STATE OF MICHIGAN
IN THE SUPREME COURT

In re RELIABILITY PLANS OF ELECTRIC UTILITIES FOR 2017-2021

ASSOCIATION OF BUSINESS ADVOCATING TARIFF EQUITY,
Appellee,

v

CONSUMERS ENERGY COMPANY,
Appellant, and

MICHIGAN PUBLIC SERVICE COMMISSION, ENERGY MICHIGAN, INC., and MICHIGAN ELECTRIC AND GAS ASSOCIATION,
Appellees.

Supreme Court Case No. 158305
Court of Appeals No. 340600
Lower Court Case No. 00-01897

ENERGY MICHIGAN, INC.,
Appellee,

v

CONSUMERS ENERGY COMPANY,
Appellant, and

MICHIGAN PUBLIC SERVICE COMMISSION, and MICHIGAN ELECTRIC AND GAS ASSOCIATION,
Appellees.

Supreme Court Case No. 158306
Court of Appeals No. 340607
Lower Court Case No. 00-01897

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,
Appellee,

v

MICHIGAN PUBLIC SERVICE

Supreme Court Case No. 158307
Court of Appeals No. 340600
Lower Court Case No. 00-01897

COMMISSION,
Appellant, and

CONSUMERS ENERGY COMPANY, and
MICHIGAN ELECTRIC AND GAS
ASSOCIATION,
Appellees.

ENERGY MICHIGAN, INC.,
Appellee,

v

MICHIGAN PUBLIC SERVICE
COMMISSION,
Appellant, and

CONSUMERS ENERGY COMPANY, and
MICHIGAN ELECTRIC AND GAS
ASSOCIATION,
Appellees.

Supreme Court Case No. 158308
Court of Appeals No. 340607
Lower Court Case No. 00-01897

ENERGY MICHIGAN, INC.'S RESPONSE TO MICHIGAN PUBLIC SERVICE COMMISSION'S APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

STATEMENT OF JURISDICTION

Appellee, Energy Michigan, Inc. ("Energy Michigan")[1], agrees with Appellant, Michigan Public Service Commission (the "MPSC" or "Commission"), 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. *In re Reliability Plans of Electric Utilities for 2017-2021*, ___ Mich App ___ (Docket No. 340600; For Publication) (the "Opinion" or "COA Opinion"). However, as set forth in Energy Michigan'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 marker–Energy Michigan asks that this Court deny the MPSC's Application for Leave to Appeal.

[1] Energy Michigan is a Michigan nonprofit corporation, formed over thirty years ago, to protect and promote the interests of producers and users of independent power and serves as the trade association for alternative and independent power supply, cogeneration, advanced energy industries, and their customers in Michigan. Its membership includes independent power producers, those interested in cogeneration, power suppliers and marketers, project developers, local units of government, and users of electricity.

COUNTERSTATEMENT OF QUESTIONS INVOLVED

1. Did the Court of Appeals correctly determine that the MPSC 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 Energy Michigan answers:	"Yes."
Appellee ABATE answers:	"Yes."
Appellant MPSC answers:	"No."
Appellant Consumers Energy Company answers:	"No."

I. INTRODUCTION

In its Application for Leave to Appeal, The MPSC claims that this a "complex utility regulatory appeal" that "threatens a basic interest in reliable energy, as well as an entire body of administrative law surrounding legislatively delegated authority." MPSC Application at 1. In reality, this is quite a simple case turning on a legal question that the Court of Appeals faces with regularity – *i.e.*, is there statutory language supporting the authority claimed by an administrative agency, in this case the MPSC? Thus, notwithstanding the MPSC's hyperbolic claims, this is at heart a simple case of statutory interpretation and agency jurisdiction.

