STATE OF MICHIGAN
IN THE SUPREME COURT

In re RELIABILITY PLANS OF ELECTRIC UTILITIES FOR 2017-2021	MSC No. 158305, 158306, 158307, 158308 COA No. 340600, 340607 Trial Ct. No. 00-018197

CORRECTED AMICUS CURIAE BRIEF
on behalf of
MICHIGAN SCHOOLS ENERGY COOPERATIVE (MISEC)

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STATEMENT OF JURISDICTION

Amicus Curiae, Michigan Schools Energy Cooperative ("MISEC"), agrees with the Statements of Jurisdiction set forth in the supplemental briefs of Energy Michigan, Inc. and the Association of Businesses Advocating Tariff Equity ("ABATE").

STATEMENT OF QUESTION PRESENTED

I. Did the Court of Appeals correctly hold that Section 6w of Act 341 of 2016 does not authorize the Michigan Public Service Commission to impose an individual local clearing requirement on alternative electric suppliers?

Appellant MPSC answers:	No.
Appellant Consumers Energy Co. answers:	No.
Appellee Energy Michigan, Inc. answers:	Yes.
Appellee ABATE answers:	Yes.
Amicus MISEC answers:	Yes.
The Court of Appeals would answer:	Yes.

INTRODUCTION & STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus Curiae, Michigan Schools Energy Cooperative ("MISEC"), is a Michigan energy cooperative formed in 1997 by the Middle Cities Education Association, the Michigan Association of Superintendents & Administrators, the Michigan Association of School Boards, the Michigan School Business Officials, and the Michigan Association of Intermediate School Administrators. MISEC was designed to manage natural gas and electric procurement by Michigan's educational community, and it is the largest program of its type in the United States. MISEC's members include 330 school districts, which represent 30% of all public school students in Michigan.

Of its 330 school district members, 157 school districts have opted to participate in the electric choice market, which allows them to contract with alternative electric suppliers ("AESs"). The competitive electric choice market brings lower electric prices to customers, which has allowed Michigan schools to save, in the aggregate, more than $133 million in electric costs. As discussed further in this amicus brief, the average annual savings for participating school districts is $15 million, which amounts to more than $30 per pupil.

Because of the importance of electric choice to Michigan's schools, MISEC actively participated in the final negotiations of Act 341 of 2016, including the local clearing requirement ("LCR") at issue in this case. MISEC opposed the inclusion of an individual LCR on AESs and agreed with the decision to remove language that would have allowed the individual LCR. MISEC supported Act 341's current language in section 6w, which does *not* authorize the Commission to impose an individual LCR on AESs.

[1] No party or counsel for a party authored this brief in whole or in part or made 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).

Despite the many benefits of the electric choice program and despite the legislative history, the Michigan Public Service Commission ("Commission") has exceeded its statutory authority and purported to impose an individual LCR on AESs, which would require AESs to source a certain proportion of their capacity from within the state. Nothing in Act 341 expressly authorizes the Commission to impose an individual LCR on AESs, nor can such authority be extended by inference. The direct legislative history – with which MISEC was directly involved – confirms what the plain language of the statute already makes clear: the Commission has no authority to impose an individual LCR on AESs.

The Legislature was wise to withhold this authority. As further discussed below, imposing an individual LCR on AESs would decimate the electric choice market, undermine the Legislature's clear deregulation plan, and cause prices for Michigan's electric customers to dramatically increase. Participants in Michigan's electric choice program – including small businesses, retailers, health care facilities, factories, schools, and universities – would lose the tremendous electric cost savings on which they have relied since the inception of the electric choice program. Instead, the market would be controlled by the utilities who hold a monopoly on local resources (Consumers and DTE), and AESs would likely be driven out of business altogether. This will have a devastating financial effect on Michigan's K-12 schools and could result in the loss of teachers, increased class sizes, and a reduction of educational opportunities for Michigan's schoolchildren.

For these reasons, amicus curiae MISEC requests that this Court deny leave to appeal or, alternatively, affirm the unanimous and published decision of the Michigan Court of Appeals.

STATEMENT OF FACTS

MISEC incorporates by references the Statements of Facts set forth in the supplemental briefs of Energy Michigan, Inc. and ABATE.

