STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellant,

v

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,

Appellee.

Supreme Court No. 158307

Court of Appeals No. 340600

MPSC Case No. U-18197

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellant,

v

ENERGY MICHIGAN, INC,

Appellee.
_____/

Supreme Court No. 158308

Court of Appeals No. 340600

MPSC Case No. U-18197

MICHIGAN PUBLIC SERVICE COMMISSION'S REPLY TO THE ANSWER OF THE ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY

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INTRODUCTION

This is a case of first impression that will likely decide whether Michigan's electric providers will have enough local generation to meet future demand. ABATE says the opinion below is confined to alternative electric suppliers, but this is wishful thinking. The opinion now has immediate effect and is binding precedent.[1] The same reasoning that led the Court of Appeals to free alternative electric suppliers from the local clearing requirement will compel the Michigan Public Service Commission and courts to free regulated electric utilities from the same requirement should they challenge it. This would jeopardize the reliability of the State's electric grid, contrary to the Legislature's intent. See MCL 460.6w(12)(h); accord MCL 460.6w(12)(d).

The MPSC does not want unconstrained authority, as ABATE suggests. The Commission merely wants to exercise the authority and discretion that the Legislature gave it—authority to require electric providers to show that they will have enough local electric capacity in the future to provide the power that their customers need.

[1] The Court of Appeals granted its opinion immediate effect after the Michigan Public Service Commission requested leave to appeal. See *In re Reliability Plans of Electric Utilities for 2017-2021*, unpublished order of the Court of Appeals, entered October 1, 2018 (Docket No. 340600).

ARGUMENT

I. If the Court of Appeals' decision is followed as binding precedent, Act 341's state reliability mechanism would be meaningless.

ABATE does not believe that the Court of Appeals' decision will meaningfully impact Act 341's state reliability mechanism, but ABATE focuses on the decision's immediate impact without considering the possible fallout. The Court of Appeals decided an issue of first impression: Whether Act 341 authorized the Commission to impose a local clearing requirement on alternative electric suppliers. Although the decision directly applied only to alternative electric suppliers "who comprise less than 10% of the load in Michigan," (ABATE's Response, p 38), this is just the ruling's immediate impact. Regulated utilities may argue that the local clearing requirement does not apply to them either, in an effort to secure less expensive capacity in the future. Under MCR 7.215(C)(2), the opinion below is binding precedent and could be used as a basis to free regulated utilities from the requirement. (See MPSC's Application, pp 25–26.)[2]

In response, ABATE claims that regulated utilities and alternative electric suppliers *are not similarly situated*, so the opinion below should not extend to regulated utilities. ABATE points to language in Act 341, Section 6t, which

[2] Although the opinion is less likely to be used as precedent to invalidate Section 6w's planning reserve margin requirement, it is possible. ABATE claims that the planning reserve is not like the local clearing requirement because MISO compels individual providers to meet the planning reserve. But the Court invalidated the Commission's local clearing requirement, not only because it is allegedly inconsistent with MISO's requirements, but also because it is not authorized in clear and unmistakable language. Applying the same analysis and rationale, another court could also find that the statute does not clearly authorize an individual planning reserve margin requirement.

requires regulated utilities to "file integrated resource plans detailing the capacity resources the utilities will rely upon to meet the 'local clearing requirement.' " (ABATE's Response, p 38, citing MCL 460.6t(1)(e)–(f), (3), (6), (8)(a)(i).) But this language reinforces that regulated utilities and alternative electric suppliers *are similarly situated*, at least as far as the local clearing requirement is concerned. Like Section 6w, Section 6t refers to the local clearing requirement without clarifying whether it is an individual or zonal requirement. See MCL 460.6t(1)(e)–(f), (3), (6), (8)(a)(i).

Indeed, Section 6t underscores the magnitude of the error below. Not only did the Court of Appeals' opinion jeopardize the local clearing requirement as part of the capacity demonstration process; it jeopardized the requirement in the integrated resource planning process as well.[3] Section 6t specifically refers to local clearing requirements as they are "determined by the commission *or the appropriate independent system operator* [i.e., MISO]." MCL 460.6t(3) (emphasis added). Following the Court of Appeals' rationale, this reference to MISO suggests that the requirement is a zonal one (since MISO allegedly has no other kind), meaning that the Commission cannot apply it to individual electric providers. This is further evidence that the opinion below would render the requirement meaningless.

