STATE OF MICHIGAN

IN THE SUPREME COURT

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

In re RELIABILITY PLANS OF ELECTRIC UTILITIES FOR 2017-2021

MICHIGAN PUBLIC SERVICE COMMISSION and CONSUMERS ENERGY COMPANY

Appellants,

v

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY

Appellee.
_____/

Supreme Court No. 158305

Court of Appeals No. 340600

MPSC No. U-18197

In re RELIABILITY PLANS OF ELECTRIC UTILITIES FOR 2017-2021

MICHIGAN PUBLIC SERVICE COMMISSION and CONSUMERS ENERGY COMPANY

Appellants,

v

ENERGY MICHIGAN, INC.

Appellee.
_____/

Supreme Court No. 158307

Court of Appeals No. 340607

MPSC No. U-18197

APPELLANT CONSUMERS ENERGY COMPANY'S
REPLY TO THE SUPPLEMENTAL BRIEF OF ENERGY MICHIGAN, INC.

ORAL ARGUMENT REQUESTED

Dated: September 6, 2019

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

I. Introduction

Pursuant to MCR 7.312 and the Supreme Court's June 21, 2019 Order in this proceeding, Consumers Energy Company ("Consumers Energy" or the "Company") files this Reply to the August 23, 2019 Supplemental Brief of Energy Michigan, Inc. ("Energy Michigan").

II. Section 6w of Public Act 341 of 2016 Authorizes the Michigan Public Service Commission to Determine and Implement a Local Clearing Requirement as Part of Each Electric Provider's Four-Year Forward Capacity Obligations, Including Individual Alternative Electric Suppliers

At pages 13 through 16 and 30 through 32 of its Supplemental Brief, Energy Michigan contends that the Michigan Public Service Commission's ("MPSC" or the "Commission") authority to implement a Local Clearing Requirement ("LCR") on individual Alternative Electric Suppliers ("AESs") as part of four-year forward capacity obligations under Section 6w of Public Act 341 of 2016 ("Act 341") is restricted to the minimum requirements imposed by the Midcontinent Independent System Operator, Inc. ("MISO") for its current Planning Year resource adequacy construct. However, the entirety of Section 6w of Act 341 demonstrates that the Legislature did not intend for the MPSC to simply default to MISO's single planning year resource adequacy requirements. To the contrary, Section 6w shows the Legislature's provision for the MPSC to implement four-year forward capacity obligations for each electric provider. These long-term capacity obligations are designed to apply to each individual electric provider, including AESs, and include the components of an LCR as well as a Planning Reserve Margin Requirement.

The differences between Act 341's four-year forward capacity obligations and those which apply to the MISO residual Planning Reserve Auction ("PRA") are substantive, not only temporal. The Legislature recognized that allowing electric providers to rely solely on the PRA, to purchase electric supply via a residual auction which is not otherwise claimed by owners of

that capacity, is insufficient to ensure the long-term reliability of electric supply in Michigan. Section 6w of Act 341 requires all electric providers to have owned or forward contract rights to sufficient generation resources to serve their load and contribute to grid reliability. Section 6w's long-term requirements for individual electric providers, including the LCR, are consistent with, and complementary to, the short-term MISO construct.

Energy Michigan contends in its Supplemental Brief (pages 18-23) that the MPSC's consideration of whether to implement an LCR in the underlying Case No. U-18197 and its findings concerning electric supply in Michigan in other cases somehow undermine its statutory authority to determine and implement an LCR on AESs under Section 6w of Act 341. However, the fact that the MPSC gave due study and consideration to its authority under the new law, and made numerous findings regarding the important issue of reliability, supports the MPSC's decision which is the subject of this appeal. The only issue at hand is indeed an issue the MPSC considered: does the MPSC have statutory authority to implement an LCR as part of individual AESs' capacity obligations under the State Reliability Mechanism ("SRM") under Section 6w of Act 341? The answer to that straightforward question is yes.