ARGUMENT

I. The Commission exceeded its statutory authority in imposing an individual LCR on AESs.

A. The Commission does not have express statutory authority to impose the individual LCR on AESs.

This Court has long held that "[t]he power and authority to be exercised by boards or commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist." *Mason County Civic Research Council v County of Mason*, 343 Mich 313, 326; 72 NW2d 292 (1955) (*quoting* 67 CJS, Officers § 107, p 378). In *Mason*, this Court refused to afford a broad construction to a statute granting limited powers to county boards of supervisors. *Id.* at 325-26. In so holding, the *Mason* Court reasoned that "an express grant of power to administrative officers, boards or commissions, is subject to a strict interpretation." *Id.* at 326.

With respect to the Commission, this Court has repeatedly held that "the [Commission] has only those powers conferred by clear statutory language." *Consumers Power Co v Public Serv Comm'n*, 460 Mich 148, 160; 596 NW2d 126 (1999); *see also Union Carbide Corp v Public Serv Comm'n*, 431 Mich 135, 151; 428 NW2d 322 (1988) (holding that the Commission's "power to regulate does not convey with it the power to exercise general management powers" where such management powers were not specifically conferred by statute).

Here, the Court of Appeals correctly found that "no provision of MCL 460.6w clearly and unmistakably authorizes the MPSC to impose a local clearing requirement on individual alternative electric providers." *In re Reliability Plans of Electric Utilities for 2017-2012*, 325 Mich App 207, 224; 926 NW2d 584 (2018). The Court of Appeals recognized that "although section 6w(8)(c) requires the MPSC to determine the local clearing requirement in order to

determine capacity obligations, it does not specifically authorize the MPSC to impose the local clearing requirement on alternative electric suppliers individually." *Id.* at 225.

Neither the Commission nor Consumers points to any specific, express grant of authority in the statutory language. In fact, the Commission admits in its Application for Leave to Appeal that "Act 341 is **silent** about the Commission's authority to impose the local clearing requirement on alternative electric suppliers." (Application, p. 47, emphasis added.) On that point, the Commission is correct: there is no provision in Act 341 requiring AESs to source a fixed proportion of their capacity from within the state or allowing the Commission to impose such an individual LCR on AESs.

In the absence of express language, the Commission urges this Court to look to the "structure" and "context" of Act 341 and follow a so-called "statutory map to the local clearing requirement" – which does not, of course, point to any *individual* LCR. (Commission Brief, pp. 17-19.) The Commission summarily reasons that "since Section 6w plainly states that a supplier's capacity obligation includes a local clearing requirement, see MCL 460.6w(8)(c), the natural conclusion is that a supplier must also individually meet the local clearing requirement." (Commission Brief, p. 19.) But although Section 6w(8)(c) directs the Commission to "set any required local clearing requirement and planning reserve margin requirement, consistent with federal reliability requirements," it does not specifically authorize the Commission to impose an *individual* LCR on AESs. The Court of Appeals therefore did not err in holding that Section 6w(8)(c) "does not specifically authorize the MPSC to impose the local clearing requirement on alternative electric suppliers individually." 325 Mich App at 225.

B. The Commission cannot rely on "inferred" authority because an agency's authority must be expressly granted.

In the absence of express statutory authority, the Commission and Consumers suggest that the Commission's authority to impose an individual LCR on AESs must be *implied* from, among other things, the structure of the statute and legislative intent. The Commission claims to have "broad discretion" to impose an LCR on AESs. (Commission Brief, pp. 9-10, 21).

The broad, inferred rulemaking authority that the Commission seeks is contrary to Michigan administrative law. The Commission "possesses only that authority granted to it by the Legislature. Words and phrases in the [Commission's] enabling statutes **must be read narrowly** and in the context of the entire statutory scheme." *Attorney General v Mich Public Serv Comm'n et al*, 291 Mich App 106, 113; 804 NW2d 574 (2010), *lv den*, 490 Mich 858; 802 NW2d 61 (2011) (emphasis added).