Despite this danger, ABATE argues that there is no reliability-driven reason to compel electric providers, including alternative electric suppliers, to purchase

[3] Section 6t describes an integrated resource plan as "a 5-year, 10-year, and 15-year projection of the utility's load obligations and a plan to meet those obligations . . . ." MCL 460.6t(3).

local capacity. ABATE believes that Michigan has enough local capacity. (ABATE's Response, p 38.) By this, ABATE implies that it does not matter whether electric providers are exempt from the local clearing requirement. ABATE focuses on the *current* risk of a capacity shortfall. But when discerning legislative intent, the focus should be on the situation that existed during legislative deliberations. *Reardon v Dep't of Mental Health*, 430 Mich 398, 407 (1988) ("As always, when interpreting a statute, our purpose is to ascertain and effectuate the legislative intent *at the time it passed the act*.") (emphasis added).

Resource adequacy mattered to the Legislature, so it is relevant to discerning its intent. Senator Mike Nofs chaired the Energy and Technology Committee in the Michigan Senate and introduced Senate Bill 437, which later became Act 341. He sponsored the Bill to address imminent power plant closures that threatened reliable energy. At the first Committee Meeting after introducing Senate Bill 437, he explained why he was considering changes to the integrated resource planning process: "So as we looked to the looming EPA regulations, the pending power plant retirements, the issues in the upper peninsula of Michigan, and the potential for energy capacity shortages in our state, it became clear to me that a more robust process was needed" to better plan for the State's future energy needs.[4]

The full Senate and the House of Representatives did not take up Senate Bill 437 until over a year later. Around that time, MISO proposed a new resource

[4] Audio recording: *Hearing Before the Michigan Senate Committee on Energy and Technology*, 98th Legislature (July 15, 2015) (statement of Senator Mike Nofs, Chairman, Senate Energy and Technology Committee) (5:05 on audio recording), available at http://www.senate.michigan.gov/committeeaudio/2015-2016.aspx.

adequacy construct and warned of a capacity shortfall. MISO said that there was a "risk of a significant capacity shortfall in Competitive Retail Areas, including Zones 4 and 7 [Michigan's Lower Peninsula] by 2018 . . . ." *In re MISO*, FERC Docket No. ER17-298, 11/1/16 MISO Transmittal Letter, p 6. The Lower Peninsula, it said, would be short 400 MW capacity. *Id.* at 2–3. The MISO region was also short on local resources. *Id.* at 4 ("Without any change to MISO's existing resource adequacy construct, areas like Local Resource Zone 4 may be short of local resources.").

Given the concerns that existed when Senator Nofs introduced Senate Bill 437 and that persisted until it was signed into law, the Legislature clearly had reliability-driven reasons to compel electric providers, including alternative electric suppliers, to purchase local capacity. It is no surprise, therefore, that it required all electric providers to demonstrate that they would have enough capacity, including local capacity, to meet long-term demand.

II. Agencies should be able to exercise the discretion that the Legislature delegated to them.

The Legislature properly delegated broad authority and discretion to the Commission to set electric providers' local clearing requirement. (MPSC's Application, pp 37–42.) ABATE suggests that the MPSC wants to eliminate the standard that requires the Legislature to confer power in "clear and unmistakable language." (ABATE's Response, p 35.) On the contrary, the Commission simply asks this Court to recognize that the Legislature delegated discretion to it in clear and unmistakable language. See *Detroit Pub Sch v Conn*, 308 Mich App 234, 242–43 (2014) ("the Legislature may confer on an administrative agency the power to . . .

exercise some discretion in administering a statute. This authority, however, must be clearly expressed in the enabling statute and will not be extended by inference."). MCL 460.6w(8)(c) clearly gives the Commission discretion to set a local clearing requirement as long as it does so with MISO's help or, if not, as long as the requirement does not conflict with federal reliability requirements.

Requiring the Legislature to detail every action an administrative agency can or cannot take, which is the effect of the opinion below, undermines the constitutional separation of powers. (MPSC's Application, pp 38–40.) ABATE responds that "simply requiring the Legislature to identify to whom the LCR applies" would not have this effect and that the Commission really wants unconstrained authority. (ABATE's Response, pp 35–36.) But the Commission did not say that the Legislature could not "identify to whom the LCR applies." The Legislature did identify who it applies to: All electric providers who must demonstrate that they will have enough capacity to meet future demand. See MCL 460.6w(8)(a)–(c). The Legislature also delegated authority to the Commission, with reasonably precise standards, to set a local clearing requirement with MISO's technical assistance. The Commission never claimed to have unconstrained authority and could not rightfully claim this. *Blank v Dep't of Corr*, 462 Mich 103, 137 n7 (2000) (MARKMAN, J., concurring) (concluding that when the Legislature

properly delegates authority, it should "be construed . . . as vesting discretionary, not arbitrary authority") (quotation marks and citation omitted).[5]

If this Court does not agree that it is clear from the statute's plain language that the local clearing requirement applies to all electric providers, the most that can be said about the statute is that it does not specifically say whether the local clearing requirement should be applied on a zonal or individual basis. And this kind of authority—whether to apply the local clearing requirement on a zonal or individual basis—is the kind of authority the Legislature surely intended to give the Commission when it required it to set a local clearing requirement with MISO's help. *Marquis v Hartford Acc & Indem,* 444 Mich 638, 644 (1994) ("[When interpreting a statute,] a court should not abandon the canons of common sense.").