Additionally, Energy Michigan contends (Energy Michigan's Supplemental Brief, pages 23-25) that the Federal Energy Regulatory Commission's ("FERC") rejection of MISO's proposed Competitive Retail Solution ("CRS") tariff eliminated the MPSC's authority to implement an LCR on individual electric providers as part of the SRM. This position is inconsistent with the text of Section 6w, which expressly provided for such event, and included direction for the MPSC to implement an LCR as part of individual electric providers' capacity obligations regardless of the outcome of FERC's consideration of the MISO CRS tariff proposal. Section 6w(1) and (2) of Act 341 provided for the MPSC's required actions if FERC approved:

(i) a MISO tariff which included a capacity forward auction and an option for a state-approved Prevailing State Compensation Mechanism ("PSCM"), or (ii) a MISO tariff with a capacity forward auction and no state PSCM. In the former case, Section 6w(1) required the MPSC to consider whether the PSCM "would be more cost-effective, reasonable, and prudent than the capacity forward auction for this state. . . . in meeting the local clearing requirement and the planning reserve margin requirement." In the latter case, Section 6w(2) directed the MPSC to consider whether the SRM established under Section 6w(8) "would be more cost-effective, reasonable, and prudent than the capacity forward auction . . . in meeting the local clearing requirement and the planning reserve margin requirement." Section 6w(2) further required the MPSC to implement an SRM under Section 6w(8) in the event FERC did not approve a MISO tariff that includes a capacity forward auction or a PSCM. Thus, an SRM was either possible or required under Section 6w(2), depending upon the outcome of the FERC's consideration of the MISO CRS tariff. The components of the SRM, set forth in Section 6w(8), must include an LCR for each electric provider. Had the MISO CRS tariff been approved and a PSCM implemented, all electric providers would have been required to demonstrate a load-ratio share of the Zone's LCR. Although the MPSC ultimately established an LCR much less than a load-ratio share of the Zone's total, the authority to determine and implement an LCR remained as part of Section 6w(8)'s SRM.

Implementing an LCR under the SRM is not, as contended by Energy Michigan in its Supplemental Brief (pages 24-25), an implementation of a wholesale market tariff. To the contrary, the SRM is the state-authorized method to require each retail electric provider in Michigan to comply with four-year forward capacity obligations. The fact that the SRM is

similar to a former MISO proposal which contemplated similar state actions is irrelevant to the MPSC's authority granted by the Legislature under Section 6w of Act 341.

Energy Michigan's Supplemental Brief (pages 27-29) also argues (contrary to the Association of Businesses Advocating Tariff Equity's concession on this issue) that Act 341 does not authorize the MPSC to impose an LCR on municipal utilities and cooperative utilities. This argument ignores the plain text of Section 6w(8)(c) of Act 341, which requires the MPSC "to determine the capacity obligations . . . [including] the local clearing requirement and planning reserve margin requirement" for all individual electric providers, which by statutory definition (Section 6w(12)(iv)) includes municipal and cooperative utilities, as well as AESs.

Section 6w(8)(b) provides municipal and cooperative utilities the ability to "aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision." Thus, while the MPSC is required to set an LCR to apply to each electric provider under the SRM, municipal and cooperative utilities are given the option to aggregate their capacity resources located in the same Zone in order to meet the LCR. That aggregation exception does not apply to other types of electric providers, including AESs.

III. The Legislative History of Act 341 Supports the MPSC's Authority to Determine and Implement an LCR On Individual AESs

The Supreme Court should also reject Energy Michigan's argument in its Supplemental Brief (pages 26, 34-37) regarding the legislative history of Section 6w of Act 341, for the reasons set forth on pages 48-50 of Consumers Energy's August 2, 2019 Supplemental Brief in this matter.

IV. The MPSC's Implementation of an LCR on Individual Electric Providers, Including AESs, Under the SRM Does Not Violate the Dormant Commerce Clause and Does Not Impermissibly Affect the MISO Wholesale Market

At pages 25 through 27 of its Supplemental Brief, Energy Michigan argues that the MPSC's implementation of an LCR as part of individual electric providers' four-year capacity obligations would impermissibly impede AESs' ability to access the MISO wholesale market and would violate the dormant Commerce Clause. Energy Michigan did not raise this federal claim in its appeal of the MPSC's decision. In any event, its position is incorrect. Act 341's state long-term resource adequacy planning process, including the requirement of complying with an LCR as determined by the MPSC, does not prohibit electric providers from using the PRA to the fullest extent allowed under MISO's and FERC's rules. Neither the SRM nor an LCR implemented under it impedes or impermissibly affects the MISO wholesale market, because electric providers remain free to participate in the PRA or to otherwise procure other wholesale resources for the MISO wholesale market (e.g., by using a Fixed Resource Adequacy Plan, which includes an LCR), which is a one-year construct unaffected by the SRM.

