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STATE OF MICHIGAN
IN THE SUPREME COURT

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.

MICHIGAN PUBLIC SERVICE COMMISSION,	Supreme Court No. 158307
Appellant,	
v	Court of Appeals No. 340600
ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,	MPSC Case No. U-18197
Appellee.	
MICHIGAN PUBLIC SERVICE COMMISSION,	Supreme Court No. 158308
Appellant,	
v	Court of Appeals No. 340607
ENERGY MICHIGAN, INC,	MPSC Case No. U-18197
Appellee.	

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY'S ANSWER TO THE APPLICATION FOR LEAVE TO APPEAL OF THE MICHIGAN PUBLIC SERVICE COMMISSION

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STATEMENT OF JURISDICTION

Appellee, the Association of Businesses Advocating Tariff Equity ("ABATE"),[1] agrees with Appellant, Michigan Public Service Commission ("PSC"), that this Court has discretionary jurisdiction under Const 1963, art 6, § 4 and MCR 7.303(B)(1) to review the unanimous and published opinion of the Court of Appeals (Meter, P.J., and Gadola and Tukel, JJ.) issued July 12, 2018. However, as set forth in ABATE's Answer, because the Court of Appeals' decision was correct and because no injustice will result from that decision -- which merely preserves the status quo of Michigan's limited competitive electric market -- ABATE asks that this Court deny the PSC's Application for Leave to Appeal.

[1] ABATE's membership is comprised of Michigan's largest industrial and business concerns whose competitiveness is impacted by energy prices and terms of service. Collectively, ABATE's members employ almost 100,000 Michiganders and spend approximately $1.5 billion on energy related services in Michigan each year. They presently include: AK Steel Corporation; Cargill, Inc.; The Dow Chemical Company; DW-National Standard-Niles LLC; Eastman Chemical Company; Eaton Corporation; Edw. C. Levy Co.; Enbridge Energy, Limited Partnership; FCA US LLC; General Motors LLC; Gerdau MacSteel INC.; Graphic Packaging International, Inc.; Hemlock Semiconductor Operations LLC; J. Rettenmaier USA LP; Marathon Petroleum Corporation; Martin Marietta Magnesia Specialties LLC; Metal Technologies, Inc.; MPI Research; Occidental Chemical Corporation; OX Paperboard Michigan, LLC; Pfizer Inc.; Praxair, Inc.; United States Gypsum Corporation; United States Steel Corporation; WestRock California, Inc.; White Pigeon Paper Company; and Zoetis LLC.

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COUNTERSTATEMENT OF QUESTION INVOLVED

1. Did the Court of Appeals correctly determine that the PSC lacks authority under Section 6w of Act 341 to impose a local clearing requirement on individual alternative electric suppliers?

The Court of Appeals would answer:	"Yes."
Appellee ABATE answers:	"Yes."
Appellee Energy Michigan answers:	"Yes."
Appellant PSC answers:	"No."
Appellant Consumers Energy Company answers:	"No."

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I. INTRODUCTION

This case involves a relatively straight-forward issue of statutory construction. It asks whether, pursuant to 2016 PA 341 ("Act 341"), the Michigan Public Service Commission ("PSC") has the authority to impose upon individual Alternative Electric Suppliers ("AESs") a novel four-year forward locational capacity requirement, referred to as a Local Clearing Requirement ("LCR").[2] On July 12, 2018, the Court of Appeals (Meter, P.J., and Gadola and Tukel, JJ.) issued a unanimous and published opinion holding that Act 341 did not, by clear and unmistakable language, or necessary inference, authorize the PSC to impose a LCR on individual AESs that procure their electric capacity resources from out-of-state generators.

The Court of Appeals afforded the interpretation of the PSC the most respectful consideration but ultimately identified several cogent reasons why the PSC's interpretation was erroneous. The Court of Appeals found that while there exists no *express* language in Act 341 authorizing the imposition of a LCR on individual AESs, Act 341 does contain multiple provisions demonstrating an intent by the Legislature to spare AESs, in particular, from having to satisfy an individual LCR. The Court of Appeals also found persuasive that the Legislature deliberately removed from the final version of the Act specific language that had expressly authorized the PSC to impose a LCR on individual AESs.

As is evident from the published opinion and as explained in greater detail below, the Court of Appeals' decision was correct. No manifest injustice has resulted or will result from this decision. Indeed, the decision merely preserves the status quo where AESs: (i) make up less than 10% of the electric load in this State; (ii) are already subject to certain federal reliability

[2] A locational requirement functions as a *de facto* embargo on lower-cost out-of-state resources historically utilized by Michigan's AESs that operate within a limited 10% competitive marketplace. Michigan's incumbent electric monopolies, on the other hand, are largely unaffected by such locational requirements where they are guaranteed a handsome rate of return on their local resources.

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requirements designed to promote resource adequacy; and (iii) have never been subject to any compulsory directive mandating that they purchase their capacity resources from more expensive local generators such as Michigan's incumbent rate-regulated utilities. ABATE therefore asks that this Court deny the PSC's Application for Leave to Appeal as well as any and all relief requested therein.

II. COUNTERSTATEMENT OF LEGAL, FACTUAL, AND PROCEDURAL BACKGROUND

A. Federal/State jurisdiction over resource adequacy.

The Federal Power Act ("FPA") authorizes the Federal Energy Regulatory Commission ("FERC") to regulate "the sale of electric energy at wholesale in interstate commerce," but leaves to the states the authority to regulate retail sales of electricity in intrastate commerce. 16 USC §§ 824(b), 824d(a), 824e(a). To ensure that wholesale electric rates are "just and reasonable" and that there exists adequate supplies of electricity, FERC authorized the formation of Regional Transmission Organizations ("RTOs") which operate regional electric transmission grids and administer the wholesale markets in which electricity and capacity resources are bought and sold through competitive auctions. In the most basic sense, these federally-regulated competitive wholesale auctions allow electric generators to sell their power to Load Serving Entities ("LSEs"), often regulated electric utilities or AESs, who then resell that power to end-customers. The price of the energy and capacity resources sold in these auctions is mostly a function of supply and demand.

Contrary to the PSC's assertion on pages nine and ten of its Application, Michigan's jurisdiction to regulate resource adequacy is neither unconstrained nor exclusive. Resource adequacy raises "complex jurisdictional concerns" which, at times, are at the "confluence of state-federal jurisdiction." *Cal Indep Sys Operator Corp*, 116 FERC ¶ 61,274, 62,273 (Sept 21,

2006) (finding that "the adequacy of resources affects can have a significant effect on wholesale rates and services" and therefore is subject to FERC jurisdiction). "[T]he FPA does not reserve authority for the states over all matters related to or that flow from resource adequacy." *Planning Res Adequacy Assessment Reliability Standard*, 134 FERC ¶ 61212, 62116 (Mar 17, 2011). "[T]he role for state authorities cannot undercut [FERC's] authority to review resource adequacy and reserve margins that affect matters within [its] jurisdiction, *i.e.*, provisions that affect [FERC] authority under sections 201, 205, and 206 of the FPA to ensure that the provisions of the tariff will result in just and reasonable and not unduly discriminatory or preferential rates." *Midwest Indep Transm'n Sys Operator, Inc,* 125 FERC ¶ 61061 (Oct 20, 2008).

Because "resource adequacy can have a significant effect on wholesale rates and service," it is therefore "subject to [FERC] jurisdiction." *PJM Interconnection, LLC,* 119 FERC ¶ 61318, 62838 (June 25, 2007); *see also PPL EnergyPlus, LLC v Solomon,* 766 F3d 241, 251 (3rd Cir 2014) ("FERC has determined that maintaining adequate resources bears a significant and direct effect on wholesale rates"). Specifically, with regard to the jurisdictional division concerning capacity issues, "states regulate facilities, while FERC regulates sale and transmission." *New England Power Generators Ass'n v FERC*, 757 F3d 283, 290 (DC Cir 2014). FERC therefore "has jurisdiction to regulate the capacity market related to the price of capacity, even if those determinations touch on states' authority." *Id.*

Moreover, the case cited by the PSC, *Hughes v Talen Energy Mktg, LLC*, 136 SCt 1288 (2016), does not support the PSC's assertion of exclusive state jurisdiction. In *Hughes*, the United States Supreme Court actually *held* that a Maryland regulatory program was preempted by the FPA because it required local electricity generators to participate in an RTO capacity auction but then guaranteed the generators a rate distinct from the clearing price for its interstate

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sales of capacity. *Id*. at 1297-98. Because FERC had approved the RTO capacity auction "as the sole rate-setting mechanism for sales of capacity" and "deemed the clearing price per se just and reasonable," Maryland's guarantee of "a rate distinct from the clearing price" impermissibly adjusted the wholesale price of capacity and thus "invade[d] FERC's regulatory turf." *Id.*

B. MISO is a private association of utilities regulated by FERC.

The PSC makes much out of the Midcontinent Independent System Operator's ("MISO's") purported support of the PSC's underlying policy objectives in this case. The PSC fails to identify, however, that MISO is a private entity owned and controlled by utilities for the benefit of utilities and heavily regulated by FERC. *See, e.g., MISO Transm'n Owners v FERC*, 860 F3d 837, 839 (6th Cir 2017) ("MISO is a regional association of utilities that own electrical transmission lines interconnected to form a regional grid and that agree to delegate operational control of the grid to the association"); *North Dakota v Heydinger,* 15 F Supp 3d 891, 896 (D Minn 2014) ("MISO is an independent, non-profit organization whose members include transmission owners, investor-owned utilities, public power utilities, independent power producers, and cooperatives"); *Midwest Indep Transm'n Sys Operator, Inc*, 84 FERC ¶ 61,231, 62,138-40 (Sept 16, 1998) (MISO is "organized as a non-stock, not-for-profit corporation" and has "a custodial trust relationship" to its members that, *inter alia*, includes "a duty to maximize transmission service revenues").

FERC has allowed MISO to manage the transmission of electric power in a large geographic area spanning portions of Michigan and 14 other states. To that end, MISO has combined the transmission facilities of several transmission owners into a single transmission system. Its members include 51 transmission owners with more than 65,800 miles of transmission lines. MISO has four main functions: (1) reliability assurance; (2) promotion of competitive energy markets; (3) transmission and capacity resource planning; and (4) tariff

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administration. MISO's FERC-approved Open Access Transmission, Energy and Operating Reserve Markets Tariff ("Tariff") can be accessed at https://www.misoenergy.org/legal/tariff/

C. MISO's resource adequacy construct.

Somewhat relevant to the disposition of this case is MISO's federally-regulated resource adequacy construct which is set forth in Module E of its Tariff.[3] MISO meets its resource adequacy obligations through a market-based system called a Planning Resource Auction ("PRA") in which LSEs can buy and sell electric "capacity," i.e., the total amount of electricity (through owned or contracted for generation resources) an LSE is capable of delivering to its customers at peak demand. Specifically, the PRA serves as a mechanism to sell and buy capacity in the near-term (*i.e.*, current year) through an auction. Its purpose is to allow for a more efficient exchange of capacity resources amongst LSEs and across local resource zones. The PRA is conducted at the beginning of April each year, and allows for the purchase and sale of capacity for the upcoming year, referred to as a planning year, which runs from June 1 through May 31 of the following year. (MISO Tariff, Module E-1 § 69A.7.1.)