On the issue of "reliable energy," the MPSC provides no evidence either from the record below or in its Application that there is any reliability crisis that would be precipitated by the Court of Appeals requiring the MPSC to implement Act 341 in accordance with the statute's plain language as the Court of Appeals order requires. The broad and discretionary authority that the MPSC is attempting to delegate to itself, and which the Court of Appeals found no support for in the statute, cannot be justified simply by a policy argument that the state's electric reliability would be better off if the Legislature had granted the MPSC such sweeping authority, and therefore that it must surely have intended to do so. As the MPSC details in its Application, the Legislature was engaged in an extended process of hearings, drafting amendments, rehearings, and the like before Act 341 was finally passed and signed into law. In that process, issues of reliability of the state's electric grid featured prominently. So the Legislature was well aware of the issues that the MPSC now seeks to invoke, it weighed them, and it found that the existing language provided all the assurance of reliability that the state needs at this time. If the MPSC is unhappy with that outcome, the proper recourse is not to seek inferred authority through the courts, but to obtain plain delegated language through the legislative process.

A point of clarification is necessary. The MPSC begins, on the very first pages of its Application, using the term "local clearing requirement" in an imprecise and, as it proceeds through its Application, an ultimately confused and confusing way. For example, the MPSC complains that "[w]ithout the ability to apply a local clearing requirement or a planning reserve margin requirement, the Commission would be powerless to ensure that electric providers have the local capacity they need to meet their customers' demand." MPSC Application at 2. The Court of Appeals opinion did not remove the MPSC's ability to apply either a local clearing requirement nor a planning reserve margin requirement. On the contrary, it affirmed the ability of the MPSC to apply a local clearing requirement (and presumably a planning reserve margin requirement)[2] so long as it is consistent with MISO and the federal reliability requirements – that is, as long as it is not an individual local clearing requirement. See COA Opinion at 10.

This is the distinction the MPSC repeatedly fails to make in its Application, between the concept of a zonal local clearing requirement as applied by MISO and consistent with the definition in Act 341 (which defines the term in reference to a "zone"), and the concept of an individual local clearing requirement, which was newly created by the MPSC itself. Thus, throughout its Application, the MPSC's use of "local clearing requirement" for both the MISO-approved zonal requirement and for its own newly minted individual requirement is confusing at best and misleading at worst. The Court of Appeals plainly understood the difference: "reading MCL 460.6w as a whole indicates that the MPSC is directed to impose a local clearing requirement upon alternative electric suppliers in a manner consistent with MISO, and not

[2] It is unclear to Energy Michigan why the MPSC is raising this issue about the planning reserve margin requirement in this proceeding. It was not a contested issue below, nor does the Court of Appeals opinion address it or place any restrictions on what the MPSC has proposed. Energy Michigan therefore respectfully requests that the MPSC's discussion of planning reserve margin requirement be disregarded as irrelevant to this proceeding.

individually upon alternative electric suppliers." COA Opinion at 10 (emphasis added). It is plain, then, that under the Court of Appeals Order the MPSC is not "without the ability to apply a local clearing requirement," as the MPSC claims, but rather has been prohibited from implementing an individual local clearing requirement in a manner inconsistent with MISO.

Oddly, the MPSC was capable of making this distinction both in its Order on September 15, 2017 and in its briefing to the Court of Appeals. Only now, in its Application to this Court, does the MPSC fail to distinguish between zonal and individual local clearing requirements.[3] Unfortunately, this new imprecision in language muddies the issues and leads to a false impression that the Court of Appeals has prohibited the MPSC from implementing reliability requirements that are routine and approved by MISO. That is not the case.

Finally, the MPSC asserts that the Court of Appeals has threatened the "entire body of administrative law surrounding legislatively delegated authority." MPSC Application at 1. As Energy Michigan discusses more fully below, this is mere hyperbole. The MPSC claims that the Court of Appeals opinion would require the Legislature "to tell administrative agencies every factor they must consider in exercising their discretion." MPSC Application at 2. The MPSC fails to identify where it finds such a requirement in the Court of Appeals opinion, and Energy Michigan cannot find any such requirement cited there. This is nothing more than a requirement that the MPSC has itself concocted as a straw man argument in order to cast doubt on the legitimacy of the Court of Appeals' opinion. In fact, the Court of Appeals' opinion is firmly

[3] In the Commission's September 15, 2017 Order that was appealed to the Court of Appeals, the Commission refers to its new requirement as a "locational requirement . . . applied to individual electric providers." See e.g., Order at 38. In its Brief to the Court of Appeals, the Commission consistently referred to an "individual local clearing requirement" or "individual LCR." See, e.g., Counter Statement of Questions Presented, Q. 2, and 25, 40-41.

within the main stream of precedent, including the precedent of this Court as discussed herein, and should therefore be allowed to stand.

