local clearing requirement upon alternative electric suppliers." COA Op, p 12. The statute's plain language is the best evidence of the Legislature's intent and is sufficient to resolve the matter.

[7] Available at https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t0000001UVRlAAO.

If any members of the Court nevertheless think the statutory language contains any ambiguity, which amici deny, then considering the actual votes of members of the House and of the Senate as this provision made its way through the legislative process will resolve that perceived ambiguity in favor of the Court of Appeals ruling. This Court has said that "legislative history that relates to an action of the Legislature" is "legitimate legislative history" "from which a court may draw reasonable inferences about the Legislature's intent." *In re Certified Question from US Court of Appeals for Sixth Circuit*, 468 Mich 109, 115 n 5 (2003). This Court indeed listed "actions of the Legislature in considering various alternatives in language in statutory provisions before settling on the language actually enacted" as an example of this "legitimate legislative history." *Id.*; accord *Ligons v Crittenton Hosp*, 490 Mich 61, 76 n 45 (2011).

This is not a new rule in Michigan. Quite the opposite; this Court has long recognized that when the Legislature considers and rejects specific language, that tends to confirm that an interpretation of a statute that would convey the same meaning as that rejected language must be wrong. E.g., *Wayne Co v Fuller*, 250 Mich 227, 235–36 (1930) ("[W]hile [an act] was pending in the Legislature, a proposed amendment was rejected which, if embodied in the act, would have rendered it subject to plaintiff's interpretation and not to that of the defendant. Surely this gives rise to the inference that the Legislature did not intend the act should be subject to the interpretation now urged by plaintiff.") (citation omitted); *People v Adamowski*, 340 Mich 422, 429 (1954) ("When the legislature affirmatively

rejected the statutory language which would have supported the State's present view, it thereby made its intention crystal clear. We should not, without a clear and [] cogent reason to the contrary, give a statute a construction which the legislature itself plainly refused to give."); *Miller v State Farm Mut Auto Ins Co*, 410 Mich 538, 567 (1981) (refusing to hold "that the Legislature meant in [a statute] not only what it did not say explicitly, but what it explicitly rejected"); *Nation v WDE Elec Co*, 454 Mich 489, 497 (1997) ("In light of the Legislature's rejection of an explicit provision requiring compound interest, we presume the Legislature's silence evidences an intent that courts continue to use simple interest."); *In re MCI Telecom Complaint*, 460 Mich 396, 415 (1999) ("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."); *Bush v Shabahang*, 484 Mich 156, 173–74 (2009) (same). And U.S. Supreme Court has applied this same rule too. E.g., *INS v Cardoza-Fonseca*, 480 US 421, 442–43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.").

The circumstances here fall into that limited category of what this Court has recognized as legitimate legislative history (again, if the Court perceives any ambiguity in the enacted statutory provision). On November 10, 2016, the Michigan Senate voted on and passed a version of the act, known as Senate Substitute S-7, that expressly required alternative electric suppliers to satisfy the local clearing

requirement. Senate Bill 437, 98th Legislature, Reg. Sess. (Mich 2015); Senate Journal, 2016 Reg. Sess. No. 70, pp 1784–87 (roll call vote no. 629). The Michigan House drafted a different version, known as H-4, that omitted this requirement, and on December 15, 2016, the House passed its version. House Journal, 2016 Reg. Sess. No. 80, pp 2490, 2502 (roll call vote no. 750). Then the Senate voted to accept the new version, H-4, without changing that provision—thereby excluding the local clearing requirement for alternative electric suppliers. Senate Journal, 2016 Reg. Sess. No. 79, p 2137; see http://www.legislature.mi.gov/(S(istd4ienu2msvfp3ecnwub41))/mileg.aspx?page=getObject&objectname=2015-SB-0437 (showing the history of Senate Bill 437).

A side-by-side comparison of S-7 and H-4 shows that the Legislature specifically rejected the local clearing requirement for alternative electric suppliers:

S-7 (rejected language)	H-4 (now MCL 460.6w(8)(b))
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 50% of its proportional share of the local clearing requirement . . . .*" (Emphasis added.)	Each 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 capacity *to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable.* (Emphasis added.)

As this comparison shows, the Michigan Senate voted to include an individual local clearing requirement, but the Michigan House replaced that local clearing

requirement with a different capacity obligation, and then the House and Senate each voted to adopt the version that omitted the individual local clearing requirement.