Michigan's Act 341 SRM retail electric resource adequacy construct is complementary to and consistent with the federal wholesale electric resource adequacy construct administered by MISO. The State is not preempted from taking action to ensure long-term retail electric resource adequacy. The Federal Power Act, as amended, 16 USC section 791a *et seq* ("FPA"), and the MISO resource adequacy process expressly respect the prerogative of the states to determine how to best meet long-term retail resource adequacy requirements. See *Midwest Indep Sys Operator, Inc*, 139 FERC ¶ 61,199 (2012). The Legislature exercised this prerogative. As iterated by MISO in the underlying MPSC proceeding, the State's action to pass Act 341 to address long-term resource adequacy is complementary to MISO's short-term single-year

planning process, and is consistent with those processes. Such a complementary and consistent federal-state regulatory structure is not preempted.

The MPSC's implementation of an LCR as part of electric providers' four-year forward capacity obligations does not prohibit AESs from accessing wholesale electric markets. Rather, it would require them to ensure that a portion of their owned or contracted capacity resources contribute to the state's LCR, on a four-year forward basis, in order to ensure the reliability of the state's electric grid. This is the type of state action which is appropriate under well-established dormant Commerce Clause analysis concerning state public utility and energy regulation.

The negative or dormant implication of the United States Constitution's Commerce Clause prohibits state regulation that discriminates against or unduly burdens interstate commerce. *General Motors Corp v Tracy*, 519 US 278, 287; 136 L Ed 2d 761 (1997). However, states' regulation of retail energy service which allegedly harms out-of-state providers vis-a-vis the state's regulated energy providers is not considered facial discrimination under the Commerce Clause in light of the states' authority to regulate retail energy (electric and gas) service and the associated public interest in the reliability of such service. See *Tracy, supra* (upholding Ohio's sales and use tax exemption for regulated domestic gas utilities even though the tax exemption did not also apply to unregulated out-of-state gas providers); and *Panhandle Eastern Pipe Line Co v Pub Serv Comm*, 341 US 329; 71 S Ct 777; 95 L Ed 993 (1951) (rejecting a dormant Commerce Clause challenge to the MPSC's requirement for an interstate natural gas pipeline to obtain a certificate of public convenience and necessity in order to provide retail natural gas service in Michigan).

The *Tracy* Court's recognition of the states' interest in regulating retail energy service to ensure reliable and dependable supply strongly supports the Michigan Legislature's action to require the MPSC to implement an SRM, which includes the component of an LCR, to ensure the reliability of the state's electric grid. The *Tracy* Court stated:

> The continuing importance of the States' interest in protecting the captive market from the effects of competition for the largest consumers is underscored by the common sense of our traditional recognition of the need to accommodate state health and safety regulation in applying dormant Commerce Clause principles. State regulation of natural gas sales to consumers serves important interests in health and safety in fairly obvious ways, in that requirements of dependable supply and extended credit assure that individual buyers of gas for domestic purposes are not frozen out of their houses in the cold months. We have consistently recognized the legitimate state pursuit of such interests as compatible with the Commerce Clause, which was "never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." [*Tracy* at 306-307, quoting *Huron Portland Cement Co v City of Detroit*, 362 US 440, 443-444; 80 S Ct 813; 4 L Ed 2d 852 (1960) (quoting *Sherlock v Alling*, 93 US 99, 103; 23 L Ed 819 (1876)).]

The express purpose of Section 6w of Act 341 and its SRM is to ensure the reliability of the electric grid in Michigan for all customers. MCL 460.6w(12)(h). No party has disputed that an LCR is necessary to ensure grid reliability, and the very definition of LCR in Act 341 (MCL 460.6w(12)(d)) shows that its purpose is to achieve grid reliability. This is not a case involving the State's attempt to economically benefit an in-state interest to the detriment of the economic interests of an out-of-state market participant with no public policy or health and safety reason for doing so. See, e.g., *Wyoming v Oklahoma*, 502 US 437; 112 S Ct 789; 117 L Ed 2d 1 (1992) (holding that Oklahoma's legislation requiring coal-fired electric generating plants producing power for sale in Oklahoma to burn a mixture of coal containing at least 10% Oklahoma-mined coal violated the dormant Commerce Clause where the state of Oklahoma did

not provide a legitimate reason for the requirement other than benefitting in-state coal suppliers' economic interests to the detriment of out-of-state suppliers). The Michigan Supreme Court should reject Energy Michigan's dormant Commerce Clause argument.