II. BACKGROUND

In response to the MPSC's Statement of Facts and Procedural History, Energy Michigan relies upon and incorporates herein (1) the Background set forth in Energy Michigan's Answer to Consumer Energy Company's Application for Leave to Appeal at pages 1 through 11 and (2) the Counterstatement of Legal, Factual, and Procedural Background set forth in ABATE's Answer to the MPSC's Application for Leave to Appeal at pages 2 through 30. In addition, by way of background, Energy Michigan provides the following overview of Act 341 and its definition of "local clearing requirement."

Act 341 defines a "local clearing requirement" as "the amount of capacity resources required to be in the local resource zone in which the electric provider's demand is served to ensure reliability in that zone as determined by the appropriate independent system operator for the local resource zone in which the electric provider's demand is served and by the commission under subsection (8)." MCL 460.6w(12)(d). It is noteworthy that this definition emphasizes that it is the amount of resources required to be "in the local resource zone" to ensure reliability "in that zone." There is no mention of a provider-specific or individual "local clearing requirement." The next sentence similarly emphasizes that the goal is to "ensure reliability in that zone as determined by the appropriate independent system operator for the local resource zone in which the electric provider's demand is served."

Thus, the stated goal is meeting a zonal standard, not an individual, provider-specific standard. Not only is the focus again on the zone, but reliability is to be determined in the same manner as MISO (the appropriate independent system operator) determines it, which is on a

zonal basis. Finally, it is also significant that while the definition refers to the individual electric provider's demand (*i.e.*, customer load), all reliability requirements are on a zonal basis. Thus, the definition in PA 341 could hardly be more clear that the local clearing requirement as that term is used in PA 341 is intended to be zonal and the same as the zonal requirement imposed by MISO.

The MPSC attempts to suggest that MISO somehow imposes an individual locational requirement, when it asserts that, "[n]or did the court acknowledge that MISO directly assigns and applies a proportional share of the local clearing requirement to electric providers that opt out of the auction–a process akin to the capacity requirements (planning reserve margin and local clearing requirement) under Section 6w." See MPSC Application at 17. This is simply misleading. MISO allows providers to voluntarily choose to identify their capacity resources through a Fixed Resource Adequacy Plan ("FRAP"), which enables a provider to remove some or all of its capacity resources from the MISO Planning Resource Auction or PRA, to which all other resources must be submitted. If a provider removes some or all of its load from MISO's auction, then it raises a risk of evading MISO's resource adequacy determination for the zone.

Therefore, a provider who elects this voluntary option then has to identify to MISO the location of the resources it is relying on. The result is that a provider may have a locality requirement self-imposed by means of choosing to use a FRAP, but use of a FRAP and application of an individual capacity locality requirement is wholly voluntary. MISO's only mandatory LCR is zonal, not individual. Furthermore, a provider may elect to apply a FRAP to only a portion of its load, and be subject to the zonal LCR for the rest. No such flexibility nor voluntariness is present in the construct that MPSC has erroneously mandated. The MPSC's

individual locational requirement is therefore, for a number of reasons, not comparable nor analogous to MISO's FRAP.

III. STANDARD OF REVIEW

In its discussion of the standard of review, the MPSC seeks deference and "most respectful consideration" from this Court to the agency's interpretation of PA 341, Section 6w ("Section 6w"). MPSC Application at 20. However, this is not the appropriate legal standard for review of an agency's first interpretations of a new statute. *Attorney General v Public Svc Comm'n*, 269 Mich App 473, 480; 713 NW2d 290 (2006) ("We do not afford the same measure of deference to an agency's initial interpretation of new legislation as we do to a longstanding interpretation"); see also *Consumers Power Co v Mich Pub Serv Comm*, 460 Mich 148, 157 n. 8; 596 NW2d 126 (1999) (finding that no deference need be given the agency interpretation of a statute where the language of the statute is plain.). Furthermore, "[t]he PSC possesses only that authority granted to it by the Legislature. Authority must be granted by clear and unmistakable language. A doubtful power does not exist." *Public Svc Comm'n*, 269 Mich App at 480.