As the Court of Appeals correctly noted below, "powers specifically conferred on an agency **cannot be extended by inference,**" and courts must find that "no other or greater power was given than that specified." 325 Mich App at 222, *quoting Herrick Dist Library v Library of Michigan*, 293 Mich App 571, 582-83; 810 NW2d 110 (2011) (emphasis added). This holding is consistent with long-standing case law from this Court. *See, e.g., Sebewaing Industries, Inc v Sebewaing*, 337 Mich 530, 546; 60 NW2d 444 (1953) ("It is a well-established rule of statutory construction that where powers are specifically conferred they cannot be extended by inference, but that the inference is that it was intended that no other or greater power was given than that specified"); *see also Alan v County of Wayne*, 388 Mich 210, 257; 200 NW2d 628 (1972).

Similarly, the Court of Appeals has recognized that "[s]tatutes that grant power to administrative agencies are strictly construed and the authority granted [to] the administrative agency must be plainly granted." *Mich State Employees Assoc v Dep't of Corrections*, 275 Mich

App 474, 486; 737 NW2d 835 (2007). In that case, the court held that there was no "plain grant" of authority in the statute for rules promulgated by DLEG and that DLEG did not possess the authority "to create by administrative rule circumstances not provided for by statute[.]" *Id.*

Thus, the Commission's and Consumers' plea that authority can be derived from "legislative structure" (Consumers Brief, p. 36) and "context" (Commission Brief, p. 19) reveals that they are arguing for an *inferred* authority, which is impermissible. The power at issue – that is, the power to impose an individual LCR on AESs – is not "specifically conferred by statute," and thus no such power can be extended by inference. *Sebewaing*, 337 Mich at 546.

The Court of Appeals correctly recognized the limits of agency power and declined Consumers' and the Commission's invitation to infer that the Commission had any additional authority beyond that included in the statute's "clear and unmistakable language." 325 Mich App at 225. Because the Commission's authority cannot be extended by inference, the Court of Appeals' decision does not constitute error, and leave to appeal should be denied.

II. The Legislature specifically *removed* proposed language that would have imposed an individual LCR on AESs, which makes clear that no such individual requirement was intended.

As set forth in detail in ABATE's and Energy Michigan's supplemental briefs, and as similarly detailed in the Court of Appeals' decision, the legislative history of Section 6w makes clear that the Legislature did *not* intend to impose an individual LCR on AESs.

Generally, this Court will not look beyond the plain language of the statute and will not resort to legislative history if the statutory language is clear. *In re Certified Question*, 468 Mich 109, 116; 659 NW2d 597 (2003). The Court of Appeals recognized this but noted that the Commission was seeking an interpretation of the statute "permitting it to assume authority not explicit within the statute" – and that even if it were necessary to look beyond the statute's plain

language (which does not authorize the Commission to impose the individual LCR), the legislative history does not support the authority that the Commission seeks. 325 Mich App at 229. The Court of Appeals did not err in reaching this conclusion.

This Court has held that the "highest quality" of legislative history is the Legislature's consideration of "various alternatives in language in statutory provisions before settling on the language actually enacted." *In re Certified Question*, 468 Mich at 115 n 5; *see also People v Harris*, 499 Mich 332, 372; 885 NW2d 832 (2016). Indeed, this Court has recognized the value of this type of legislative history in another case involving the Commission:

> Moreover, it is apparent from the history of § 312a that the Legislature specifically considered adding the language that would be required to give the statute the meaning urged by Ameritech and granted by the Court of Appeals, and rejected doing so. . . . . .
>
> However, as can be seen from the current version of § 312a, which was ultimately signed into law on November 30, 1995, such language is not present in the version of the statute as enacted. **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.** The express mention of one thing in a statute implies the exclusion of other similar things.

Ameritech Mich v Public Serv Comm'n (In re MCI), 460 Mich 396, 415; 596 NW2d 164 (1999) (emphasis added).

This is precisely the kind of valuable legislative history that is available here. In Senate Bill 437 Substitute 7 ("S7"), the draft language in then-proposed Section 6w(2)(D) would have imposed an individual LCR by requiring suppliers (including AESs) to own or contract with generation resources located in Michigan. Specifically, the draft language in S7 provided that AESs must "demonstrate to the Commission" that the AES "owns or has contractual rights to sufficient dedicated and firm electric capacity to meet the equivalent of 90% of its proportional share of the local clearing requirement."