The Supreme Court should also reject arguments that the MPSC's imposition of an LCR on individual AESs as part of the SRM would be federally preempted by the FPA. The MPSC's action at issue in this case is distinguishable from *Hughes v Talen Energy Marketing, LLC*, 136 S Ct 1288; 194 L Ed 2d 414 (2016). The *Hughes* Court held that the FPA preempted the Maryland Public Service Commission's order directing that state's electric utilities to enter into contracts for differences with a new electric generation plant which would require the utilities to pay the owner of that new plant the difference between their contract price and the FERC-regulated wholesale auction clearing price for the plant's capacity, thereby guaranteeing the plant a rate distinct from the FERC-approved market clearing price. *Id.* at 1297. Unlike the situation in *Hughes*, the MPSC's implementation of an LCR does not impermissibly affect the MISO PRA, or the rates charged in the MISO wholesale market. The LCR is a state regulation of long-term electric grid reliability, a subject which the FPA assigns to the states. The *Hughes* court recognized that the FPA reserves to the states the authority to regulate retail electric service, including the facilities needed to provide that service, even if those state actions incidentally affect areas within FERC's domain. *Id.* at 1292, 1298. The MPSC's implementation of an LCR is not preempted.

V. Act 341 Does Not Require Incumbent Utilities to Bear the Full Burden of the Zone's LCR

At pages 30 through 32 of its Supplemental Brief, Energy Michigan contends that despite the text of Section 6w(8) of Act 341, the MPSC is prohibited from requiring AESs to meet an LCR component of the SRM capacity obligations. Energy Michigan contends it is "easy" for

incumbent utilities to bear the full burden of the LCR for the state's electric reliability, and that AESs should be permitted to rely exclusively on out-of-state generation resources using the prompt-year MISO PRA for all of their supply. However, AESs' ability to avoid an individual LCR in MISO's prompt-year, residual PRA is irrelevant to their capacity obligations under the SRM, which apply to a four-year forward period. In enacting Act 341 and authorizing the MPSC to determine and implement capacity obligations on all electric providers, including AESs, the Legislature clearly intended for all electric providers to be required to contribute to the state's long-term electric reliability, and to not allow AESs to continue to obtain a free reliability subsidy paid for by the customers of incumbent utilities. Energy Michigan's policy arguments regarding whether it is "easy" or "hard" for AESs to do comply with their long-term state capacity obligations are irrelevant to the issue of this appeal—the MPSC's authority to determine and implement the LCR component of the SRM capacity obligations on AESs.

VI. The Court of Appeals' Recent Cloverland Opinion Conflicts with the Court of Appeals' Decision at Issue in This Appeal

At page 33 of its Supplemental Brief, Energy Michigan attempts to distinguish the Court of Appeals' July 23, 2019 decision in *In re Implementing Section 6w of 2016 PA 341 for Cloverland Electric Cooperative*, Slip Opinion for Publication (Court of Appeals Docket No. 342552). The *Cloverland* court held that Section 6w affords the MPSC authority to determine and implement a member-regulated cooperative utility's capacity charge despite Public Act 167 of 2008's provision for cooperative utility member-regulation in lieu of MPSC regulation. The *Cloverland* Court found that Section 6w(3)'s requirement that the capacity charge to be applied for AES load "does not differ" from that which applies to a utility's full-service load provides the MPSC authority to set the cooperative utility's capacity rate. Notwithstanding Energy Michigan's attempt to distance the instant appeal from the *Cloverland* case, that Court of

Appeals' opinion demonstrates that the text of Section 6w must be read logically, giving meaning, context, and effect to the goal and the entire text of the statute. The MPSC's authority to implement an LCR as part of the capacity obligations of individual electric providers, including AESs, is even more clear and unmistakable in Section 6w(8) than the authority to regulate the rates of cooperative utilities which are otherwise member regulated.

VII. Request for Relief

For the reasons stated, Consumers Energy Company requests the Michigan Supreme Court to grant leave to appeal the Court of Appeals' July 12, 2018 Opinion in consolidated Docket Nos. 340600 and 340607, reverse that decision, and find that the Michigan Public Service Commission has authority to implement a local clearing requirement as part of alternative electric providers' capacity obligations under Section 6w of Act 341.

Respectfully submitted,

CONSUMERS ENERGY COMPANY

Dated: September 6, 2019[1]

By: Kelly M. Hall Digitally signed by Kelly M. Hall Date: 2019.09.06 14:40:00 -04'00'

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[1] Pursuant to the instructions given by the Michigan Appellate Courts, this document is being filed on September 7, 2019 due to the court migration system.