For the purpose of ensuring resource adequacy, MISO divides its footprint into ten Local Resource Zones ("Zones"), which are intended to reflect the need for an adequate amount of capacity to be located in the right physical locations. (*Id.* at Attachment VV.)[4] Each year, MISO establishes the Planning Reserve Margin Requirement ("PRMR"), which represents the amount

[3] For additional background on MISO's resource adequacy construct, see the following FERC orders: *Midwest Indep Transm'n Sys Operator, Inc*, 122 FERC ¶ 61,283 (Mar 26, 2008), *reh'g granted and denied in part*, 125 FERC ¶ 61,060 (Oct 20, 2008), *reh'g denied,* 126 FERC ¶ 61144 (Feb 19, 2009); *Midwest Indep Transm'n Sys Operator, Inc*, 139 FERC ¶ 61199 (June 11, 2012), *reh'g granted and denied in part*, 153 FERC ¶ 61229 (Nov 20, 2015).

[4] Most of Michigan's lower peninsula is located in Zone 7. Because the LCR in Zone 7 represents approximately 95% of the overall PRMR, a large majority of Zone 7's capacity resources must be either physically located in the Zone 7 or have dedicated firm transmission service to Zone 7 in order for Zone 7's overall LCR to be met.

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of capacity each LSE must acquire to reliably serve the peak demand of its customers, and a LCR, which represents the minimum amount of capacity that must be physically located within a Zone in order for the Zone to meet certain federal reliability requirements. (*Id.* §§ 68A, 69A.)

Importantly, except for one very limited instance not relevant here, MISO does not impose the LCR upon individual LSEs. (*Id.* §§ 68A.6, 69A.)[5] Rather, MISO applies the LCR to a Zone, as a whole, and only the zonal capacity auction price is affected if this requirement is not met. (*Id.*)[6] For example, if a Zone, as a whole, does not meet the LCR, LSEs from that Zone participating in the capacity auction are required to pay capacity prices equal to the Cost of New Entry ("CONE"), which is based on the cost of construction of new gas combustion turbine generators. Moreover, MISO's tariff allows capacity resources located in another Zone to count toward the importing Zone's LCR if adequate transmission service is obtained and approved by MISO. (*Id.* §§ 69A.3.1.c; 69A.3.1.g; 69A.7.1.)

D. FERC's rejection of MISO's CRS Proposal.

On November 1, 2016, MISO filed for approval of its proposed Competitive Retail Solution ("CRS"), which, if approved, would have revised the MISO Tariff to establish a voluntary three-year Forward Resource Auction ("FRA") whereby LSEs could procure capacity in order to meet new CRS Resource Adequacy Requirements. (*In re MISO*, FERC Docket No ER17-298, 11/1/16 MISO Transmission Letter at 22.) The scope of the CRS was limited to Zones with competitive retail demand like Michigan's Zone 7. (*Id.*) The CRS proposal also

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[5] MISO imposes the PRMR on individual LSEs. (*Id.* §§ 68A.7; 69A; 69A.7.1.) Outside of the voluntary use of a Fixed Resource Adequacy Plan ("FRAP"), not relevant here, there are no geographical limitations on the capacity resources that may be used by a LSE to meet its PRMR.

[6] *Midcontinent Indep Sys Operator, Inc,* 148 FERC ¶ 61091, 61535 (Aug 1, 2014) ("MISO also establishes a [LCR] for each Local Resource Zone, which is the minimum amount of Planning Resources that must be physically located within the zone in order to meet loss of load expectations while fully using the Capacity Import Limit").

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included an optional Prevailing State Compensation Mechanism ("PSCM") that certain states could chose to adopt in lieu of the FRA. (*Id.* at 23-24.) If adopted, the PSCM would have required LSEs to either: (i) submit a Forward Fixed Resource Adequacy Plan ("FFRAP") satisfying their PRMR and a proportional share of the overall LCR; or (ii) pay a capacity charge set by the state. (*Id.*)

On February 2, 2017, FERC rejected MISO's CRS proposal in its entirety because it had "not been shown to be just and reasonable, and not unduly discriminatory or preferential." *Midcontinent Indep Sys Operator, Inc*, 158 FERC ¶ 61128 (Feb 2, 2017). FERC found that MISO's proposed bifurcation of the capacity market could have "uncertain, and potentially adverse, impacts on price formation, in both the Forward Auction and the Prompt Auction," and would "likely result in clearing prices and capacity resource selections that lack the desirable properties associated with a single market-wide clearing process." *Id.* FERC also found that MISO's CRS proposal could (i) "lead to improper or inefficient allocations" of transmission capability; (ii) "result in price separation in the Forward Auction that does not truly reflect the physical limitations of the system or the locational need for capacity"; or (iii) "prevent load serving entities in the Prompt Auction from procuring lower-cost capacity." *Id.*

Earlier this year, FERC reaffirmed that MISO's existing resource adequacy construct "enables the MISO region to maintain sufficient resources to meet system-wide and locational Reserve Requirements and, thus, results in just and reasonable rates." *Midcontinent Indep Sys Operator, Inc*, 162 FERC ¶ 61176 (Feb 28, 2018). In support of its finding, FERC referenced recent studies showing that "the MISO region will continue to maintain sufficient resources through 2022" and acknowledged MISO's assertion that "its construct, inclusive of all its

components, is sufficient to ensure resource adequacy over the long-term." *Id.* FERC identified that MISO's existing capacity market has, without fail, resulted in a capacity surplus:

> The low capacity prices, where they have arisen in MISO, accurately reflect MISO's capacity surplus. The fact that prices have not signaled to independent generators a need to build, retro-fit, or even simply maintain existing resources is more indicative of a well-functioning capacity procurement construct than it is of an unjust and unreasonable construct. To the extent that local or regional capacity needs arise in the MISO region, we would expect prices to increase to reflect such needs. Indeed, recent Auction prices indicate that MISO's resource adequacy construct reflects the availability of capacity. The Auction price changes over the last three years of data correlate to movements in supply and demand conditions. Specifically, the Auction prices for the majority of MISO Midwest (Zones 1-7) cleared at $3.48/MW-day in the 2015/16 Auction, $72/MW-day in the 2016/17 Auction, and $1.50/MW-day in the 2017/18 Auction. [*Id.*]

E. Michigan's novel resource adequacy construct.

1. Section 6w of Act 341.

Section 6w of Act 341 (effective April 20, 2017) created a unique regulatory construct that requires not only regulated electric utilities -- that have been granted a monopoly over 90% of Michigan's electric market -- but also AESs, Municipally-Owned Electric Utilities ("Munis"), and Electric Cooperatives ("Co-Ops") to contribute to the state's long-term resource adequacy planning by demonstrating compliance with certain four-year forward capacity obligations.

Specifically, because FERC rejected MISO's CRS proposal, Section 6w(2) of Act 341 directed the PSC to "establish a state reliability mechanism . . . for a minimum of 4 consecutive planning years beginning in the upcoming planning year." MCL 460.6w(2). Section 6w(12) defines a "state reliability mechanism" as "a plan adopted by the commission . . . to ensure reliability of the electric grid in this state . . . ." MCL 460.6w(12).

Section 6w(8) (a) and (b) direct the PSC to require regulated electric utilities, AESs, Munis, and Co-Ops to "demonstrate to the commission, in a format determined by the commission, that for the planning year beginning 4 years after the beginning of the current

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planning year, [each electric provider] 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." MCL 460.6w(8)(a),(b). Section 6w(12)(a) defines the "appropriate independent system operator" as MISO. MCL 460.6w(12)(a).

Section 6w(8)(b) also contains a special provision allowing Michigan's Munis and Co-Ops to "aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision," which are the capacity obligations set by MISO or the PSC, as applicable. MCL 460.6w(8)(b). However, because they are able to aggregate to meet their capacity obligations and because MISO only imposes a LCR on an aggregate zonal basis, Section 6w(8)(b) further provides that Munis and Co-Ops "may meet the requirements of this subdivision through any resource, including a resource acquired through a capacity forward auction, that [MISO] allows to qualify for meeting the local clearing requirement." *Id.*

The first sentence of Section 6w(8)(c) generally requires the PSC to defer to MISO in setting the applicable capacity obligations for a particular year. MCL 460.6w(8)(c). It states that "[i]n order to determine the capacity obligations, request that [MISO] provide technical assistance in determining the [LCR] and [PRMR]." *Id.* "If [MISO] declines, or has not made a determination by October 1 of that year," the second sentence of Section 6w(8)(c) provides that the PSC "shall set any required [LCR] and [PRMR], consistent with federal reliability requirements."[7]

Although the phrase "federal reliability requirements" is not defined, the phrase means the "Resource Adequacy Requirements" set forth in MISO Tariff, Module E-1. This understanding is bolstered by Section 6w(8)(d) which directs the PSC to seek assistance from

[7] The terms LCR and PRMR are defined to mean the LCR and PRMR as determined by MISO. MCL 460.6w(12)(d), (e).

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and defer to MISO when determining whether a particular capacity resource meets federal reliability requirements. MCL 460.6w(8)(d). Moreover, Section 6w(6) provides that:

> A capacity charge shall not be assessed for any portion of capacity obligations for each planning year for which an alternative electric supplier can demonstrate that it can meet its capacity obligations through owned or contractual rights to any resource that [MISO] allows to meet the capacity obligation of the electric provider. The preceding sentence shall not be applied in any way that conflicts with a federal resource adequacy tariff, when applicable. [MCL 460.6w(6).]

Section 6w(8)(b)(i-iii) provides remedies when an electric provider is unable to demonstrate it has procured adequate capacity to cover its load. MCL 460.6w(8)(b)(i-iii). With respect to situations where the PSC has determined that an AES has failed to demonstrate compliance with its capacity obligation, the PSC must require the "alternative electric load" to pay a capacity charge (determined by the PSC) to the applicable regulated electric utility that is required to "provide capacity to meet the capacity obligation for the portion of that load taking service from an alternative electric supplier." MCL 460.6w(7), (8)(b)(i).

2. Pertinent legislative history.

The legislative process leading to the passage of Act 341 lasted for almost 17 months, involved numerous amendments and bill substitutes, and brought about significant stakeholder participation from not only the regulated electric utility lobby, but also a plethora of AESs, businesses, municipalities, schools, residents, and related interest groups intent on preserving Michigan's limited customer choice market. It is well documented that the final legislation (reflected in House Substitute 4) was the result of a late-night compromise struck between the initial proponents of the legislation and those stakeholders interested in preserving the electric choice market served by AESs. (U-18197, Doc No 97.) The compromise entailed the removal of certain language imposing a LCR upon individual AESs, many of whom had historically obtained a majority of their capacity from out-of-state resources, as opposed to the regulated

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electric utilities that have historically obtained 98% of their capacity from in-state resources on which they earn a guaranteed rate of return.