Ultimately, however, the locational requirement was removed from the draft legislation, as part of a compromise between numerous stakeholders. Instead, the final bill's language authorizes AESs to use *any* resource MISO allows to meet the electric supplier's capacity obligations, without reference to local resources. MISO does not impose a locality requirement; rather, MISO accepts any recognized resources to satisfy individual capacity obligations. Thus, as the Court of Appeals recognized, the Legislature "rejected statutory language imposing the local clearing requirement on individual alternative electric suppliers in favor of statutory language adopting the MISO method of not imposing the local clearing requirement on individual electric providers." 325 Mich App at 231. Because the Legislature "considered certain language and rejected it in favor of other language," the final version of Section 6w "should not be held to explicitly authorize what the Legislature explicitly rejected" – i.e., an individual LCR. *See In re MCI*, 460 Mich at 415.

In response, Consumers claims that this change did not eliminate the "express requirement" that the Commission implement an LCR. (Consumers Brief, p. 48.) But as discussed above, there *is* no such "express requirement" that an individual LCR be imposed on AESs. Neither Consumers nor the Commission points to any such express language. They engage instead in what the Court of Appeals aptly described as "interpretive gymnastics," seeking an "implied grant of authority." 325 Mich App at 231-32. The statute simply does not provide express authority for the Commission to impose an individual LCR on AESs – and the statute's history makes clear that the Legislature did not intend to give the Commission that authority. Accordingly, the Court of Appeals' decision should be upheld.

III. An individual LCR for AESs will eliminate choice in the energy market and result in monopoly pricing to the detriment of Michigan's electric choice customers, including schools.

The legal question presented in this case will have a tremendous practical impact on electric customers across the state, including school districts. If this Court reverses the Court of Appeals' decision and allows the Commission to impose an extrastatutory individual LCR on AESs, electric choice will effectively be eliminated, and Michigan schools will face dramatically higher electric prices.

A. Electric Choice Market

In 2000, Michigan enacted Act 141, which authorizes the operation of AESs – suppliers who sell electric generation service to retail customers. Act 141 allows "customers to buy electricity from alternative electric suppliers instead of limiting customers to purchasing electricity from incumbent utilities," such as Consumers and DTE. 325 Mich App at 211. This "electric choice" is limited by a 10% cap on the available market imposed by Act 286 of 2008 – meaning that 90% of retail electric sales in the state are supplied by Consumers and DTE, while AESs can provide the other 10% of retail electric sales.

Twenty-three AESs are licensed to participate in electric choice in Michigan.[2] Most AESs do not own or control generation resources in the state; instead, they purchase resources through MISO's federally regulated wholesale energy market. Because AESs compete to secure customers, prices in the electric choice market are lower, and reliability is improved. According to a 2018 Commission report, AESs currently serve 5,819 customers, and more than 6,600 schools and businesses are on a wait list (or "queue").[3]

[2] https://www.michigan.gov/mpsc/0,4639,7-159-16377_17111_17114-413939--,00.html#tab=License
[3] https://www.michigan.gov/documents/lara/MPSC_Status_of_Electric_Competition_Report_2018_with_cover_letter_649821_7.pdf

B. Impact of Individual LCR on Electric Choice Customers

AESs primarily serve industrial and commercial customers, such as retailers, restaurants, and health care facilities, as well as schools and universities. Of MISEC's 330 school district members, 157 are electric choice customers who contract directly with AESs. 100 school districts are on the wait list (queue) to join the electric choice program, but they cannot yet join due to the 10% cap. Electric choice has resulted in an aggregate electric savings of more than $133 million for MISEC's participating school districts, with an average annual savings of $15 million (more than $30 per pupil). By way of example, the following school districts have saved the following amounts through electric choice:

School District	**Cumulative Savings through Dec. 2018**
Chippewa Valley School District	$9,034,396.00
Grand Rapids Public Schools	$3,305,940.00
Mason Public Schools	$1,089,391.00
Northville Public Schools	$2,239,391.00
Utica Community Schools	$7,393,901.00
Ypsilanti Public Schools	$2,035,256.00