Where, as here, the Court of Appeals has found that the plain language of the statute does not support the Commission's action, no deference need be given. The MPSC argues that "[b]ecause the Commission's order is 'not in conflict with the indicated spirit and purpose of the legislature,' the Court of Appeals should have deferred to the Commission's interpretation." Application at 21 (citation omitted). But this simply ignores the finding of the Court of Appeals: "We further conclude . . . . the order of the MPSC conflicts with the intent of Act 341 . . . ." COA Opinion at 12. In fact, the MPSC has simply failed to make their case at the Court of Appeals and now seeks to present that failure as a deficiency in the reasoning of the Court of Appeals. Instead, the unanimous, published opinion of the Court of Appeals should be allowed to stand.

IV. ARGUMENT

A. The Plain Language of Act 341 Prohibits an Individual LCR.

The MPSC asserts, incorrectly, that the parties to this proceeding are in agreement that the Legislature did not forbid an individual LCR. In fact, Energy Michigan has consistently taken the position that the MPSC's authority is plainly bounded by the statutory language, which prohibits the MPSC from imposing requirements that are inconsistent with those of MISO.

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. It oversees the electrical grid in all or part of fifteen states in the Midwest and South, including Michigan. *MISO Transm'n Owners v FERC*, 860 F3d 837, 839 (6th Cir 2017); see also *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."). 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 . . . ." *MISO, Inc*, 84 FERC ¶ 61,231, 62,138-40, 1998 WL 770197 (Sept 16, 1998). Part of MISO's role is that of regional reliability coordinator. *Midwest ISO Transmission Owners v FERC*, 373 F3d 1361, 1370; 362 US App DC 314 (DC Cir, 2004).

1. ACT 341 Mandates That the MPSC's Resource Adequacy Requirements be Consistent with MISO's Requirements.

Act 341 mandates that the new resource adequacy requirements established by the MPSC be consistent with MISO and not conflict with federal resource adequacy standards. For instance, in subsection 6w(6), the MPSC is explicitly barred from exercising independent authority to create its own local sourcing requirements:

> 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 [i.e., 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) (emphasis added). This provision requires that the MPSC allow any such resource that MISO would allow, and that any conditions the MPSC places on capacity resources available to meet the MPSC's requirements not conflict with MISO's FERC-approved tariffs. Similarly, Section 6w(8)(c) states:

> In order to determine the capacity obligations, request that the appropriate independent system operator [MISO] provide technical assistance in determining the local clearing requirement and planning reserve margin requirement. If the appropriate independent system operator declines, or has not made a determination by October 1 of that year, the commission shall set any required local clearing requirement and planning reserve margin requirement, consistent with federal reliability requirements.

MCL 460.6w(8)(c) (emphasis added). Again, the statute requires that the MPSC's actions be consistent with federal and MISO requirements. As discussed above, MISO has no mandatory locational requirement for individual electric providers, but only a zonal requirement in the aggregate, and so to be consistent, the MPSC's requirements must be zonal and not individual.

2. The MPSC Unlawfully Seeks to Infer Authority to Create New Standards.

Despite having no clear authorization for an individual locational requirement, and being prohibited from imposing something different from what MISO requires, the MPSC nevertheless argues that its ability to create an individual local clearing requirement can be inferred from the general purposes of the Legislature, even in the absence of a clear grant of authority in the statute.

This Court has already addressed this argument from the MPSC in *Consumers Power Co v Mich Pub Serv Comm*, 460 Mich 148, 155; 596 NW2d 126 (1999), where the MPSC sought to implement a retail wheeling program in the absence of clear statutory authority. On that occasion, this Court reviewed the decision of the Court of Appeals, which had deferred to the MPSC's interpretation of its own statutes and found no grant of specific powers but did find a grant of broad authority that it determined was sufficient. *Consumers Power Co*, 460 Mich at 154. In reversing the Court of Appeals, this Court plainly set forth the following principles:

> The Public Service Commission has no common-law powers. It possesses only that authority granted by the Legislature. *Union Carbide, Supra* at 146, 428 N.W. 2d 322. Moreover, this Court strictly construes the statutes which confer power on the PSC. As this Court explained in *Union Carbide, supra* at 151, 428 N.W.2d 322, quoting *Mason Co. Civic Research Council v. Mason Co.*, 343 Mich. 313, 326-327, 72 N.W.2d 292 (1955):
>
> > "The power and authority to be exercised by boards or commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist."
>
> In construing the statutes empowering the PSC, this Court does not weigh the economic and public policy factors that underlie the action taken by the PSC.

