

STATE OF MICHIGAN  
IN THE SUPREME COURT

MICHIGAN PUBLIC SERVICE  
COMMISSION,

Appellant,

v

ASSOCIATION OF BUSINESSES  
ADVOCATING TARIFF EQUITY,

Appellee.

MICHIGAN PUBLIC SERVICE  
COMMISSION,

Appellant,

v

ENERGY MICHIGAN, INC,

Appellee.

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Supreme Court No. 158307

Court of Appeals No. 340600

MPSC Case No. U-18197

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**MICHIGAN PUBLIC SERVICE COMMISSION'S REPLY TO THE ANSWER  
OF ENERGY MICHIGAN, INC**

Bill Schuette  
Attorney General

Aaron D. Lindstrom (P72916)  
Solicitor General

B. Eric Restuccia (P49550)  
Chief Legal Counsel

Ann M. Sherman (P67762)  
Assistant Solicitor General  
Counsel of Record

Steven D. Hughey (P32203)  
Spencer A. Sattler (P70524)  
Assistant Attorneys General  
Attorneys for Michigan Public  
Service Commission  
Plaintiff-Appellant  
Public Service Division  
7109 W. Saginaw Hwy, 3<sup>rd</sup> Floor  
Lansing, MI 48917 (517) 284-8140

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## INTRODUCTION

“The most important thing in communication,” Peter Drucker once said, “is hearing what isn’t said.”<sup>1</sup> This is true of Energy Michigan, Inc.’s Response to the Public Service Commission in this case: the most remarkable thing about it is not what it says but what it does not say. Energy Michigan claims that this is a “simple case turning on a legal question that the Court of Appeals faces with regularity.” (Energy Michigan’s Response, p 1.) But Energy Michigan does not acknowledge that the Court of Appeals’ published opinion on this “simple” legal question may affect future decisions in similar cases that it “faces with regularity.” This case will ultimately determine not only whether alternative electric suppliers must comply with a local clearing requirement but, as binding precedent, it will likely determine whether all other electric providers must comply with the same requirement. Energy Michigan has no response to this, and its silence speaks volumes.

Energy Michigan also has nothing to say in response to arguments that the opinion below will undermine the delegation doctrine by not allowing agencies to exercise discretion when carrying out their statutory authority. This is pivotal to this State’s jurisprudence because, as Energy Michigan acknowledges, courts often hear cases about administrative agencies’ statutory authority, which makes this case more important, not less. This case will set a precedent that will likely be followed in future cases, which is why this Court should grant leave to appeal.

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<sup>11</sup> Peter Drucker, *Peter Drucker Quotes*, BRAINYQUOTE.COM, at [https://www.brainyquote.com/quotes/peter\\_drucker\\_142500](https://www.brainyquote.com/quotes/peter_drucker_142500) (accessed October 20, 2018).

## ARGUMENT

### I. **Act 341’s plain language allows the Commission to set a local clearing requirement.**

Energy Michigan also does not address language in Act 341 that requires individual electric providers to meet a local clearing requirement. Under Act 341, electric providers must demonstrate that they have enough capacity to serve their customers. MCL 460.6w(8)(a) and (b). As part of this capacity demonstration, the MPSC can impose a local clearing requirement. MCL 460.6w(8)(c). Because the local clearing requirement is part of the capacity demonstration process, providers obviously must show that they can meet the requirement through the demonstration process. It is no use saying, as Energy Michigan does, that electric providers must meet a zonal local clearing requirement and not an individual local clearing requirement. Under the statute, they must meet the requirement, however it is labeled, so the requirement applies to them individually.

Energy Michigan does not address the MPSC’s interpretation directly but instead suggests that the Commission uses the term “local clearing requirement” imprecisely. (Energy Michigan’s Response, p 2.) The Commission, it says, did not distinguish between an individual local clearing requirement and a zonal one. But Act 341 does not explicitly distinguish between the two either; indeed, there is no practical distinction, even under federal reliability requirements. The Commission went to great pains in its Application to explain how the Midcontinent Independent System Operator (MISO)—the steward of federal reliability requirements for the region—applies zonal local clearing requirements to electric providers individually.