Senate Bill 437 was introduced and referred to the Senate Committee on Energy and Technology on July 15, 2015. It proposed substantial amendments to the Michigan Public Service Commission Act, 1939 PA 3, and the Customer Choice and Electricity Reliability Act, 2000 PA 141, including a robust integrated resource planning process for regulated electric utilities and a requirement that regulated electric utilities, AESs, and other electric suppliers supply "enough dedicated, firm, and physical electric generating capacity" (*i.e.,* capacity resources located in or deliverable to the applicable resource adequacy zone) to serve retail electric customers' total peak demand and planning reserve margin requirements. Absent was any language imposing an individual locational capacity requirement (*i.e.*, a LCR) for AESs. A copy of the SB 437 (as introduced) is attached as **Exhibit A**.

For the next ten months, the Senate Committee on Energy and Technology deliberated over SB 437. Emerging from the committee process on May 31, 2015, was Substitute 4 ("S-4"), attached as **Exhibit B.** S-4 maintained a robust integrated resource planning process for regulated electric utilities in Section 6t which, among other things, required utilities to demonstrate how they planned to meet the LCR. *Id.* S-4 also included a new Section 6w which contained a novel capacity obligation and demonstration process whereby not only regulated electric utilities, but also AESs, Munis, and Co-Ops, were required to own or contract for enough capacity resources to meet a percentage of their proportional share of the LCR. For example, Section 6w(3) of S-4 provided that:

> AN ALTERNATIVE ELECTRIC SUPPLIER . . . SHALL BY OCTOBER 1, 2018, AND BY OCTOBER 1 OF EACH YEAR THEREAFTER, DEMONSTRATE TO THE COMMISSION, IN A FORMAT DETERMINED BY THE COMMISSION, THAT FOR THE PLANNING YEAR BEGINNING

> THE FOLLOWING JUNE 1 AND THE SUBSEQUENT PLANNING YEAR, THE ALTERNATIVE ELECTRIC SUPPLIER . . . OWNS OR HAS CONTRACTUAL RIGHTS TO SUFFICIENT DEDICATED AND FIRM ELECTRIC GENERATION CAPACITY **TO MEET THE EQUIVALENT OF 90% OF ITS PROPORTIONAL SHARE OF THE LOCAL CLEARING REQUIREMENT** AS ESTABLISHED BY THE COMMISSION UNDER SUBSECTION (7). [(Emphasis added.)]

S-4 was adopted by the Committee on Energy and Technology on May 31, 2015.

On November 10, 2016, the Senate Committee of the Whole replaced S-4 with Substitute 7 ("S-7"), attached as **Exhibit C.** The language requiring AESs to meet a percentage of their proportional share of the LCR remained. For example, Section 6w(2)(C) provided:

> AN ALTERNATIVE ELECTRIC SUPPLIER . . . SHALL BY OCTOBER 1, 2018, AND BY OCTOBER 1 OF EACH YEAR THEREAFTER, DEMONSTRATE TO THE COMMISSION, IN A FORMAT DETERMINED BY THE COMMISSION, THAT FOR THE PLANNING YEAR BEGINNING THE FOLLOWING JUNE 1 AND THE SUBSEQUENT PLANNING YEAR, THE ALTERNATIVE ELECTRIC SUPPLIER . . . 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** AS DETERMINED BY THE COMMISSION UNDER SUBSECTION (3). [(Emphasis added.)]

Prior to the vote on S-7, the primary sponsor of the legislation made a floor statement whereby he represented that: "Despite what you have heard, my bill maintains the 10% choice program and even allows it to expand." *See* Senate Journal No. 1792 (No. 70, November 10, 2016), attached as **Exhibit D**. The legislation then passed the Senate. A copy of Senate Bill 437 (as passed by the Senate) is attached as **Exhibit E**.

Senate Bill 437 (as passed the Senate) was transmitted to the House. On December 15, 2016, Representative Afendoulis moved to replace Senate Bill 437 (as passed by the Senate) with House Substitute 4 ("H-4"). *See* House Journal 2493 (No. 80, December 15, 2016), attached as **Exhibit F**. The motion prevailed and H-4 was adopted. (*Id.*) A copy of H-4 is attached as **Exhibit G**. *Importantly, H-4 removed the specific language requiring AESs to meet a percentage*

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of their proportional share of the LCR.[8] H-4 also added language to Section 6w(6) clarifying that AESs could meet their overall capacity obligation with any resource that MISO allows to meet the capacity obligation:

> A CAPACITY CHARGE SHALL NOT BE ASSESSED FOR ANY PORTION OF CAPACITY OBLIGATIONS FOR EACH PLANNING YEAR FOR WHICH AN ALTERNATIVE ELECTRIC SUPPLIER CAN DEMONSTRATE THAT IT CAN MEET ITS CAPACITY OBLIGATIONS THROUGH OWNED OR CONTRACTUAL RIGHTS TO ANY RESOURCE THAT THE APPROPRIATE INDEPENDENT SYSTEM OPERATOR ALLOWS TO MEET THE CAPACITY OBLIGATION OF THE ELECTRIC PROVIDER.[9]

After a few amendments, immaterial to the instant matter, H-4 (as amended) passed the House. A copy of H-4 (as passed by the House) is attached as **Exhibit H**. The Senate immediately concurred in H-4 (as passed the House). *See* Senate Journal 2137 (No. 79, December 15, 2016), attached as **Exhibit I**. On December 28, 2016, H-4 (as passed by the House and Senate) was approved by the Governor and assigned Public Act 341 of 2016. A copy of H-4 (as passed by the House and Senate) is attached as **Exhibit J**.

F. PSC Case No. U-18197 – LCR authority proceeding.

1. The PSC's initiation of technical conferences to set capacity obligations and establish a demonstration process.

On March 10, 2017, the PSC in Case No. U-18239 directed Staff to convene "technical conferences" in Case No. U-18197 to "[d]evelop recommendations regarding requirements for capacity demonstrations for electric utilities, cooperatives, municipalities, and AESs in this state subject to an [state reliability mechanism]," and "[d]evelop recommendations regarding load

[8] H-4 maintained the requirement in Section 6t that regulated electric utilities file with the PSC integrated resource plans demonstrating how those regulated electric utilities would plan to meet the LCR set under Section 6w.

[9] Notably, as discussed above, because MISO (*i.e.,* the appropriate independent system operator) does not impose a LCR upon individual LSEs (such as AESs), MISO allows AESs to demonstrate compliance with their capacity obligations by owning or contracting for capacity resources located outside of the applicable MISO Zone.

forecasts, planning reserve margin requirements and locational requirements for capacity resources." (U-18239, Doc No 28 at 19.) In an Order dated May 11, 2017, the PSC clarified its intention that the format for the capacity demonstrations required of electric providers under Section 6w(8) was to be "determined through collaborative efforts in the technical conferences." (U-18239, Doc No 74 at 3.) The PSC stated that "the Legislature has not required the PSC to conduct contested case proceedings to resolve the issue of what should be counted by the PSC in making the capacity demonstration determinations required by Sections 6w(8)(a) and 6w(8)(b) of Act 341 . . . ." (*Id.* at 4.) The PSC did not address whether its establishment of a capacity obligation and demonstration process constituted a rulemaking governed by the Michigan Administrative Procedures Act ("APA"), MCL 24.201 *et seq*.

2. The PSC's initial Order suggesting that it has the implied statutory authority to impose a LCR on individual AESs.

By way of its May 11, 2017 Order, the PSC provided stakeholders the opportunity to address certain threshold issues including whether there should "be a 'locational requirement' for resources used to satisfy capacity obligations, and if so, should individual [LSEs]. . . be required to demonstrate a share of the overall locational requirement?" (*Id.* at 5.) ABATE, Consumers Energy Company ("Consumers"), DTE Electric Company ("DTE"), Energy Michigan, Inc. ("Energy Michigan"), PSC Staff, and numerous other stakeholders filed initial and/or reply comments. (U-18197, Doc Nos 60, 62-68, 71-74, 76-78, 80-83.)[10]

With respect to the locational question, ABATE and many other stakeholders explained, *inter alia*, that: (i) nothing in the text of Section 6w imposes a LCR on AESs; (ii) such language was actually removed from an early draft of the legislation; (iii) Section 6w(6) provides that

[10] The docket may be accessed at: https://mi-psc.force.com/s/case/500t0000008eg00AAA/in-the-investigation-on-the-commissions-own-motion-into-electric-supply-reliability-plans-of-michigans-electric-utilities-for-the-years-20172021

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AESs may demonstrate compliance with capacity obligations "through owned or contractual rights to any resource [MISO] allows to meet the capacity obligation . . . ."; (iv) MISO imposes a PRMR but not a LCR on individual electric providers; and (v) imposition of a LCR on AESs would likely result in an underutilization of the capacity import limit set by MISO for Zone 7. (U-18197, Doc Nos 67, 80.)[11] ABATE further agreed with Staff's perspective that degraded reliability levels have not resulted from the status quo whereby smaller entities are able to utilize a large share of Michigan's capacity import capability because Michigan's two largest utilities source almost all of their resources from within Zone 7. *Id.*[12]

By way of a June 15, 2017 Order, the PSC determined it was authorized to impose a LCR on individual electric providers, including AESs, and that the remaining technical conferences should be used to address the appropriate design of a LCR for capacity obligations. (U-18197, Doc No 86 at 8-14.) In support of this broad interpretation of its authority, the PSC opined that "[t]he premise underlying Section 6w is to safeguard Michigan's long-term resource adequacy and ensure that all providers contribute to reliability in the state" and then stated that:

> It is clear that the statute requires the Commission to create capacity obligations, that these capacity obligations include a locational requirement, and that the Commission, in setting locational capacity obligations, is allowed to require a demonstration by individual electric providers that the resources that they use to meet their capacity obligations meet a local clearing requirement.
>
> * * *
>
> Thus, the Commission finds that a locational requirement is required under Section 6w and that a locational requirement applicable to individual LSEs is allowed as part of the capacity obligations set forth by the Commission pursuant to Section 6w in order to ensure all providers contribute to long-term resource adequacy in the state. [(*Id.* at 10-11.)]

[11] DTE and Consumers supported a locational requirement. (U-18197, Doc Nos 64, 72, 81, 83.)

[12] Energy Michigan identified that because: (i) the combined PRMR of Michigan's two largest electric utilities is 18,744 MW and those utilities control 18,890 MW of local capacity in the state, (ii) if local capacity becomes short, Michigan could end up with 994 MW (*i.e.,* $640M) more capacity than needed, with no increase in reliability. (U-18197, Doc Nos 71, 78.)