Id. at 155. Thus, this Court concluded that without explicit statutory language granting it authority, the MPSC was without power to implement a retail wheeling program for utilities. *Id.* In the MPSC's current Application, the Court is faced with the exact same argument again by the MPSC, this time in the context of resource adequacy. Having already addressed this argument from the MPSC on a previous occasion, there is no need for this Court to take up the MPSC's Application in order to repeat what is now settled law.

3. The Zonal Requirement in Act 341 Further Demonstrates that an Individual Local Clearing Requirement is not Authorized Under the Statute.

Contrary to the MPSC's assertion, Energy Michigan does not agree that the Legislature did not forbid an individual LCR, and the statute reveals the opposite to be true. Act 341 states that the MPSC's implementation must be "consistent with MISO," and MISO's requirements are all zonal. So by requiring consistency with a zonal requirement, the Legislature prohibited an individual requirement. This is consistent with the interpretive principle of *expressio unius est exclusio alterius.* See *Taylor v Mich Public Utilities Comm'n*, 217 Mich 400, 402-403; 186 NW 485 (1922) ("'*Expressio unius est exclusio alterius*' has been a long time legal maxim and a safe guide in the construction of statutes marking powers not in accordance with the common law."); *Bradley v Saranac Community Schools Bd of Educ*, 455 Mich 285, 298; 565 NW2d 650 (1997) ("This Court recognizes the maxim *expressio unius est exclusio alterius*; that the express mention in a statute of one thing implies the exclusion of other similar things."). The MPSC is asking this Court to set aside not only its own long-standing precedent, but also what in 1922 was already for this Court a trusted and "long time legal maxim and a safe guide," in favor of giving – in the Commission's words – "most respectful consideration" to the Commission's own novel interpretation of a statute, and allowing the Commission to infer discretionary authority where it lacks the "clear and unmistakable language" that the Court has long required.

Energy Michigan asks that this Court allow the Court of Appeals decision to stand, consistent with long-standing Michigan law and precedent. As the Court of Appeals noted, rather than follow the path the MPSC was beckoning down, they preferred to "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." COA Opinion at 14, citing *Rovas*, 482 Mich at 108; *City of Coldwater*, 500 Mich at 167. This decision, which is consistent with well-settled law, should not be disturbed.

B. MISO's FRAP is Not an Analogue for What the Commission Has Imposed.

The MPSC attempts to sidestep the fatal problem that it has with the lack of direct statutory authorization for its unauthorized proposed individual local clearing requirement by comparing that proposed requirement to the MISO Fixed Resource Adequacy Plan ("FRAP"). Thus, the MPSC asserts that, "[t]he Act 341 provisions requiring electric providers to meet capacity obligations and prove that they have done so are akin to this fixed resource adequacy process [FRAP]." MPSC Application at 33. It is true that MISO ordinarily requires that all resources flow through its Planning Resource Auction ("PRA") in order that all capacity resources may be accounted for and MISO may ensure that there are adequate resources in all zones to cover the load. However, MISO allows providers to voluntarily choose to identify some or all of their capacity resources through a FRAP, which then enables a provider to remove some or all of its capacity resources from the PRA.[4] Because MISO certifies that enough capacity is in the zone to satisfy the zonal locality requirements by means of what is submitted for and approved in the PRA, resources that are set aside in the FRAP must have a separate zonal requirement applied to them in order to ensure that the overall zonal resource adequacy requirement is met.