(MPSC’s Application, pp 7–8.) In practice, if a MISO zone does not meet its zonal local clearing requirement, all individual electric providers in the zone participating in the market pay higher prices as a result.<sup>2</sup> In this way, MISO applies the zonal requirement individually.

If the zonal local clearing requirement cannot be applied to individual electric providers, it cannot be applied at all. It would be impossible to ensure that a zone meets a zonal local clearing requirement if the requirement cannot be applied to individual electric providers within the zone. The zonal requirement would serve no purpose. When the Legislature wrote the local clearing requirement into statute, it was more than just words on paper. The Legislature intended the requirement to mean something. *Altman v Meridian Twp*, 439 Mich 623, 635 (1992), as modified on denial of reh’g (“Every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible.”).

## **II. The Commission’s resource adequacy requirements are consistent with MISO’s requirements.**

Energy Michigan misinterprets Sections 6w(6) and 6w(8)(c) in an attempt to invalidate Section 6w(8)’s local clearing requirement. For example, Energy Michigan claims that Section 6w(6) bars the MPSC “from exercising independent authority to create its own local sourcing requirements.” (Energy Michigan’s Response, p 7.) Energy Michigan also focuses on language in Section 6w(8)(c) that

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<sup>2</sup> For an energy provider that opts out of the auction, MISO directly assigns the energy provider its individual share of the local cleaning requirement. (MISO Tariff § 69A.9.)

requires the MPSC’s reliability requirements to be consistent with federal requirements. It then infers that the MPSC’s local clearing requirement is inconsistent with federal requirements. It says that because MISO allegedly “has no mandatory location requirement for individual electric providers, but only a zonal requirement in the aggregate, the MPSC’s requirements must be zonal and not individual.” (*Id* at 8.)

Concerning Section 6w(6), Energy Michigan overlooks language in this subsection that incorporates a supplier’s capacity obligations.

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. [MCL 460.6w(6) (emphasis added).]

By referencing the supplier’s capacity obligations, Section 6w(6) incorporates the local clearing requirement. Section 6w(8) provides that “[i]n order to *determine the capacity obligations*,” MISO and the MPSC must “set any required *local clearing requirement* and planning reserve margin requirement, consistent with federal reliability requirements.” MCL 460.6w(8)(c) (emphasis added). Because a supplier’s “capacity obligations” under Section 6w(8) consists of its “local clearing requirement” and “planning reserve margin requirement,” Section 6w(6)’s “capacity obligations” should be read to incorporate these terms as follows:

A capacity charge shall not be assessed for any portion of [*the local clearing requirement and planning reserve margin requirement*] . . . for which an alternative electric supplier can demonstrate that it can meet its [*local clearing requirement and planning reserve margin requirement*] through owned or contractual rights to any resource that the appropriate independent system operator allows to meet the [*local*

*clearing requirement and planning reserve margin requirement*] of the electric provider. . [MCL 460.6w(6).]

When properly read in this way, Section 6w(6) incorporates the MPSC's authority to set a local clearing requirement and planning reserve margin. For this reason, Energy Michigan is wrong when it says that Section 6w(6) bars the MPSC "from exercising independent authority to create its own local sourcing requirements." (Energy Michigan's Response, p 7.) Section 6w(6) explicitly incorporates the Commission-established local clearing requirement, which is either set with MISO's technical assistance or consistent with federal reliability requirements. MCL 460.6w(8)(c). This ensures "consistency between the Section 6w obligations and MISO rules . . . [and] reinforce[s] how the legislation sought to align the federal and state resource adequacy mechanisms." (9/15/17 Order, p 36, Attachment 2 to the MPSC's Application.)