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With respect to the provision in Section 6w(6) allowing AESs to demonstrate compliance with their capacity obligations "through owned or contractual rights to any resource [MISO] allows to meet the capacity obligation," the PSC acknowledged that "MISO does not currently require LSEs to meet their individual share of the overall locational requirement . . . ." (*Id.* at 8-9.) The PSC nevertheless concluded that "this does not mean that the PSC's framework is bound by the minimum requirements of MISO" because, unlike Section 6w's four-year forward capacity obligations, "MISO has no requirements four years out . . . ." (*Id.*) Thus, the PSC surmised that because of this temporal difference, the rules MISO employs to govern the type of capacity resources that may be used to satisfy MISO's one-year forward capacity obligations were not applicable to Section 6w's four-year forward capacity obligations. (*Id.*)

3. The PSC's final Order finding that it has the implied statutory authority to impose a LCR on individual AESs.

Additional technical conferences, in which ABATE participated, were held to address the appropriate design of a LCR. At the conferences, Staff presented a proposed process for capacity demonstrations. Other presenters included Energy Michigan, DTE, and Consumers. MISO representatives participated in the conferences. Staff requested stakeholders to submit written position statements regarding the capacity demonstration process. On July 17, 2017, ABATE, DTE, Consumers, Energy Michigan, and other stakeholders filed their respective position statements. (U-18197, Doc Nos 90-96.) ABATE maintained its opposition to the imposition of a LCR on individual AESs. (U-18197, Doc No 91.)

On August 1, 2017, Staff filed a Report and Recommendation regarding the setting of capacity obligations and design of the capacity demonstration process. (U-18197, Doc No 100.) On August 15, 2017, DTE, Consumers, ABATE, Energy Michigan, and numerous other stakeholders filed comments on the Report. (U-18197, Doc Nos 104-114.) With limited

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exceptions, ABATE supported the capacity demonstration process outlined by Staff. (U-18197, Doc No 107.) ABATE, however, maintained its opposition to the imposition of a LCR on individual AESs. (*Id.*) ABATE also preserved its right to challenge the proceeding's lack of compliance with administrative and constitutional due process standards. (*Id.*) On August 30, 2017, ABATE, including two of its members, United States Steel Corporation and Dow Chemical Company, as well as Energy Michigan, DTE, Consumers, and other stakeholders filed reply comments. (U-18197, Doc Nos 116-124.)

On September 15, 2017, the PSC issued a final Order holding that "[u]nder Section 6w, the PSC is required to establish a forward local clearing (locational) requirement" and "a locational requirement is authorized and may be applied to individual electric providers." (U-18197, Doc No 125 at 34-40.) It also found that "[b]ased on Section 6w, the MISO tariff, and applicable case law, a properly designed locational requirement applied to individual load serving entities as part of a demonstration that capacity obligations have been met is consistent with these requirements." (*Id.* at 49.)

In support of its conclusion that Section 6w implicitly authorizes it to impose a LCR on individual AESs, the PSC relied upon the same analysis set forth in the June 15 Order; namely, that since the determination of the "capacity obligations" under Section 6w(8)(c) involves a determination of the LCR (either by MISO or by the PSC consistent with MISO's tariff), the "capacity obligations" of all electric providers, including AESs, necessarily entails the imposition of a LCR. (*Id.* at 35.) The PSC also provided its position regarding several of the arguments made by the commentators. (*Id.*)

First, the PSC acknowledged that H-4 (which ultimately became law) *removed* express language from the Senate Bill which had allowed the PSC to impose a specific share of the LCR

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on individual AESs. (*Id.* at 36.) In the PSC's view, "[w]hat changed from the version passed by the Senate to the one ultimately enacted into law is not that a locational requirement went away entirely, but that an explicit methodology was removed and replaced with provisions that leave decisions on the methodology of how to establish the locational requirement up to the PSC." (*Id.*) That is, the PSC opined that by removing language providing the PSC with the authority to impose a LCR on AESs, the Legislature actually intended to vest the PSC with more "flexibility to determine how best to establish a forward locational requirement and the resources that qualify to meet that requirement." (*Id.*)

Second, the PSC took issue with the argument that it could not impose a LCR on an AES because: (i) Section 6w(6) permits an AES to meet its "capacity obligations" through "any resource that MISO allows to meet the capacity obligation"; and (ii) MISO does not allow the imposition of a LCR on individual AESs. (*Id.* at 36.) The PSC again reasoned that because the "capacity obligation" allegedly encompasses a LCR and because MISO does not allow certain out-of-zone resources to meet the LCR, Section 6w(6) does not in preclude the PSC from imposing a LCR on individual AESs. (*Id.* at 36-37.)

Third, the PSC took issue with the argument that the "capacity obligations" imposed on individual AESs under Section 6w(8)(b) do not include a LCR because (i) Sections 6w(8)(b) and (c) and 6w(12)(d) provide that MISO set both the "capacity obligations" and LCR; and (ii) MISO does not impose a LCR on individual AESs. (*Id.* at 37.) The PSC identified that under the MISO Tariff, individual AESs that voluntarily FRAP are subject to the LCR. (*Id.*) The PSC also pointed to language in Section 6w(8)(b) whereby Munis and Co-Ops -- entities afforded special treatment to aggregate their resources in order the meet their capacity obligations -- are confined to meet their capacity obligations "through any resource, including a resource acquired through a

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capacity forward auction, that [MISO] allows to qualify for meeting the [LCR].” (*Id.*) Although this plain language only demonstrates a legislative intent to impose a LCR on Munis and Co-Ops, the PSC found that it could “find nothing in the law, and no rational basis, to indicate an intent to place a local clearing requirement only on non-profit utilities.” (*Id.* at 37-38.)

Notwithstanding its determination that Section 6w authorizes it to impose a LCR on individual AESs, the PSC determined that “that a full record, which more deeply explores issues related to establishment of a forward locational requirement and which is developed through a contested case process, is necessary to establish an appropriate allocation of the forward locational requirement.” (*Id.* at 40.) To that end, the PSC declined to set an individual allocation of the LCR for the 2018/19 through 2021/22 planning years and opened a new case (*i.e.,* U-18444) for the purpose of making a determination on the methodology to set a LCR for the 2022/2023 planning year and subsequent planning years. (*Id.*)

G. PSC Case No. U-18444 – LCR methodology proceeding.

1. Staff Report and Recommendation.

By way of its initial order on October 11, 2017, the PSC opened a contested case to “establish a methodology to project how much capacity will be needed to meet [MISO’s LCR] over the long term as required by law, and to ensure that all electric providers are contributing to meeting that requirement through the use of a forward locational requirement for the 2022/2023 planning year.” (U-18444, Doc No 1.)[13] Because the PSC read Section 6w of Act 341 as neither dictating, guiding, nor constraining the method the PSC may employ when allocating the LCR amongst LSEs, the PSC instructed its Staff to submit a proposal addressing no less than 27

[13] The docket may be accessed at: https://mi-psc.force.com/s/case/500t0000008eg3zAAA/in-the-matter-on-the-commissions-own-motion-to-open-a-contested-case-proceeding-for-determining-the-process-and-requirements-for-a-forward-locational-requirement-under-mcl-4606w

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questions concerning certain phase-in and incremental approaches, both of which entailed imposing a share of the LCR on AESs. (*Id.* at 3-4.)

On November 15, 2017, Staff submitted a proposal recommending an incremental methodology which was supported by the testimony of Catherine Cole and Roger Doherty. (U-18444, Doc No 5.) Staff revised its testimony on November 21, 2017. (U-18444, Doc No 11.) Staff recommended the PSC set an LCR for Zone 7 of 3.3% in the 2022/23 planning year and 6.6% in the 2023/24 planning year and that the PSC utilize an incremental approach for allocating same amongst all LSEs. (*Id.* at 23-25.)

Staff acknowledged that "MISO LRZ 7 has met its LCR in the MISO PRA each year" and opined that it "expects MISO LRZ 7 will continue to meet its LCR going forward without an overly burdensome, large forward locational requirement set by the MPSC." (*Id.* at 29.) Staff further expressed its opinion that a LCR over 47.5% would result in a "costly oversupply" of capacity (possibly in excess of 1,000 MW in Zone 7) "saddling Michigan customers with additional, potentially un-necessary, costs." (*Id.* at 24.)

In support of its conclusion, Staff relied on the following findings: (i) "100% of the incumbent utilities' planning resources from 2017 through 2022 are located in-state" and the utilities' own resource adequacy filings show that they plan to "exceed their individual PRMR requirements" by "utilizing only in-state resources"; (ii) the vast majority of the load in Michigan is still served by incumbent utilities; (iii) "Staff does not have any evidence to present that any shift in the location of the utilities' planning resources will occur anytime soon," especially where the utilities have the "opportunity to earn a return of and on resources that they own, and in the past, have had little incentive to plan to purchase or import significant amounts of

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capacity"; and (iv) the utilities "have very little incentive to sell the capacity at a rate less than the SRM charge set by the MPSC." (*Id.* at 24-28.)

2. Relevant testimony and briefing.

A number of intervening parties, including ABATE, Energy Michigan, Consumers, and DTE, filed direct and rebuttal testimony on January 23, 2018, and February 16, 2018, respectively. (U-18444, Doc Nos 67, 71-73, 88-90, 92-93.) Staff filed revised rebuttal testimony on February 20, 2018. (U-18444, Doc No 96.) Those same parties filed their initial and reply briefs on March 27, 2018 and April 20, 2018, respectively. (U-18444, Doc Nos 115, 117-18, 120-21, 125-28, 130.)

In its briefing, ABATE attacked the approaches of Consumers, DTE, and, to a lesser extent, Staff. (U-18444, Doc No 120 at 1-2, 7-12; *see also* Doc No 127 at 1-3, 6-12.) By artificially manipulating what capacity resources may be counted when calculating whether there is a projected capacity shortfall, the approaches of Consumers, DTE, and Staff were designed to reach a full (or 47.5% in Staff's case) load-ratio allocation of the LCR amongst all LSEs regardless of whether there is a projected capacity shortfall. (*Id.*) That is, by arbitrarily excluding known and planned for generation resources, the approaches of Consumers, DTE, and Staff would create a false capacity shortfall which in turn would trigger all LSEs to eventually meet a state-based LCR for which there is no actual need. (*Id.*) Such a policy, ABATE said, would result in both an underutilization of Michigan's capacity import capability and an expensive and likely ratepayer-financed overbuild of local capacity resources. (*Id.*) ABATE argued that these approaches were not tailored to further any reliability objective and that the burden of a LCR should only be imposed on individual LSEs if an actual capacity shortfall is projected. (*Id.*)

ABATE also laid out several practical or policy reasons why the PSC should not impose an individual LCR on AESs:

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(i) **No Shortfall:** There is no supply-based reliability problem in Michigan. Recent reports from the utilities in U-18441 project no capacity resource shortfall in Michigan. Rather, they project capacity oversupply. MISO has never imposed its LCR on individual LSEs and yet no MISO zone has ever failed to meet its LCR in the aggregate. Moreover, discouraging the use of out-of-state capacity with firm dedicated transmission service into Michigan (*i.e.,* capacity MISO deems deliverable to Michigan) does not improve the reliability of the regional grid.