By finding that the Legislature must not only give the Commission authority to set a local clearing requirement, but must also authorize it to apply the requirement to individual providers, the Court of Appeals effectively held that the Legislature must separately endorse every possible course of action the Commission can take. Courts have rejected similar arguments, finding "no construction of the 'clear and unmistakable' requirement that would necessitate a separate legislative endorsement for each action taken . . ." *In re Consumers Energy Co*, 279 Mich App 180, 190 (2008).

[5] As noted in the MPSC's Reply to Energy Michigan, by requiring the Commission to seek MISO's technical assistance, the Legislature included significant standards because MISO is bound to follow its resource adequacy tariff.

III. The local clearing requirement is inseparable from ratemaking.

The state reliability mechanism and capacity demonstration process at issue are multifaceted regulatory structures that allow electric providers to build generation, purchase power, or have their customers pay a capacity charge to meet their capacity obligations. The capacity charge is obviously a rate, and the other aspects of the process also impact rates. (MPSC's Application, pp 45–46.) ABATE nonetheless argues that Commission's ratemaking authority does not extend to issues that only "tangentially involve ratemaking" and that it is a stretch for the Commission to argue that the local clearing requirement "is even tangentially related to ratemaking." (ABATE's Response, pp 34–35.) ABATE's position is at odds with its position below, where it acknowledged that the local clearing requirement directly affects customer rates. Specifically, in Case No. U-18444, ABATE said that the local clearing requirement will result in "both an underutilization of Michigan's capacity import capability and an expensive and *likely ratepayer financed overbuild of local capacity resources*." (ABATE's Response, p 22.) ABATE cannot credibly claim that the local clearing requirement will lead to a ratepayer-financed overbuild yet not impact ratepayers.

That said, the case below was not a contested rate case and the order did not set rates. As the Commission itself said: "This order establishes the format and requirements for electric providers in the state to make demonstrations to the Commission that they have sufficient electric capacity . . . ." (9/15/17 Order, p 1, Attachment 2 to MPSC's Application.) The capacity demonstration process, however, is a ratemaking process, so the order establishing requirements for that

process was ratemaking in nature and should have been given greater deference. See *Ins Institute of Mich v Dep't of Labor & Economic Growth*, 486 Mich 370, 416 (2010) (KELLY, C.J., dissenting) ("[Q]uasi-legislative agency actions are afforded greater deference."); accord *Consumers Power Co v Pub Serv Comm*, 226 Mich App 12, 21 (1997) ("[W]hen the PSC exercises its 'legislative' ratemaking authority . . . this Court . . . accords deference to the administrative expertise and judgment of the PSC absent some breach of a constitutional standard or statutory mandate . . . .").[6]

IV. The Commission has jurisdiction over long-term resource adequacy.

The Federal Energy Regulatory Commission (FERC) recently recognized Michigan's resource adequacy construct. When MISO asked FERC to reaffirm its resource adequacy tariff, FERC granted the request and clarified that MISO's tariff does not preempt states from implementing a forward locational requirement. It said that most of MISO's load is in states with resource planning processes that "typically consider resource needs multiple years in the future." *In re Midcontinent Independent Sys Operator, Inc*, 162 FERC ¶ 61176 (February 28, 2018) at P 73. In Michigan, FERC noted, even competitive suppliers "must demonstrate that they have sufficient capacity several years out." *Id.*

FERC defers to state decisions concerning resource adequacy. ABATE cites a 2007 FERC order to suggest that FERC, not the PSC, has jurisdiction over

[6] This is a point of law that the Commission, as the decision maker below, did not need to preserve. *Vushaj v Farm Bureau Gen Ins Co*, 284 Mich App 513, 519 (2009) ("This Court may review an unpreserved issue if it is an issue of law for which all the relevant facts are available.").

resource adequacy, but the order it cites clarifies that FERC defers to state resource adequacy decisions whenever possible. *PJM Interconnection, LLC*, 119 FERC ¶ 61318, 62838 (June 25, 2007) ("*We will defer to state and local entities' decisions when possible on resource adequacy matters*, but in doing so we will not shirk our congressionally-mandated responsibilities.") (emphasis added).

FERC's reference to Michigan's capacity demonstration process as support for its decision to approve MISO's resource adequacy tariff is evidence that FERC does not believe that Michigan's process conflicts with MISO's tariff.

CONCLUSION AND RELIEF REQUESTED

The Michigan Public Service Commission again asks this Court to grant leave to appeal, reverse the Court of Appeals' July 12, 2018 opinion, and instead affirm the Commission's September 15, 2017 order.

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