Energy Michigan is also wrong when it argues that the MPSC's individual local clearing requirement is inconsistent with federal reliability requirements, in conflict with MCL 460.6w(8)(c), because MISO has no individual local clearing requirement. (Energy Michigan's Response, p 8.) Energy Michigan ignores the way that MISO applies the zonal requirement, in practice, to individual electric providers. (MPSC's Application, pp 8–9.) Energy Michigan also does not consider that MISO's local clearing requirement only covers electric capacity in the next planning year and that it is complemented by the Commission's local clearing requirement covering electric providers' long-term capacity needs. (*Id.* at 35.)



Even if MISO did not apply its zonal requirement to individual providers, it would not mean that the MPSC's local clearing requirement is inconsistent with MISO's. Act 341 does not require the Commission to adopt a carbon copy of MISO's local clearing requirement. Act 341 requires only that they be consistent. MCL 460.6w(8)(c). "Consistent" is defined as "1. In agreement; compatible." *American Heritage College Dictionary, Third Edition* (2000). A local clearing requirement that the MPSC establishes and applies with MISO's technical assistance, which helps to ensure that the MISO-established local clearing requirement is met over the long term, is compatible with federal reliability requirements.

In sum, the local clearing requirement in Act 341 that the MPSC has applied to all individual electric providers, with MISO's input, is not only compatible with federal reliability requirements, it directly supports and complements them, as MISO has acknowledged, by providing a path to ensure adequate supplies are secured over the long term to protect reliability.

**III. In addition to its explicit authority to craft a local clearing requirement, the Commission has inherent authority.**

If there was ever a case to be made that an administrative agency has inherent authority under a statute to carry out the statute's mandates, this is it. If this Court does not agree that Act 341 explicitly gives the MPSC authority to set a local clearing requirement and require electric providers to show that they can meet it, this Court should still hold that the Commission has inherent authority to do so. Applying the local clearing requirement in this way is "necessary to the due and efficient exercise of the power expressly granted" to create the local clearing

requirement, and it is “implied from the power granted.” *Ranke v Michigan Corp & Sec Comm*, 317 Mich 304, 309 (1947) (quotation marks and citation omitted).

*Consumers Power Co v Mich Pub Serv Comm*, 460 Mich 148 (1999) did not preclude the MPSC from arguing that it has inherent authority in this case, as *Energy Michigan* suggests. In *Consumers Power Co*, this Court considered whether the Commission could institute what was known as retail wheeling, forcing regulated utilities to let competitors use their transmission network to sell power to customers in the utility’s service territory. To justify its decision, the Commission relied entirely on authority found in statutes that had absolutely no reference to retail wheeling or anything like it. *Id.* at 159–168.

This case presents a far different question. Act 341 gives the MPSC explicit statutory authority to set a local clearing requirement. *Energy Michigan* does not believe that the statute gives the Commission authority to set an individual requirement, but it does not dispute the Commission’s authority to set a zonal one. Its argument turns on the nature of the Commission’s authority rather than its existence. By contrast, in the *Consumers Power* decision, the Court held that the Commission had no power to authorize retail wheeling whatsoever. That holding has no bearing on this case.

#### **IV. The Commission consulted with MISO when setting the local clearing requirement, so it is presumptively valid.**

As the MPSC pointed out in its Application, Act 341 does not limit the Commission’s ability to determine the local clearing requirement if it does so with MISO’s technical assistance. MCL 460.6w(8)(c). The first sentence of Section

6w(8)(c) reads, “In order to determine the capacity obligations, request that the appropriate independent system operator provide technical assistance in determining the local clearing requirement and planning reserve margin requirement.” MCL 460.6w(8)(c). It includes no limitation. The limitation appears in the second sentence of Section 6w(8)(c), which applies only if MISO does not provide technical assistance. In that instance, the local clearing requirement must be consistent with federal reliability requirements. *Id.*