(ii) **Market Power:** Imposing an individual LCR on all LSEs aggravates the market power imbalance between the regulated utilities and the AESs where regulated utilities own nearly all of the local capacity in Michigan and are presently under no obligation to either sell their excess local capacity to AESs or do so at reasonable prices. As a result, requiring AESs to acquire local capacity (*i.e.,* capacity owned by the regulated utilities) to meet an individual LCR, increases the ability of the regulated utilities to exploit their market power over local capacity to the disadvantage of their competitors.[14]

(iii) **Costly Overbuild:** Imposing a *de facto* embargo on out-of-state capacity resources (above and beyond the zonal reliability safeguards already implemented by MISO) when there is no actual or projected need for more local capacity will result in both an underutilization of Michigan's capacity import capability and an expensive and likely ratepayer financed overbuild of local capacity resources. (*Id.* at 5-7.)

The briefing of the PSC's own Staff largely supported the main factual and legal themes underlying ABATE's positions. Staff first acknowledged that Act 341 "is silent on the allocation of LCR" and thus neither dictates, guides, nor constrains the method the PSC may purportedly employ when allocating the zonal LCR amongst LSEs:

> [W]hile PA 341 requires the Commission to set an LCR, it specifically does not restrict the Commission's discretion in determining the amount or allocation of the LCR. MCR 460.6w(7)(c). Nowhere does Act 341 state that the Commission must eventually set an LCR applicable to individual LSEs four years forward that is exactly in the amount of their pro-rata share of MISO's projected prompt-year LCR. In fact, the statute is silent on the allocation of LCR. The Legislature delegated the authority to set these forward requirements to the Commission. [(U-18444, Doc No 117 at 36-37.)]

Staff also agreed that "[t]here is no mandatory prompt-year requirement in MISO's resource adequacy construct that requires an individual LSE to supply any particular level of

[14] Because the electric choice market is restricted to 10%, economies of scale make it inefficient to rely on limited market participants such as AESs to build new generation in Michigan. (*Id.*)

local resources" but rather "MISO's local clearing requirement is for a local resource zone, as a whole." (U-18444, Doc No 126 at 3.) Because "federal resource adequacy requirements do not actually require states to ensure that a LCR is met," Staff recommended that the PSC "consider structuring its four-year forward locational requirement in a manner that is consistent with the MISO prompt-year resource adequacy requirements, to comply with MCL 460.6w(8)(c)." (*Id.*) Stated differently, Staff suggested that the PSC "may continue to set the forward LCR at the zonal level" rather than apply the LCR to individual LSEs. (*Id.* at 3-4.)[15] Should the PSC disregard this warning, and "elect to set forward locational requirements applicable to individual LSEs," Staff suggested that the PSC stray from MISO's Tariff just a little bit and "set those requirements as low percentages of the zone's LCR." (*Id.* at 4-5.)

Staff further opined that imposition of "an individual LCR is unnecessary purely to maintain reliability." (U-18444, Doc No 117 at 11-14, 37.) Despite the lack of any individually imposed locational requirement in the past, Staff highlighted that no Michigan Zone has ever failed to meet its LCR and was adamant that "there is no projected shortfall in MISO LRZ 7 to remedy." (*Id.* at 42.) "Michigan LSEs already have filed forward capacity demonstrations that include the necessary capacity resources to meet the forecasted LCR." (U-18444, Doc No 126 at 9.) Staff then explained that the only purpose of its proposed incremental approach was simply "to equitably divide responsibility for the aggregated amount of planned new capacity resources among all LSEs." (*Id.*) Only "[i]f the legislature lifts or expands the ten percent cap on electric choice," Staff says "an individual LCR may become necessary to maintain reliability." (U-18444, Doc No 117 at 13.)

[15] Staff further explained that "[u]nder MISO's resource adequacy concept, there is no particular allocation of capacity imports – so long as the total imports don't exceed allowable levels, MISO is unconcerned with who imports what. PA 341 does not change this construct, and §6w(8)(c) requires consistency with MISO's requirements." (*Id.* at 15.)

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As a result, Staff vehemently opposed the utilities' proposed full load-ratio share methodology and associated claims of a looming reliability crisis:

> 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. [(*Id.* at 19.)]

Staff characterized the utilities' bombastic reliability concerns as "needlessly hyperbolic," (*id.* at 19), and "patently false," (*id.* at 24). Staff then put forth credible evidence showing that "the sky will not fall" absent imposition of the utilities' full load-ratio share methodology. (*Id.* at 13-15.) Staff further explained that "requiring each LSE to supply a full load-ratio share of the zone's LCR with local resources may have deleterious results," including, but not limited to, the creation of a "captive market," "oversupply" of capacity, "raise[d] customer costs," and "technology stagnation." (*Id.* at 20-32).

3. The PSC's June 28, 2018 Order imposing an individual LCR on AESs.

On June 28, 2018, the PSC entered a final Order imposing a LCR on all LSEs including AESs. (U-18444, Doc No 135.) The PSC stated that its "understanding of its authority to impose an individual forward locational requirement under Section 6w of Act 341 has not changed since it issued its September 15 order in Case No. U-18197," (*id.* at 111-112), and that "merely continuing the status quo where no allocation of forward local resource capacity obligations takes place, is not an option," (*id.* at 117). The PSC came to this conclusion even though its own "Staff does not believe there is a necessity from a reliability standpoint for AESs to contribute to the forward locational requirement." (*Id.* at 123.) The PSC then adopted a modified version of Staff's "incremental need approach" "as the methodology to be used in determining the

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individual forward locational requirement" and imposed a LCR on all LSEs, including AESs, for the 2022/23 and 2023/24 planning years. (*Id.* at 131.)

On September 13, 2018, the PSC stayed its Order in U-18444 so that AESs would not be required to enter into four-year-forward contracts for in-zone capacity when the legal question of the PSC's statutory authority to impose an individual forward locational requirement on AESs remains pending before this Court. (U-18444, Doc No 156.) In staying its Order, the PSC acknowledged that (i) "Michigan has never required electric providers to source a percentage of their peak demand from within Zone 7"; and (ii) "AESs that become contractually bound to those generating in-state electricity will pass on those costs to their customers and that, in aggregate, these costs could amount to several millions of dollars." (*Id.*)

H. Proceedings before the Court of Appeals.

1. Motion practice related to ripeness and expedited review.

On October 13, 2017, ABATE and Energy Michigan filed timely appeals of right to the Michigan Court of Appeals. (U-18197, Doc Nos 130-31.) That same day, ABATE sought expedited review. ABATE's appeal was assigned COA No. 340600 and Energy Michigan's appeal was assigned COA No. 340607. On October 20, 2017, both the PSC and Consumers opposed ABATE's request for expedited review. The PSC also moved for dismissal of the appeals on grounds that they were purportedly not ripe for review. The PSC averred that it had not yet determined whether it would impose a LCR on individual AESs. ABATE responded to the PSC's Motion to Dismiss on October 20, 2017, highlighting the specific language in the PSC's September 15, 2017 Order which showed that the PSC had, in fact, determined that it would impose a LCR on individual AESs and was simply conducting a successive proceeding (*i.e.,* U-18444) to decide what method it would employ to impose a LCR on individual AESs. Finding that the PSC's ripeness arguments did not impact its jurisdiction, the Court of Appeals

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denied the PSC's Motion to Dismiss on November 15, 2017. The Court of Appeals also granted ABATE's Motion to Expedite and consolidated the ABATE and Energy Michigan appeals.

2. Substantive briefing and oral argument.

ABATE and Energy Michigan filed their respective Initial Briefs on December 8, 2018, arguing that: (i) the PSC erred by determining that it is empowered by Act 341 to impose a LCR upon individual AESs; and (ii) the PSC imposed new rules upon AESs without complying with Michigan's APA, MCL 24.201, *et seq*. The PSC and Consumers filed their respective Response Briefs on January 12, 2018, seeking dismissal on ripeness grounds and arguing in the alternative that the PSC's Order was lawful. ABATE and Energy Michigan then filed their respective Reply Briefs on February 1-2, 2018. Oral argument was held on May 9, 2018.

3. Opinion and Order.

On July 12, 2018, the Court of Appeals (Meter, P.J., and Gadola and Tukel, JJ.) issued its unanimous and published opinion reversing the decision of the PSC. (COA Op at 1-16.) Based on its review of the PSC's September 15, 2017 Order, the Court of Appeals first found that the PSC had not merely announced its supposed authority to impose a LCR on individual AESs; it announced its decision to assert that authority, leaving only the methodology of the exercise of that authority to chance. (*Id.* at 6-7.) The Court of Appeals thus held that the question of whether the PSC erred in determining that it has statutory authority to impose a LCR upon individual AESs was ripe for review. (*Id.* at 7.)[16]

In addressing the question of whether the PSC's September 15, 2017 Order was authorized by law, the Court of Appeals conducted a *de novo* review which entailed respectful consideration of the PSC's interpretation of Act 341. (*Id.* at 7-8 (*citing In re Complaint of Rovas*,

[16] Neither the PSC nor Consumers has challenged the Court of Appeals' ripeness determination and, as set forth above, the PSC actually imposed a LCR on individual AESs in a June 28, 2018 order in U-18444.

482 Mich 90, 103; 754 NW2d 259 (2008); *City of Coldwater v Consumers Energy Co*, 500 Mich 158, 167; 895 NW2d 154 (2017); *Consumers Power Co v PSC,* 460 Mich 148, 157; 596 NW2d 126 (1999).) The respectful consideration given the PSC's interpretation of Act 341 is reflected in the Court of Appeals' published opinion which carefully parses through each facet of the PSC's interpretation of Act 341, including a lengthy review of the analysis contained within the PSC's September 15, 2017 Order and the substantive arguments contained within the PSC's and Consumers' appellate briefs. (*Id.* at 8-11.)