This is not the type of legislative history that is like "looking over a crowd and picking out your friends," Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983) (quoting Judge Harold Leventhal); it is not the remark of a single legislator on the floor, or language in a committee report that was written by a staffer and never subjected to a vote. Rather, these differences in language contained in the actual bills proposed and voted on by the Legislature are direct evidence of the Legislature's intent; the House specifically replaced the individual local clearing requirement for alternative electric suppliers, and the Senate agreed, by voting on it, with that replacement.

As this Court has repeatedly said, "[w]here 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." *In re MCI Telecom*, 460 Mich at 415 (1999). Yet that is what the MPSC seeks here. It argues that "all electric providers, including alternative electric suppliers," must "show that they can meet their planning reserve margin and local clearing requirements." MPSC Suppl Br, p 3. And it attempts to buttress this argument by talking at length about the overall structure of the act. MPSC Suppl Br, pp 17–25 ("Act 341 is structured to require all electric providers, including

alternative electric suppliers, to show that they can meet the local clearing requirements."). But general statutory structure does not (and indeed cannot) overcome specific statutory language. E.g., *Michigan v EPA*, 135 S. Ct. 2699, 2710 (2015) (rejecting an argument about the overall structure of a statute because "[t]his line of reasoning overlooks the whole point of having a separate provision about power plants: treating power plants *differently* from other stationary sources" and explaining that an agency's "'preference for symmetry cannot trump an asymmetrical statute'"). Because the MPSC's interpretation, if accepted, would overlook that the Legislature chose to treat alternative electric suppliers differently from other suppliers and would construe the statute to explicitly authorize what the Legislature explicitly rejected, its interpretation should be rejected.

II. The MPSC's statutory interpretation is not entitled to deference.

The MPSC also suggests that this Court should defer to the MPSC's interpretation of the statute because "Section 6w of Act 341 is an intricate statute" and because the MPSC's "interpretation of Act 341 is consistent with the language of the statute and does not conflict with the spirit and purpose of the law." MPSC Suppl Br, p 5. But interpreting the law, including complex statutes, is the core task of the judiciary in our three-branch system of government; this Court can read statutes as well as the MPSC. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 98 (2008) ("Since the time of *Marbury v. Madison*, interpreting the law has been one of the defining aspects of judicial power. Although we may not usurp the lawmaking function of the legislature, the proper construction of a statute is a

judicial function, and we are required to discover the legislative intent.") (footnotes and internal quotation marks omitted). Indeed, Michigan has not followed the path of the federal courts, which apply the *Chevron* doctrine, of deferring to agency interpretations so long as they are "permissible" readings of a statute (as opposed to the best reading of the statute). See *Chevron, USA, Inc v Nat Res Def Council, Inc*, 467 US 837, 843 (1984).

Instead, as *Rovas* explained, "statutory interpretation is a question of law that this Court reviews de novo" even when reviewing "an agency's interpretation of a statute during a contested case." 482 Mich at 102. The MPSC, though, seems to be attempting to turn this de novo review into something different. Instead of noting that *Rovas* calls for de novo review of questions of statutory interpretation that arise in contested cases, the MPSC cites as the standard of review a decision of the Court of Appeals for the proposition that "an agency 'decision *must be affirmed* unless it is in violation of statute, in excess of statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious.'" MPSC Suppl Br, p 6 (quoting and adding emphasis to *Brandon Sch Dist v Michigan Ed Special Services Ass'n*, 191 Mich App 257, 263 (1991)). According to the MPSC, this *Brandon* test is now controlling law (and places a thumb on the side of agency interpretation) as a result of *Henderson v Civil Service Commission*, 923 NW2d 595 (Mich, 2019). MPSC Suppl Br, 6 & n 3. But the MPSC is wrong in its understanding of both *Henderson* and *Brandon*.

The question in *Henderson* was not whether questions of statutory interpretation should be reviewed de novo; rather, *Henderson* considered whether the "authorized by law" standard of § 28 of article 6 of the Michigan Constitution includes a review of the evidentiary record even in cases where there was no contested case and whether that standard includes arbitrary-and-capricious review. Order, *Henderson v CSC*, No. 156270 (Mich, April 6, 2018) (granting argument on the application and identifying questions to brief, including "whether the Court of Appeals gave proper meaning to the 'authorized by law' constitutional standard"); see also *Henderson*, 923 NW2d at 596 (Markman, J, concurring) ("I write separately only to note that this Court by its order today does not decide that an 'arbitrary and capricious' review *does* comport with the 'authorized by law' standard, as the Court of Appeals held in *Brandon*."); *id.* at 597 (Cavanaugh, J, concurring) ("I disagree with the Court of Appeals that review of the evidentiary support for an agency's final decision, finding, ruling or order is not proper under 'authorized by law' review.").