It made sense for the Legislature to structure Section 6w(8)(c) this way. If MISO helps the MPSC establish a local clearing requirement, MISO is bound to follow its own resource adequacy tariff. (See MISO’ Tariff, Module E-1, §§ 68.A–69A.11.16.) But if the Commission sets the requirement without MISO’s help, the Legislature specified that the Commission would nonetheless be bound by federal reliability requirements as if MISO were involved. Here, this was not a concern because MISO helped the Commission set the local clearing requirement, (9/15/17 Order, pp 48–49), so MISO ensured that it was consistent with federal reliability requirements.

Although Act 341 does not limit the MPSC’s ability to determine the local clearing requirement when it does so with MISO’s help, the Commission does not claim to have unbridled discretion as Energy Michigan argues. (See Energy Michigan’s Response, p 13.) MISO is bound by its resource adequacy tariff, which is over 100 pages long. If MISO, being bound by these standards, helps the Commission develop a local clearing requirement, it is presumptively valid under

the statutory construct just described.<sup>3</sup> Energy Michigan claims that this argument somehow depends on inferred authority, but it is based on the statute’s text.

In this case, MISO helped the MPSC set the local clearing requirement. (9/15/17 Order, pp 48–49). Energy Michigan disputes this, arguing that MISO helped the Commission establish a zonal local clearing requirement and not an individual one. (Energy Michigan’s Response, p 14.) This claim does not square with case history. In Case No. U-18444, MPSC Staff witness Roger Doherty described how the information that MISO provided in Case Nos. U-18197 and U-18444 helped Staff develop its “incremental need approach,” *In re Forward Locational Requirement*, MPSC Case No. U-18444, 2/28/2017 Hr’g Tr, pp 250–257.

The MPSC adopted Staff’s incremental need approach, with changes, as the method for “determining the individual forward locational requirement.” *In re Forward Locational Requirement*, MPSC Case No. U-18444, 6/28/18 Order, p 131. Given MISO’s involvement in this process, the Commission’s individual local clearing requirement is valid.

**V. Energy Michigan’s other arguments also fall short.**

Energy Michigan disagrees with the MPSC about several other issues, but it does nothing to bolster the flawed analysis in the opinion below or undermine this case’s importance. For example, Energy Michigan disputes the comparison between

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<sup>3</sup> When the Legislature delegates authority, it can use a broad directive as long as it “invokes a body of guidelines” like MISO’s tariffs. *Blue Cross & Blue Shield of Michigan v Milliken*, 422 Mich 1, 53 (1985) (“The only direction given to the health care corporations is that ‘sound actuarial practices’ shall be used. Yet this apparently broad, general directive in fact invokes a body of guidelines.”).

MISO's Fixed Resource Adequacy Plan (FRAP) and Act 341's local clearing requirement, arguing that the FRAP is voluntary and Act 341 is not. (Energy Michigan's Response, pp 11–12.) But as established above, this distinction does not undermine the comparison because Act 341 does not require the Commission to duplicate MISO's local clearing requirement. Even if it was a faulty comparison, however, it would not save the opinion below from its flawed analysis or change how important this case is to resource planning, which ensures that residents and businesses have the power they depend on every day.

### **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.

Respectfully submitted,

Bill Schuette  
Attorney General

Aaron D. Lindstrom (P72916)  
Solicitor General

B. Eric Restuccia (P49550)  
Chief Legal Counsel

Ann M. Sherman (P67762)  
Assistant Solicitor General  
Counsel of Record

/s/ Spencer A. Sattler (P70524)  
Steven D. Hughey (P32203)  
Assistant Attorneys General  
Attorneys for Michigan Public  
Service Commission, Appellant  
Public Service Division  
7109 W. Saginaw Hwy, 3<sup>rd</sup> Floor  
Lansing, MI 48917 (517) 284-8140

Dated: October 26, 2018