In accordance with nearly seven decades of Michigan Supreme Court precedent, the Court of Appeals also accepted that it must "strictly construe" statutes like Act 341 that are alleged to confer power upon the PSC, and that such power must be conferred by "clear and unmistakable language." (*Id.* at 8 (*citing Consumers Power Co*, 460 Mich at 155; *Union Carbide Corp v PSC*, 431 Mich 135, 151; 428 NW2d 322 (1988); *Huron Portland Cement Co v PSC*, 351 Mich 255, 262; 88 NW2d 492 (1958).) It was through application of this well-established precedent, that the Court of Appeals was constrained to reject the PSC's interpretation of Act 341 as granting it authority to impose a LCR on individual AESs. (*Id.*)

The Court of Appeals recognized that Section 6w(8)(b) of Act 341 requires each electric provider to demonstrate that it "owns or has contractual rights to sufficient capacity to meet its capacity obligations," and that, "[i]n order to determine the capacity obligations," Section 6w(8)(c) instructs the PSC to either request that MISO provide technical assistance "in determining the local clearing requirement and planning reserve margin requirement" or, if MISO declines, "set any required local clearing requirement and planning reserve margin requirement, consistent with federal reliability requirements." (*Id.* at 10.) The Court of Appeals,

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however, did not read these statutory provisions as granting to the PSC by "clear and unmistakable language" the authority to impose a LCR on individual AESs. (*Id.*)

The Court of Appeals identified that although Section 6w(8)(c) grants to the PSC the authority to "determine" or "set any required" LCR, it does not expressly authorize the PSC to impose a LCR on individual AESs. (*Id.*) The Court of Appeals declined to infer that the mere authority to "determine" or "set any required" LCR was intended by the Legislature to authorize the additional and different action of imposing a LCR on individual AESs. (*Id.*) Considering the statute as a whole, the Court of Appeals found that Act 341 could not be read as authorizing the PSC to impose a LCR on individual AESs where: (i) Section 6w(6) expressly allows AESs and only AESs to satisfy their capacity obligations using any resource MISO allows to meet capacity obligations; (ii) Section 6w(6) expressly constrains the PSC from assessing a capacity charge against AESs in any manner that "conflicts with a federal resource adequacy tariff"; (iii) 6w(8)(c) mandates that "any required" LCR be set "consistent with federal reliability requirements"; and (iv) MISO's federally-approved resource adequacy tariff does not impose a LCR on individual LSEs. (*Id.*)

Thus, based on a holistic review of Act 341, it was apparent to the Court of Appeals that the Legislature intended for the PSC to apply the LCR in a manner consistent with MISO's Tariff which does <u>not</u> impose a LCR on individual LSEs:

> Given that "Michigan courts determine the Legislature's intent from its words, not from its silence," *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999), the better understanding is, as we have articulated it here, that the Legislature's reference to MISO's standards, which allow the local clearing requirement to be met on a zonal basis, and *no language* imposing the local clearing requirement on individual alternative electric suppliers, means that the MPSC is without authority to impose such a requirement upon individual alternative electric suppliers. [(*Id.* at 11 n 8.)]

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The Court of Appeals also thoroughly considered, but ultimately rejected, the PSC's argument that the provision in Section 6w(8)(b), which allows only Munis and Co-Ops to aggregate their resources in order to meet the LCR, purportedly implies that a LCR may be imposed upon individual AESs, which are neither mentioned in that provision nor authorized to aggregate resources. (*Id.* at 11.) The Court of Appeals declined to "infer from the Legislature's failure to impose the [LCR] on individual [AESs], i.e. the Legislature's *silence*, that it, in fact, intended to impose the [LCR] on individual [AESs]." (*Id.* at 11 n 8.) The Court of Appeals further found that such an interpretation "requires the inference that section 6w permits the MPSC to establish a capacity obligation that includes an individual local clearing requirement contrary to that imposed by MISO." (*Id.* at 11.)

To the extent the statute could be deemed ambiguous, and it were necessary to look outside the language of the statute to ascertain the intent of the Legislature, the Court of Appeals opined that the Order of the PSC was in conflict with the intent of Act 341 as reflected in that statute's legislative history. (*Id.* at 12.) The Court of Appeals found, as a persuasive indicator of legislative intent, that the final version of Act 341 (*i.e.,* H-4) had removed specific language requiring individual AESs to meet a percentage the LCR and added language specifying that an AES could meet its overall capacity obligation with any resource that MISO allows to meet the capacity obligation. (*Id.* at 12-13.) Because the Legislature rejected statutory language imposing the LCR upon individual AESs in favor of statutory language adopting the MISO method of not imposing the LCR on individual AESs, the Court of Appeals, followed this Court's decisions in *Bush v Shabahang*, 484 Mich 156, 173-174; 772 NW2d 272 (2009); *In re Certified Question from US Court of Appeals for Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 596 (2003); *In re MCI Telecom Complaint*, 460 Mich 396, 415; 596 NW2d 164 (1999), and refused the PSC's

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invitation to "interpret the language adopted in MCL 460.6w as authorizing what the Legislature explicitly rejected when enacting that statute." (*Id.* at 13-14.)

The Court of Appeals then summarized the PSC's statutory interpretation and the Court's cogent reasons for rejecting same in the following passage:

> In sum, the MPSC urges us to read into the statute an implied grant of authority to the MPSC to impose a local clearing requirement on individual alternative electric suppliers even though (1) such authority is not clearly and unmistakably granted by the statute, (2) such an interpretation is contrary to the directive of section 6w that the local clearing requirement be imposed in accordance with MISO's practices, which do not impose the local clearing requirement on individual alterative electric suppliers, and even though (3) the Legislature rejected language granting such authority to the MPSC, removing it from the final draft of the statute ultimately enacted. We decline the invitation to engage in these interpretive gymnastics and return to our ultimate concern and primary objective when reviewing an agency decision interpreting a statute, which is the proper construction of the plain language of the statute and to discern and give effect to the Legislature's intent. *Rovas*, 482 Mich at 108; *City of Coldwater*, 500 Mich at 167. [(*Id.*)][17]

III. ARGUMENT

A. The Court of Appeals applied the correct standard of review.

The PSC muddles together several standards of review applicable to "judicial or quasi-judicial" factual determinations and "legislative or quasi-legislative" ratemaking decisions and then claims that the Court of Appeals erred by applying a *de novo* review which purportedly failed to give an appropriate level of deference to the PSC's inherent authority and interpretation of Act 341. (PSC App at 18-21, 31-47.) The PSC's arguments lack merit.

1. The PSC's interpretation of Act 341 is subject to *de novo* review.

A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is either unlawful <u>or</u> unreasonable. MCL 462.26(8). An order is *unlawful* if it is based on an erroneous interpretation or application of the law, and it is

[17] Because it found that the PSC lacked the statutory authority to impose the LCR on individual AESs, the Court of Appeals did not address the APA challenge. (*Id.*)

unreasonable if it is not supported by the evidence. Compare *Enbridge Energy Ltd P'ship v Upper Peninsula Power Co*, 313 Mich App 669, 674-78; 884 NW2d 581 (2015), *lv den*, 500 Mich 997; 894 NW2d 605 (2017) (striking down PSC order as unlawful where "the PSC exceeded its clear statutory authority") with *Associated Truck Lines, Inc v PSC*, 377 Mich 259, 279; 140 NW2d 515 (1966) (upholding PSC order as reasonable because there was "evidence in the record made before the commission to support its specific finding of fact").

The PSC cites *In re MCI Telecom Compl*, 460 Mich 396; 596 NW2d 164 (1999), in support of its proposition that those challenging PSC orders face an exceedingly "difficult" task in demonstrating that the order is unlawful or unreasonable. (PSC App at 19.) This is not true with respect to questions of statutory interpretation. *MCI Telecom's* discussion of the requisite standard was called into doubt by *In re Compl of Rovas*, 482 Mich 90, 102-03; 754 NW2d 259 (2008), where this Court explained that:

> [C]oncepts such as "abuse of discretion" or "clear error," which are similar to the standards of review applicable to other agency functions, simply do not apply to a court's review of an agency's construction of a statute . . . While there are some opinions [(*e.g., MCI Telecom*)] that seem to stand for the proposition that agency statutory interpretations are reviewed for "reasonableness" or an "abuse of discretion," those standards do not apply to the interpretation of a statute, and they threaten the separation of powers principles discussed earlier by allowing the agency to usurp the judiciary's constitutional authority to construe the law and infringe on the Legislature's lawmaking authority.

In this case, the PSC's Order was based on an erroneous interpretation of law. The PSC wrongly expanded the scope of its authority by declaring that Section 6w of Act 341 purportedly granted it the unfettered discretion to not only impose a LCR on individual AESs but to do so using any method it deemed fit without constraint. As a general proposition, questions of law, such as the proper interpretation of a statute, are reviewed *de novo*. *Coldwater v Consumers Energy Co*, 500 Mich 158, 895 NW2d 154 (2017) (citation omitted). Even more specifically, "the PSC's determination regarding the scope of its authority is one of law," and therefore also

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"reviewed *de novo*." *Consumers Power Co v PSC*, 460 Mich 148, 157; 596 NW2d 126 (1999). When conducting such a review, "this Court strictly construes the statutes which confer power on the PSC" and "does not weigh the economic and public policy factors that underlie the action taken by the PSC." *Id.* at 155-56.

2. The Court of Appeals gave respectful consideration to the PSC's interpretation of Act 341.

The PSC claims that the Court of Appeals did not give respectful consideration to the PSC's interpretation of Act 341. (PSC App at 20-21.) The PSC says that because its interpretation of Act 341 was not purportedly "in conflict with the indicated spirit and purpose of the legislature," which the PSC describes quite loosely as to "ensure reliability of the electric grid in this state," "the Court of Appeals should have deferred to the [PSC's] interpretation." (*Id.* at 21 (*citing Boyer-Campbell Co v Fry*, 271 Mich 282, 296–97; 260 NW 165 (1935).) The PSC's claims are devoid of legal merit and, as a factual matter, there is nothing in the record to suggest that the PSC has any unique insight into the Legislature's intentions in passing Act 341.

As an initial matter, the *Boyer-Campbell Court* did not employ a level of deference demanding affirmation of an agency's statutory interpretation so long as that interpretation could be reconciled with some "generalized purpose" of the overall statute. 271 Mich at 296–97. What the *Boyer-Campbell Court* said was that while an agency's construction of "doubtful or obscure laws,"[18] is neither "binding" nor "controlling," it should be "taken note of by the courts as an aiding element to be given weight" and "is sometimes deferred to when not in conflict with the indicated spirit and purpose of the Legislature." (*Id.* (emphasis added).)

[18] *See also Howard Pore, Inc v Nims*, 322 Mich 49, 66; 33 NW2d 657 (1948) ("The construction given to a legislative enactment by those charged with the duty of administering it is entitled to respectful consideration, especially so when the statute is ambiguous in its provisions. However, administrative interpretation is not binding on the court and must be rejected if not in accord with the intent of the legislature").

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Here, the Court of Appeals neither found Section 6w ambiguous, nor found the PSC's interpretation to be consistent with the indicated spirit and purpose of the Legislature. (COA Op at 8-12.) Rather, after a thorough analysis of the statute, the challenged Order, and the PSC's appellate arguments, the Court of Appeals found that the indicated (*i.e.*, written) spirit and purpose of Act 341 suggested that the PSC is obligated to apply the LCR in a manner consistent with MISO and therefore not individually upon AESs. (*Id.*) The Court of Appeals decision therefore employs the level of "respectful consideration" required by this Court and reflects the reality that an agency's interpretation cannot be affirmed if it "conflict[s] with the Legislature's intent as expressed in the language of the statute." *In re Compl of Rovas*, 482 Mich at 103, 108.