MISO's presentation from June 8, 2017 puts it this way: "LSEs that choose to use a FRAP to meet their Resource Adequacy Requirements must designate a sufficient volume of

[4] See *MISO Business Practices Manual No. 11, Resource Adequacy*, Section 5.3 Fixed Resource Adequacy Plan ("FRAP"), available at: https://cdn.misoenergy.org/BPM%20011%20-%20Resource%20Adequacy110405.zip, accessed 10-04-2018.

resources located in the same LRZ [local resource zone] as the LSE's PRMR to meet the LCR requirement."[5] Thus, there is a locality requirement imposed on providers who voluntarily choose to use a FRAP. The application of an individual capacity locality requirement in MISO's FRAP is wholly voluntary, while the MPSC's individual LCR is mandatory. MISO has no mandatory individual locality requirement or LCR. MISO's only mandatory LCR is the zonal one. Therefore, for the MPSC's mandatory locational requirement to be consistent with MISO's, it must also be zonal and not individual. Furthermore, electric providers who choose to use the FRAP under MISO's rules can also use it for only a portion of their load, and can source the rest through the MISO auction (the PRA). In doing so they are, again, voluntarily choosing to make a certain portion of their load, at their own election, subject to an individual locational requirement. The MPSC's individual LCR is based on the electric provider's entire load and providers do not get to choose how much load falls into that category.

These differences make the MPSC construct entirely different in function and effect from the MISO LCR or from the zonal "local clearing requirement" as defined in Act 341. Despite these fundamental differences, the MPSC seeks to argue that its own novel requirements are "akin" to the MISO FRAP. See MPSC Application at 33. The Court of Appeals was correct when it held that "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 alternative electric suppliers… ." See COA Opinion at 13.

[5] Presentation of Mr. John Harmon, Manager, Resource Adequacy, MISO, available at https://www.michigan.gov/documents/mpsc/6-8 2017_MI_Resource_Adequacy_Overview_573222_7.pdf:, slide 10, first bullet.

C. Consultation with MISO Does Not Confer Unbridled Discretion on the MPSC.

The MPSC also argues that "[t]he Act does not limit the Commission's ability to determine the local clearing requirement if it does so with MISO's technical assistance." See MPSC Application at 31. As a preliminary manner, this argument is fundamentally flawed as it presupposes that the MPSC has some "ability to determine the local clearing requirement" in the first place. Running with this flawed assumption, the MPSC seemingly argues that as long as it consults with MISO, it can do anything else that it chooses that is not expressly limited by Act 341. This argument ignores the MPSC's limited authority as a creature of statute with no inherent or common law power, whose jurisdiction must affirmatively appear in a statute before it can be invoked or exercised. See *Taylor v Michigan Pub Utilities Comm'n*, 217 Mich 400, 402; 185 NW2d 485 (1922). The Court of Appeals addressed this argument directly in its Order:

> The MPSC argues that because section 6w(8)(b) is silent[] as to whether an alternative electric supplier may similarly aggregate its resources, the intent of the statute must be to permit the imposition of a local clearing requirement upon individual alternative electric suppliers. Again, however, reaching this conclusion 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. Because we must strictly construe the statutes that confer power upon the MPSC, and that power may not be inferred but instead must be conferred by "clear and unmistakable language," we conclude that MCL 460.6w does not authorize the MPSC to impose a local clearing requirement upon individual alternative electric suppliers. See *Herrick Dist Library*, 293 Mich App at 582-583.

See COA Opinion at 11-12.

In the argument being addressed by the Court of Appeals, the MPSC tried to raise its inferred authority to support its interpretation of 6w(8)(b). Here, it is raising the same argument to support its interpretation of 6w(8)(c). In either case, the argument founders on the same legal principle that the MPSC's power "may not be inferred but instead must be conferred by 'clear and

unmistakable language.'" The MPSC cannot substitute conferring with MISO for that "clear and unmistakable language" from the Legislature.

In addition, even assuming, for purposes of argument that the MPSC somehow did have the authority to impose an individual LCR as long as MISO was first consulted, there is an additional problem with the way that the MPSC now attempts to use its consultation with MISO as an "overlooked fact" to support its appeal – namely that the consultation was over a zonal, not individual LCR. The MPSC now argues, "[i]n this case, MISO helped the Commission set the local clearing requirements, (9/15/17 Order at 48-49), so they are presumptively valid." See MPSC Application at 32. However, in its September 15, 2017 Order, the MPSC stated, "[e]xcept as applicable under MISO's tariff, a locational requirement will not be applied to individual load serving entities during planning years 2018-2021 as part of the transition to the new capacity obligations required under Section 6w." See September 15, 2017 Order at 49 (emphasis added). So what MISO "helped the Commission set" is "a locational requirement [that] will not be applied to individual load serving entities."