These savings are particularly meaningful given that Michigan's retail electric prices are among the highest in the country. According to a Commission report, "[i]n 2016, Michigan's average industrial retail rates ranked the third highest among the six Midwest states at $0.0700/kWh," and "Michigan's weighted average industrial retail rate . . . has been above the national average since 2009."[4]

The savings are also critical because school funding in Michigan has decreased. A recent Michigan State University study concluded that funding for Michigan's public schools has fallen

[4] https://www.michigan.gov/documents/mpsc/compreport2016_555283_7.pdf

more sharply than any other state in recent years.[5] And since 2002, total revenue for Michigan's schools has declined by 30 percent when adjusted for inflation.[6] As a result, schools are constantly seeking ways to reduce infrastructure and energy costs so they can increase spending for classroom instruction. Electric choice offers an effective way to accomplish that.

The Commission's erroneous interpretation of its own statutory authority threatens the continued existence of the electric choice program and thus puts schools at risk of dramatically higher energy costs. An individual LCR benefits only in-state utilities, like Consumers and DTE, because they possess the majority of in-state generation resources. Under an individual LCR obligation, any electric supplier that controls more local resources than the minimum required for its own capacity requirements effectively removes those resources from the zonal pool used to meet the total requirements of electric suppliers within the zone. Because in-state utilities control most of those local resources, an individual LCR will result in anti-competitive conditions that will eliminate the electric choice market and return Michigan to monopoly pricing for electricity.

These anti-competitive conditions, in turn, will decimate the electric choice market and eliminate the electric cost savings that help MISEC's school district members dedicate more dollars to their classrooms. The loss of annual savings for participating districts equates to the loss of 300 teachers (using an average salary of $50,000 per teacher). At a time when school funding is already precarious, elimination of the electric choice program would be devastating to schools. This Court should reject the Commission's and Consumers' efforts to eliminate the

[5] *Michigan School Finance at the Crossroads: A Quarter Century of State Control*, Michigan State University Education Policy Report, Jan. 2019, http://education.msu.edu/ed-policy-phd/pdf/Michigan-School-Finance-at-the-Crossroads-A-Quarter-Center-of-State-Control.pdf.
[6] *Id.*

electric choice market, particularly given the Legislature's explicit creation of this market in Act 141 of 2000, and deny leave to appeal.

C. Reliability & the Individual LCR

Contrary to the Doomsday scenarios forecasted by Consumers and the Commission, electric reliability does *not* depend on an individual LCR. Consumers and the Commission present no evidence of the widespread blackouts they predict. To the contrary, the Commission's staff has conceded that an "individual LCR is **not necessary** to secure reliability, provided that the 10% cap on electric choice continues and effective import capabilities remain at or better than the levels that exist today."[7] Commission staff went so far as to reject Consumers' and DTE's "hyperbolic" concerns about reliability, noting as follows:

> These assertions from Consumers Energy and DTE Electric are needlessly hyperbolic. A four-year forward pro-rata load-ratio share LCR applicable to individual LSEs in LRZ 7 is **completely unwarranted** and is **absolutely unnecessary to protect reliability**, given the ten percent cap on electric choice and the natural continuing incentive for incumbent utilities to earn a return of and on local utility-owned assets, and the utilities' filed resource plans confirming continued reliance on local resources.

Commission Staff Initial Brief, Case No. U-18444, emphasis added.[8]

Consumers' and the Commission's hyperbolic warnings also overlook the important role that MISO plays in maintaining electric grid reliability. Nothing in the Court of Appeals' decision divests MISO of its resource adequacy construct, nor does the Court of Appeals' decision exempt AESs from Act 341's overall capacity obligations (without a locational requirement). *See Cloverland Elec Coop v Mich Pub Serv Comm'n (In re Implementing Section 62 of 2016 PA 341)*, ___ Mich App ___ (Docket No. 342552), issued July 23, 2019. Simply put, safeguards already exist to protect system reliability – and, according to the Commission's staff,

[7] https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t00000023GMHAA2
[8] https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t0000002230HAAQ

an individual LCR for AESs is *not* a necessary safeguard. The Court of Appeals therefore did not err.

CONCLUSION

For these reasons, Amicus Curiae MISEC requests that this Court deny leave to appeal or, alternatively, affirm the unanimous and published decision of the Michigan Court of Appeals.

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