As a secondary matter, the PSC's request for a "generalized purpose" standard of deference, is at odds with one of the foremost rules of construction which is that all statutory interpretation must begin with the plain language. *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014). This Court has recently recognized that "reliance on the perceived purpose of [a] statute runs counter to the rule of statutory construction directing us to discern legislative intent from plain statutory language." *People v Pinkney*, 501 Mich 259, 272; 912 NW2d 535 (2018) (citation omitted).[19]

A fundamental problem with elevating the supposed general purpose of a statute, over its actual text, is that the general purpose of a statute can be characterized so expansively as to grant nearly unlimited discretion to the agency charged with implementing it. That is exactly what the PSC is advocating for here. There is no doubt that a purpose of the "state reliability mechanism"

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[19] *See also Johnson v Recca*, 492 Mich 169, 196-97; 821 NW2d 520 (2012)("[I]t must be assumed that the language and organization of the statute better embody the obvious intent of the Legislature than does some broad characterization surmised or divined by judges"); *Houghton Lake Area Tourism & Convention Bureau v Wood,* 255 Mich App 127, 142; 662 NW2d 758 (2003) (stating that courts "cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose").

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is to "ensure reliability of the electric grid in this state," MCL 460.6w(12)(h), but such a near limitless purpose cannot be employed by the PSC as a means of disregarding a number of more specific provisions expressly providing that "any required" LCR must be set "consistent with federal reliability requirements," MCL 460.6w(8)(c), or that AESs may meet their capacity obligations via any resource permitted by MISO or its "federal resource adequacy tariff," MCL 460.6w(6).

3. The PSC's imposition of a LCR on individual AESs is not ratemaking.

For the first time, and without preserving the argument on appeal, the PSC argues that the Court of Appeals overlooked the PSC's "broad ratemaking authority to set rates without judicial interference." (PSC App at 42, 45-47.)[20] But it is not at all clear why the PSC, at this late date, now believes that the imposition of a LCR on individual AESs constitutes ratemaking. (*Id.*) The PSC neither asserts that the challenged action (*i.e.,* imposition of a LCR), itself, constitutes a rate, nor that any "rate" was set in the proceeding below. (*Id.*) At best, the attenuated explanation provided by the PSC in its Application, is nothing more than a generalized claim that the overall "multifaceted regulatory structure" bears some tangential relation to the rates charged by Michigan's incumbent rate-regulated utilities. (*Id.*)

The argument of the PSC is not a serious one. It is well-established that PSC's ratemaking authority does not extend to issues that only "tangentially involve ratemaking." *In re PSC for Trans Between Affiliates*, 252 Mich App 254, 265; 652 NW2d 1 (2002); see also *Consumers Power Co*, 460 Mich at 157-59 ("Although retail wheeling has a ratemaking component, i.e., the establishment of the rate a third-party provider must pay to transmit power through a local utility's system, appellants do not challenge that aspect of the experimental

[20] "Generally, an issue is not properly preserved if it is not raised before, addressed by, or decided by the lower court or administrative tribunal." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386–87; 803 NW2d 698 (2010).

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program"). In this case, it is a stretch for the PSC to argue that the imposition of a LCR on individual AESs is even tangentially related to ratemaking. As such, any additional deference afforded to the PSC when exercising its ratemaking authority is not applicable here.

4. Agency authority must be conveyed by clear and unmistakable statutory language.

For the last century, this Court has consistently held that because the PSC (and its predecessors) possess no common-law powers and are mere creatures of the Legislature, all of their authority must be conferred by clear and unmistakable language in specific statutory enactments. *Union Carbide Corp v PSC*, 431 Mich 135, 146, 151; 428 NW2d 322 (1988).[21] Wanting unchecked power to regulate, promulgate, and adjudicate as it sees fit, the PSC would have this Court further sanction broad, pliable, and even unintended legislative delegations of authority by eliminating the "clear and mistakable language" standard applicable to statutes conferring power on the PSC. (PSC App at 37-42.)

The PSC says that given the "complexity of the capacity demonstration process" it needs to operate under broadly-termed grants of legislative authority unconstrained by specific statutory text. (*Id.* at 38-39.) It admits that "Act 341 is silent about the Commission's authority to

[21] *See also Consumers Power*, 460 Mich at 164 ("[T]he PSC has only those powers conferred by clear statutory language"); *G & A Truck Line, Inc v PSC*, 337 Mich 300, 305; 60 NW2d 285 (1953) ("The Commission can do only those things authorized by statute"); *Sparta Foundry Co v Pub Utilities Comm'n*, 275 Mich 562, 564; 267 NW 736 (1936) ("The Michigan public utilities commission is an administrative body created by statute and the warrant for the exercise of all its power and authority must be found in statutory enactments"); *Taylor v Pub Utilities Comm'n*, 217 Mich 400, 402; 186 NW 485 (1922) (holding that the PUC's jurisdiction "must affirmatively appear in the statute before it can be invoked or exercised"); G*rand Rapids & I Ry Co v Mich RR Comm'n*, 183 Mich 383, 392; 150 NW 154 (1914) ("The Michigan Railroad Commission is a body possessing limited powers, to be ascertained by reference to the statute creating it"); *In re Application of Detroit Edison Co*, 311 Mich App 204, 216; 874 NW2d 398 (2015) ("The Legislature must grant authority by clear and unmistakable statutory language"); *Att'y Gen v PSC,* 269 Mich App 473, 482; 713 NW2d 290 (2005) (holding that PSC exceeded its authority where no statute "specifically authorize[d]" the PSC's action); *Booth v Consumers Power Co*, 226 Mich App 368, 373; 573 NW2d 333 (1997) ("As a creation of the Legislature, [the PSC] possesses only that authority specifically granted by statute").

impose the local clearing requirement on alternative electric suppliers," but says the Legislature should not be required to "tell the agency every factor it must consider in exercising its discretion." (*Id.* at 40, 46-47.) Drilling down further, the PSC complains that simply requiring the Legislature to identify to whom the LCR applies would "tip the scales of power in the judiciary's favor by giving it more control over the legislative and executive branches of government." (*Id.* at 22-23.)

The PSC's dramatic argument grossly misrepresents the Court of Appeals holding below. (COA Op at 1-16.) The Court of Appeals did not dive into the intricacies of the capacity demonstration process or the complicated equations used to calculate the PRMR or LCR. (*Id.*) Rather, the Court of Appeals read the plan language of Act 341 and determined that the statute does not delegate to the PSC the authority to impose a LCR on individual AESs. (*Id.* at 8-12.) The Court of Appeals not only held that Act 341 contains no provision expressly authorizing the imposition of a LCR on AESs, it found that Sections 6w(6) and 6w(8) contain provisions which actually forbid the PSC from imposing a LCR on individual AESs. (*Id.*)

Moreover, the PSC's assertion (*i.e.,* the subject matter is too complicated to demand a statutory delegation with any precision) is belied by the fact that an earlier version of the legislation contained an express grant of authority authorizing the PSC to impose a specified percentage of the LCR on individual AESs. (*Id.* at 12-14.) As pointed outed by the Court of Appeals, however, that language was removed and replaced with language that precludes the PSC from imposing a LCR on individual AESs. (*Id.*) Consequently, there was nothing unusual or unreasonable about the Court of Appeals' application of the "clear and unmistakable" language standard to Act 341.

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B. The Court of Appeals' decision does not render the state reliability mechanism meaningless.

The PSC argues that the Court of Appeals' decision (namely that, Act 341 does not impose a LCR on individual AESs) is at odds with the general purpose of the state reliability mechanism which is to promote the reliability of this state's electric grid. (PSC App at 22-28.) The PSC says, without legal or factual support, that only its statutory interpretation advances this general purpose by allocating the LCR "equitably to all electric providers." (*Id.* at 23.) It further speculates that the Court of Appeals' decision will cause manifest injustice by leaving only Munis and Co-Ops subject to the LCR where, according to the PSC, the Court of Appeals' interpretation "logically extends to other electric providers" and the "Legislature also did not grant the [PSC] explicit authority to impose the [LCR] on electric utilities." (*Id.* at 22-24.) This, the PSC claims, will render most LSEs exempt from Act 341's four-year forward LCR and maybe even exempt from Act 341's four-year forward PRMR. (*Id.* at 24-28.) These conjectural and exaggerated arguments are not well taken.

First, the Court of Appeals' decision leaves undisturbed the PSC's imposition of Act 341's PRMR on individual LSEs. No party has challenged the PSC's imposition of the four-year forward PRMR on individual LSEs, perhaps, because, unlike MISO's prompt-year LCR, which is only applied on a zonal basis, MISO's prompt-year PRMR is applied on an individual basis. Furthermore, Act 341's four-year forward PRMR, coupled with MISO's prompt-year PRMR and LCR, is more than sufficient to ensure reliability. It remains undisputed that even though no state in MISO has ever imposed its own PRMR or LCR and even though MISO has never imposed its LCR on an individual basis, no MISO Zone has ever failed to meet its zonal LCR.

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Second, the Court of Appeals' decision applied only to AESs who comprise less than 10% of the load in Michigan. The electric utilities, that comprise approximately 90% of the load in Michigan, did not challenge the PSC's imposition of the individual LCR. To the contrary, they supported it. This is not surprising where the regulated utilities, that earn a guaranteed return on their owned in-state resources, have submitted filings showing that "100%" their "planning resources from 2017 through 2022 are located in-state." (U-18444, Doc No 11 at 24-28.)

Third, the regulated utilities are not similarly situated to AESs and thus not treated the same as AESs by Act 341. In addition to many other differences, including that AES rates are set by the free market while regulated utility rates are set by the PSC, Section 6t of Act 341 expressly requires regulated utilities to prepare and file integrated resource plans detailing the capacity resources the utilities will rely upon to meet the "local clearing requirement." MCL 460.6t(1)(e-f), (3), (6), (8)(a)(i). Moreover, Section 6w(6), which prohibits the individual imposition of the LCR, applies only to AESs and not to regulated utilities. MCL 460.6w(6).

Fourth, there exists no reliability-driven justification for compelling AESs (all of whom operate in a limited competitive marketplace unshielded by the broad protections afforded to regulated monopolies) to meet their capacity obligations with even more local capacity. The PSC's own Staff has adamantly explained that imposition of "an individual LCR is unnecessary purely to maintain reliability" and "there is no projected shortfall in MISO LRZ 7 to remedy." (U-18444, Doc No 117 at 11-14, 37, 42.)[22]

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[22] For this reason alone, the Court should reject the PSC's factually unsupported "public interest" arguments. (PSC App at 47-50.) PSC stretches too far when it bombastically states, without record support, that if the LCR is not applied "equitably to all electric providers," "the entire zone could fall short of the requirement, which would increase prices for all providers." (*Id.* at 48.) There are no such findings in the record and, again, the PSC's own Staff has repeatedly opined to the contrary. (U-18444, Doc Nos 11, 117, 126.)