Nothing in *Henderson* suggests this Court has decided that it is no longer going to review questions of statutory interpretation de novo. Indeed, neither of the two separate concurrences in *Henderson* even mentions *Rovas*, let alone questions *Rovas*'s statement, made specifically when addressing statutory interpretation by an agency during a contested case, that "statutory interpretation is a question of law that this Court reviews de novo." 482 Mich at 102. It is not plausible to believe that this Court changed such a fundamental principle of Michigan law in such an

oblique way, in an order denying leave to appeal, without even mentioning the leading case on the issue. Cf. *Whitman v Am Trucking Associations*, 531 US 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). Yet the MPSC's brief never mentions de novo review of questions of statutory interpretation.

As to *Brandon*, the Court of Appeals in that case interpreted the statutes at issue for itself, without deferring to any agency interpretation, so it also does not support the MPSC's proposition that agency interpretations are entitled to deference. E.g., 191 Mich App at 264 ("The language of the statutes does not support this argument."). This de novo review makes sense because when courts ask whether an agency acted "in violation of statute" or "in excess of the statutory authority or jurisdiction of the agency," 191 Mich App at 263, they are asking questions of statutory interpretation. Moreover, the MPSC does not explain why courts should defer to an agency on questions about the agency's own authority instead of reviewing de novo whether they are authorized by law (which is a question of law).

Nor *should* courts defer to agencies on such questions: deferring to an agency on whether the agency exceeded its statutory authority would be letting the fox guard the henhouse. This point circles back to *Chevron*. The federal *Chevron* doctrine is now so deferential to agencies that it does just that—it defers to agencies even as to questions about the agency's jurisdiction. *City of Arlington, Tex v FCC*,

569 US 290, 295, 296, 307 (2013) (holding that "a court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority (that is, its jurisdiction)"). This may be why a number of current Justices have criticized *Chevron*. E.g., *Michigan v EPA*, 135 S Ct at 2712 (2015) (Thomas, J, concurring) ("*Chevron* deference raises serious separation-of-powers questions."); *Gutierrez-Brizuela v Lynch*, 834 F3d 1142, 1152 (CA 10, 2016) (Gorsuch, J) ("*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty."); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv L Rev 2118, 2154, 2150 (2016) (criticizing the *Chevron* doctrine because it is "indeterminate—and thus can be antithetical to the neutral impartial rule of law" and because "*Chevron* encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints").

If the Court were to adopt the MPSC's suggestion that something less than de novo review applies to questions of agency authority, this Court would be adopting a *Chevron*-like approach that defers to administrative agencies on a core judicial function—interpreting statutes—and it would be doing so in a case considering an agency's very authority to act. This Court has previously "decline[d] to import the federal [*Chevron*] regime into Michigan's jurisprudence" because "the unyielding deference to agency statutory construction required by *Chevron* conflicts with this state's administrative law jurisprudence and with [separation-of-powers principles] by compelling delegation of the judiciary's constitutional authority to

construe statutes to another branch of government." *Rovas*, 482 Mich at 111. This Court should again decline that invitation and preserve de novo review for questions of statutory interpretation, including questions about whether agency actions are authorized by statute.

The MPSC attempts to shore up its argument about the supposed *Brandon* standard of review by reassuring the Court that the Legislature delegated discretion to the MPSC "to ensure that electric providers have enough generation to meet demand." MPSC Suppl Br, p 3. But its assertion that it has been authorized to exercise discretion *rests* on its interpretation of the statute, it doesn't *support* it; the very question in this case is whether the statute in fact authorizes this discretion. While the Legislature could have drafted a statute with the sort of broad discretion the MPSC describes, it did not do so here. When the Legislature delegates authority to agencies, it does so through statutory language, and, as explained above, the language of MCL 460.6w does not allow the MPSC to impose an individual local clearing requirement on alternative electric suppliers. In other words, the statutory language identifies the boundaries of the agency's authority and of its discretion, and the MPSC cannot overcome its lack of authority by reading language into the statute. Because the Legislature did not give the MPSC the authority to impose this requirement, the MPSC's decision to impose the requirement is in violation of the statute and in excess of the MPSC's statutory authority.

CONCLUSION AND RELIEF REQUESTED

For these reasons, the amici respectfully ask this Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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