In other words, MISO helped set a zonal LCR consistent with MISO's own practice for a period (2018-2021) during which the MPSC had decided not to impose an individual LCR on subscribers. Thus, MISO's assistance, given to set a zonal requirement at a time when the MPSC was not setting individual LCR requirements, is wholly irrelevant to the question of whether the MPSC's individual LCR is consistent with MISO or not.

Finally, the MPSC attempts to argue that "MISO's process does impose the local clearing requirement on individual electric suppliers, even if it does so indirectly through wholesale market charges in some instances." MPSC Application at 35. This is sophistry. No one has argued that local clearing requirements do not impact individual suppliers "indirectly through

wholesale market charges in some instances." However, that is not the same thing as a mandatory, individual LCR applied to an alternative electric supplier. And all parties are in agreement that MISO has no such thing: "The parties acknowledge 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 Opinion at 10. For these reasons, the MPSC's arguments about MISO's consultation on its local clearing requirement can be disregarded as not relevant to the issue before this Court and which was before the Court of Appeals.

D. The Proceeding Below Was Not a Ratemaking Proceeding.

The MPSC now, for the first time, asserts that the action below was a "ratemaking proceeding." See MPSC Application at 45. This is the first time that the MPSC has suggested this line of argument, as it was not raised at the Court of Appeals. In any event, it is obviously incorrect and can be disregarded on its face. The proceeding appealed from below was in U-18197, which was a comment proceeding and not a contested case. There was no evidentiary record, no sworn testimony, no briefing, no decision by an administrative law judge, and consequently no process under the Administrative Procedures Act.[6] Therefore Commission's September 15, 2017 Order in U-18197 was issued without being based on any formal record.

[6] These are points that the Energy Michigan raised with the Court of Appeals in objecting to the process that led up to the issuance of the Commission's "Attachment A: Capacity Demonstration Process and Requirements" document attached to the September 15, 2017 Order in U-18197, as not having been consistent with the requirements of the Administrative Procedures Act.

See U-18197 Docket Sheet, attached **Exhibit 1**. The proceeding below was not a "ratemaking proceeding" any more than it was a rulemaking proceeding.

The Commission itself appears to have believed that it was not a ratemaking proceeding up until it filed its Application with this Court. In its ordering clause 4 in the September 15 Order in U-18197, the Commission said, "[a] formal contested case proceeding is necessary to provide an opportunity for parties to present and challenge evidence in order for the Commission to determine a just and reasonable locational requirement and methodology that is consistent with federally approved tariffs, which will be applied beginning in the 2022 planning year." See September 15 Order, U-18197 at 49. That "formal contested case proceeding" is Case No. U-18444. This separate proceeding was only necessary because U-18197 was not a ratemaking proceeding and no evidence was presented or challenged on the record.

Furthermore, the MPSC never explains how the proceeding below could have been a ratemaking proceeding when no rate, or even methodology, was set. Instead, the Commission determined that it would establish these through a new, contested proceeding, in U-18444: "The Commission instead seeks additional information through a formal hearing process in order to determine the proper methodology and allocation of a locational requirement, which would apply in 2022." September 15 Order, U-18197 at 47; see also discussion on page 42 of the Order of the need for "a more formal proceeding." The Commission opened U-18197 on January 12, 2017 as a docket in which filings could be made by "electric utilities regulated by the Commission, alternative electric suppliers, utility affiliates, and certain power supply cooperatives and associations to submit a self-assessment of their ability to meet their customers' expected electric requirements and associated reserves during the five-year period of 2017 through 2021." See January 12, 2017 Order in Case No. U-18197 at 1, attached as **Exhibit 2**. MPSC Staff was then

ordered to additionally file a report by June 2017 "on its review of the data and overall capacity outlook for the state and areas within the state." *Id.* at 7.