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Fifth, even if none of the foregoing was accurate, it is not the role of the judiciary to rewrite Act 341 so as to make it more equitable or align it more closely to the PSC's perception of the general purpose of the Act. This "Court does not weigh the economic and public policy factors." *Consumers*, 460 Mich at 156. "The Legislature . . . is the body that must consider these questions." *Id.* "Whether or not a statute is productive of injustice, inconvenience, is unnecessary, or otherwise, are questions with which courts ... have no concern." *Voorhies v Recorder's Court Judge*, 220 Mich 155, 157; 189 NW 1006 (1922).

C. The Court of Appeals did not overlook MISO's FERC-approved tariffs.

For the first time, and without preserving the issue below, the PSC argues that because MISO purportedly provided the PSC with technical assistance in setting the LCR, under Section 6w(8)(c), the PSC's LCR did not need to be set "consistent with federal reliability requirements" because that language only applied to situations where the PSC sets the LCR on its own. (PSC App at 31-32.) The argument is a red herring. Even if this factual allegation is true and even if this interpretation is valid, which it is not, it does not change that fact that Section 6w(6) forbids the PSC from imposing the LCR on individual AESs. MCL 460.6w(6). Nor does it change the fact that the very definition of LCR contemplates a zonal application which again is consistent MISO's Tariff. MCL 460.6w(12)(d).

The PSC also attempts recharacterize MISO's resource adequacy construct so as to distort the unavoidable fact that MISO does not impose a LCR on individual LSEs. (PSC App at 32-34.) With respect to LSEs that participate in MISO's PRA, the PSC acknowledges that MISO does not impose a LCR on individual LSEs. (*Id.* at 33.) It surmises, however, that if the Zone as a whole does not meet its LCR, and the price of capacity goes to CONE, "for all practical purposes," this mechanism imposes a LCR on individual AESs. (*Id.*) With respect to LSEs that <u>voluntarily</u> opt to FRAP or pay a capacity deficiency charge, the PSC identifies that such LSEs

must either acquire resources sufficient to meet their pro rata share of the LCR or pay a penalty for not acquiring resources sufficient to meet their pro rata share of the LCR. (*Id.* at 33-34.)

These semantical arguments, which were not raised below, are of no moment. The fact remains, (i) MISO does not impose a LCR on individual LSEs that participate in the PRA; and (ii) the option of submitting a FRAP or paying a capacity deficiency charge is still voluntary. The PSC's own Staff thoroughly rejected these same arguments when proffered by Consumers in U-18444. The PSC's Staff stated that "MISO's current construct does not require any LSE to meet a load-ratio share of LCR" and "so long as the total imports don't exceed allowable levels, MISO is unconcerned with who imports what." (U-18444, Doc No 126 at 13-15.) Staff next explained that imposition of a LCR on individual LSEs, "would be *inconsistent* with federal reliability requirements due to the elimination of two of the three existing methods to meet requirements in the current MISO resource adequacy construct" and then opined that "[i]t is completely unnecessary for the [PSC] to disregard two of the three options available to meet federal reliability requirements in the current MISO resource adequacy construct in the name of preventing a reliability problem that does not yet exist." (*Id.*)

The Court of Appeals properly interpreted the MISO Tariff and correctly found that "MISO permits an alternative electric supplier to meet its capacity obligations, including the local clearing requirement, by owning or contracting for capacity resources located outside the applicable local resource zone, and does not require each alternative electric supplier to demonstrate a proportionate share of the local clearing requirement." (COA Op at 10.)

D. The plain statutory text shows that Act 341 does not empower the PSC to impose a LCR on individual AESs.

The PSC has not and cannot identify any provision in Act 341 that expressly authorizes it to impose a share of the LCR on AESs. Instead, it infers such authority from Sections 6w(8)(b)

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and (c). (PSC App at 25-28.) The Court of Appeals correctly found that those provisions do not confer such power, much less by "clear and unmistakable language," and that imposition of the LCR on individual AESs is not "necessary to the due and efficient" implementation of those provisions. Each provision has independent meaning. (COA Op at 8-11.)

Because the PSC has the power to "set" the LCR for Zone 7, the PSC argues that the ability to "impose" a share of the LCR on individual AESs is "inherent." (PSC App at 25-28, 42-47.) The Court of Appeals correctly rejected this inherent-power argument holding that the power to "set" the LCR must be "strictly construed" and could not be extended by inference to include the power to "impose" the LCR. (COA Op at 11-12 (citing *Herrick Dist Library v Library of Mich*, 293 Mich App 571, 582-83; 810 NW2d 110 (2011).)[23]

The PSC further argues that Court of Appeals erred in finding that Section 6w(8)(b)'s special aggregation provision, which, on its face, only applies to Co-Ops and Munis, could not be read so as to apply to AESs. (PSC App at 22-23, 26-28, 36-37.) Although it claims this finding runs counter to the purpose of the Act, it does not actually dispute that the plain text of Section 6w(8)(b) imposes a LCR on Co-Ops and Munis but does not mention AESs. (*Id.*) The leading scholar on administrative law in Michigan has explained that "a specific grant of statutory authority allowing an agency to act in one circumstance does not authorize it to do so in another" and that "[t]his seems to have been a hard lesson for the Public Service Commission to grasp . . . ." LeDuc, Michigan Administrative Law § 1:2 (2013 Edition) (citation omitted).

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[23] Furthermore, the inability of the PSC to impose the LCR on AESs does not render the task of setting the LCR futile. Reading Act 341, as a whole, several independent purposes become apparent. For example, because Section 6w(8)(b) imposes the LCR on Co-Ops and Munis, the LCR must be set. MCL 460.6w(8)(b). Also, determination of a forward LCR, as opposed to MISO's prompt LCR, assists the PSC with its regulation of incumbent utilities: (i) utility integrated resource planning, MCL 460.6t; (ii) supervision of utility mergers, MCL 460.6q; (iii) approval of certificates of necessity, MCL 460.6s; (iv) evaluation of performance based regulations, MCL 460.6u; and (v) deciding utility abandonment petitions, MCL 460.6z.

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Lastly, the PSC fails to provide any meaningful criticism to the Court of Appeals interpretation of Section 6w(6) which expressly permits AESs to use "any resource that [MISO] allows to meet the capacity obligation of the electric provider" and provides that "[t]he preceding sentence shall not be applied in any way that conflicts with a federal resource adequacy tariff, when applicable." MCL 460.6w(6). This AES-specific provision controls.

E. The legislative history further shows that Act 341 does not empower the PSC to impose a LCR on individual AESs.

The PSC does not dispute the simple and dispositive fact that H-4 of SB 437, which ultimately became Act 341, deliberately removed "contentious" language from S-7 of SB 437 that had expressly required individual AESs to meet a prescribed percentage of their proportional share of the LCR. (PSC App at 28-31.) Nor does the PSC provide any analysis of the Court of Appeals' application of this Court's decision in *Bush v Shabahang*, 484 Mich 156, 173-174; 772 NW2d 272 (2009), holding that where, as 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." (COA Op at 12-14.) Instead, the PSC merely maintains, without any factual support, its view that by removing the express authority to impose a specific percentage of the LCR on individual AESs, the Legislature actually intended to grant unconstrained authority for the PSC to impose the LCR on individual AESs in whatever way the PSC saw fit.

Such an interpretation is illogical, contrary to this Court's precedent, and without factual merit. Indeed, the PSC's view is undercut by a letter filed with the PSC by the Sponsor of H-4 (Rep. Afendoulis) wherein the Sponsor of the amendment explains that H-4 was the result of a compromise to deliberately remove contentious language in S-7 that imposed upon AESs a supplier-specific LCR obligation:

> The language related to the imposition of a supplier-specific LCR obligation on capacity demonstrations on [AESs] was a significant obstacle that was removed from the Senate-passed version of SB 437. The substitutes deliberately removed this contentious language and in doing so, a compromise was reached. The final language clearly allows AESs to use any resource allowed by MISO to meet capacity obligations without reference to local resources.
>
> We have strong concerns that the imposition by the Commission of any requirements on AESs in excess of those MISO requires of load serving entities, violates the legislative intent of PA 341 and will place a significant additional burden on schools and businesses in our districts and all across Michigan. It will also threaten the sustainability of the Retail Open Access program, the viability and continuation of which was a primary goal of the legislation and the intent of our substitute. [(U-18197, Doc No 97.)]

While statements of individual legislators are normally accorded little weight, the amendment sponsor's clarifying explanation is certainly of more value than the PSC's wholly speculative and unsupported interpretation. *Washington Cnty v Gunther*, 452 US 161, 194 n6 (1981) (JJ, Rehnquist, Stewart, Powell, Burger, dissenting) (explaining that subsequent legislative history may be helpful where, as here, "the sponsor of the legislation makes a clarifying statement which is not inconsistent with the prior ambiguous legislative history").

Moreover, by interpreting the Act as a standardless delegation of discretion, the PSC reads the Act in violation of Michigan's non-delegation doctrine. *See, e.g., BCBSM v Milliken*, 422 Mich 1, 51-55; 367 NW2d 1 (1985) ("A complete lack of standards is constitutionally impermissible"); *Oshtemo Charter Twp v Kalamazoo Cnty Rd Comm'n*, 302 Mich App 574, 592; 841 NW2d 135 (2013) (opining that a statute conferring "unlimited discretion, without guiding standards," was an unlawful delegation).[24] While the PSC's assumption that the Legislature would punt away the authority to render such an important policy decision to unelected

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[24] The unconstrained discretion delegated to PSC, under the PSC's view of the Act, is manifested by the PSC's Order in U-18444 directing its Staff to submit a proposal addressing no less than 27 questions concerning the unlimited ways PSC might chose to go about imposing a share of the LCR on AESs. *Arlan's Dep't Stores, Inc v Attorney General,* 374 Mich 70, 77; 130 NW2d 892 (1964) (where a deciding body is given "an unlimited number of choices" regarding when and how to apply the law, the delegation is unconstitutional).

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bureaucrats is offensive, the real constitutional transgression arises from the PSC reading the Act so that there exists no effective measure by which the Legislature, the courts, or the public might "check" the PSC's apportionment of the LCR.

IV. REQUEST FOR RELIEF

WHEREFORE, ABATE respectfully requests that the Michigan Supreme Court reject the PSC's Application for Leave to Appeal and any and all relief sought therein. 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.

Dated: October 4, 2018

Respectfully submitted,

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APPENDIX TO THE APPELLEE ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY'S BRIEF

Exhibit A:	SB 437 (as introduced)
Exhibit B:	SB 437 (S-4)
Exhibit C:	SB 437 (S-7)
Exhibit D:	Senate Journal 1792 (No. 70, November 10, 2016)
Exhibit E:	SB 437 (as passed by Senate)
Exhibit F:	House Journal 2493 (No. 80, December 15, 2016)
Exhibit G:	H-4 (SB 437) (House substitute)
Exhibit H:	H-4 (SB 437) (as passed by the House)
Exhibit I:	Senate Journal 2137 (No. 79, December 15, 2016)
Exhibit J:	H-4 (as passed by House and Senate) (Public Act 341 of 2016)