Following filings by alternative electric suppliers ("AESs") in the U-18197 docket, Consumers Energy sought to compel disclosure to the utility of confidential information provided to the Commission and its Staff by AESs, which the AESs contested. In its subsequent Order on May 11, 2017, denying Consumers' Motion to Compel, the Commission had the following to say about the nature of the proceeding in U-18197:

> This docket is an uncontested investigation. Decisions regarding the sufficiency of a capacity demonstration and the amount of an SRM capacity charge applicable to any entity will be made in contested dockets after the conclusion of the technical conferences. Undoubtedly, the confidential information sought by Consumers from the AESs, or similar confidential information, will be disclosed and that evidence will be tested in those proceedings. This docket is not the forum for those issues, and discovery "is neither a weapon nor a means of obtaining information to be used in another forum."

See May 11, 2017 Order in U-18197 at 6 (emphasis added), attached as **Exhibit 3**. The Commission's attempt now, after the fact, to turn what was a series of technical conferences and informal, informative filings into a "ratemaking proceeding" is simply not credible and is belied by the language in the Commission's own orders.

E. The MPSC Raises a Series of Red Herrings Which Should be Disregarded.

The MPSC invokes a number of red herring issues in an apparent attempt to find an appealable issue. For instance, the MPSC states that, "MISO leaves long-term planning reserve requirements to states, so that the MPSC's local clearing requirement that requires providers to secure capacity three and four years into the future does not conflict with federal reliability requirements." MPSC Application at 35. Energy Michigan has not contested that Act 341

granted the MPSC authority to require capacity demonstrations "three and four years into the future." That is not an issue in dispute here and may be disregarded by this Court.

The MPSC also claims that the Court of Appeals held "that MISO does not impose a local clearing requirement on alternative electric suppliers and that doing so is inconsistent with federal reliability requirements." MPSC Application at 36. As has already been addressed elsewhere in this answer, the MPSC's use of "local clearing requirement" when the proper term would be "individual local clearing requirement" or even "mandatory individual local clearing requirement" leads to confusion. In this particular case it leads to an incorrect statement. The Court of Appeals never held that MISO does not impose an LCR, just that MISO does not impose an individual LCR on alternative electric suppliers. See, for example, COA Opinion at 10. Therefore, the MPSC's claims about the dire effects on reliability from the Court of Appeals holding may be disregarded, as they are founded on supposed limitations that the Court of Appeals never imposed (such as no LCR, no PRMR, etc.).

Another red herring is the MPSC's attempt to suggest that the Court of Appeals has objected to the forward resource adequacy requirements that are attached to the MPSC's September 15, 2017 Order as "Attachment A: Capacity Demonstration Process and Requirements." The MPSC argues that because MISO leaves long-range resource planning to the states, "so the MPSC's local clearing requirement that requires providers to secure capacity 3 and 4 years into the future does not conflict with federal reliability requirements." MPSC Application at 35. It is unclear why the MPSC is raising this issue here, as it has nothing to do with the Court of Appeals' Order.

The forward capacity resource demonstrations have not been overturned–only the individual LCR has been addressed by the Court of Appeals. Energy Michigan did challenge

how the MPSC promulgated its rules (*i.e.*, the "Attachment A: Capacity Demonstration Process and Requirements") for implementation of the forward demonstration process in its appeal before the Court of Appeals, but it did not challenge the MPSC's authority to require such a forward demonstration. Because the Court of Appeals decided that the MPSC lacked the authority to impose an individual local clearing requirement on alternative suppliers, it concluded that it was not necessary to reach the question of how the related rules were promulgated. COA Opinion at 15. Therefore this issue remains open, and if this Court should determine to take up the Applications of either Consumers or the MPSC, the question of the validity of the promulgation of the MPSC's rules should also be addressed simultaneously.

V. REQUEST FOR RELIEF

Wherefore, Energy Michigan respectfully requests that the Michigan Supreme Court reject Michigan Public Service Commission's Application for Leave to Appeal and all of the relief requested therein. The Court of Appeals' July 12, 2018 unanimous and published Opinion was correct in all regards and should be upheld.

VARNUM LLP
Attorneys for Energy Michigan, Inc.

Date: October 5, 2018

By: */s/ Brion B. Doyle* .
Laura A. Chappelle (P42052)
Timothy J. Lundgren (P62807)
Brion B. Doyle (P67870)
Business Address and Telephone:
Bridgewater Place, P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000

13975141_3.docx