

STATE OF MICHIGAN  
IN THE SUPREME COURT

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**In re Application of Consumers Power Company**

TES FILER CITY LIMITED PARTNERSHIP,  
Appellant

Supreme Court No. 150395

v

Court of Appeals No. 305066

MICHIGAN PUBLIC SERVICE COMMISSION  
AND ATTORNEY GENERAL BILL  
SCHUETTE,  
Appellee

MPSC No. U-15675-R

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150395

**ATTORNEY GENERAL'S BRIEF OPPOSING  
TES FILER CITY'S APPLICATION FOR LEAVE TO APPEAL**

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. MCL 460.6a(8) limits the costs that may be recovered by certain merchant plants that sell electricity to a public utility, except for “costs that are incurred due to changes in federal or state environmental laws or regulations that are implemented after [October 6, 2008].” In this case, a single merchant plant sought recovery of costs incurred in 2009 to comply with 2006 federal regulations as well as state air pollution regulations which, by their terms, took effect in 2007. Did the Public Service Commission and the Court of Appeals correctly determine that the exception depends on the date when the regulation takes effect—not to the date when a party subject to the regulation first complies with it?

TES Filer City answers:	No.
The Attorney General answers:	Yes.
The MPSC answers:	Yes.
The Court of Appeals answered:	Yes.

2. In addition to issuing its own rule in 2006, the US Environmental Protection Agency finally approved the 2007 state regulations at issue in 2009, then making the state regulations also enforceable as a matter of federal law. Did the Commission and the Court of Appeals correctly determine that—irrespective of the timing of the federal approval of the state rules—environmental regulations that required TES Filer City to incur the costs at issue were implemented before October 6, 2008 within the meaning of MCL 460.6a(8) and that, therefore, TES Filer City did not qualify for the recovery under the statutory exception?

TES Filer City answers:	No.
The Attorney General answers:	Yes.
The MPSC answers:	Yes.
The majority in the Court of Appeals answers:	Yes.
The dissenting opinion answers:	No.

## CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

In 2008 PA 286, the Legislature amended provisions in 1939 PA 3, as amended. For the purposes of this appeal, the relevant amendments are included as subsections (7), (8), and (9) in MCL 460.6a. Those subsections state:

(7) If, on or before January 1, 2008, a merchant plant entered into a contract with an initial term of 20 years or more to sell electricity to an electric utility whose rates are regulated by the commission with 1,000,000 or more retail customers in this state and if, prior to January 1, 2008, the merchant plant generated electricity under that contract, in whole or in part, from wood or solid wood wastes, then the merchant plant shall, upon petition by the merchant plant, and subject to the limitation set forth in subsection (8), recover the amount, if any, by which the merchant plant's reasonably and prudently incurred actual fuel and variable operation and maintenance costs exceed the amount that the merchant plant is paid under the contract for those costs. This subsection does not apply to landfill gas plants, hydro plants, municipal solid waste plants, or to merchant plants engaged in litigation against an electric utility seeking higher payments for power delivered pursuant to contract.

(8) *The total aggregate additional amounts recoverable by merchant plants pursuant to subsection (7) in excess of the amounts paid under the contracts shall not exceed \$1,000,000.00 per month for each affected electric utility. The \$1,000,000.00 per month limit specified in this subsection shall be reviewed by the commission upon petition of the merchant plant filed no more than once per year and may be adjusted if the commission finds that the eligible merchant plants reasonably and prudently incurred actual fuel and variable operation and maintenance costs exceed the amount that those merchant plants are paid under the contract by more than \$1,000,000.00 per month. The annual amount of the adjustments shall not exceed a rate equal to the United States consumer price index. An adjustment shall not be made by the commission unless each affected merchant plant files a petition with the commission. As used in this subsection, "United States consumer price index" means the United States consumer price index for all urban consumers as defined and reported by the United States department of labor, bureau of labor statistics. If the total aggregate amount by which the eligible merchant plants reasonably and prudently incurred actual fuel and variable operation and maintenance costs determined by the commission exceed the amount that the merchant plants are paid under the contract by more than*

\$1,000,000.00 per month, the commission shall allocate the additional \$1,000,000.00 per month payment among the eligible merchant plants based upon the relationship of excess costs among the eligible merchant plants. *The \$1,000,000.00 limit specified in this subsection, as adjusted, shall not apply with respect to actual fuel and variable operation and maintenance costs that are incurred due to changes in federal or state environmental laws or regulations that are implemented after the effective date of the amendatory act that added this subsection.* The \$1,000,000.00 per month payment limit under this subsection shall not apply to merchant plants eligible under subsection (7) whose electricity is purchased by a utility that is using wood or wood waste or fuels derived from those materials for fuel in their power plants.

(9) The commission shall issue orders to permit the recovery authorized under subsections (7) and (8) upon petition of the merchant plant. The merchant plant shall not be required to alter or amend the existing contract with the electric utility in order to obtain the recovery under subsections (7) and (8). The commission shall permit or require the electric utility whose rates are regulated by the commission to recover from its ratepayers all fuel and variable operation and maintenance costs that the electric utility is required to pay to the merchant plant as reasonably and prudently incurred costs. [Emphasis added.]

The following other statutes are also relevant to the decision in this case.

**MCL 324.5503:**

The department [of environmental quality] may do 1 or more of the following:

- (a) Promulgate rules to establish standards for ambient air quality and for emissions.

**MCL 324.5512:**

(1) The department [of environmental quality] shall promulgate rules for purposes of doing all of the following:

- (a) Controlling or prohibiting air pollution.
- (b) Complying with the clean air act.
- (c) Controlling any mode of transportation that is capable of causing or contributing to air pollution.

- (d) Reviewing proposed locations of stationary emission sources.
- (e) Reviewing modifications of existing emission sources.
- (f) Prohibiting locations or modifications of emission sources that impair the state's ability to meet federal ambient air standards.
- (g) Establishing suitable emission standards consistent with ambient air quality standards established by the federal government and factors including, but not limited to, conditions of the terrain, wind velocities and directions, land usage of the region, and the anticipated characteristics and quantities of potential air pollution sources. This part does not prohibit the department from denying or revoking a permit to operate a source, process, or process equipment that would adversely affect human health or other conditions important to the life of the community.
- (h) Implementing sections 5505 and 5506.

(2) Unless otherwise provided in this part, each rule, permit, or administrative order promulgated or issued under this part prior to November 13, 1993 shall remain in effect according to its terms unless the rule or order is inconsistent with this part or is revised, amended, or repealed.

**42 USC 7416:**

Except as otherwise provided in sections 119(c), (e), and (f) (as in effect before the date of the enactment of the Clean Air Act Amendments of 1977 [enacted Aug. 7, 1977]), 209, 211(c)(4), and 233 [42 USCS §§ 7543, 7545(c)(4), and 7573] (preempting certain State regulation of moving sources) *nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112 [42 USCS § 7411 or 7412], such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.* [Emphasis added.]

**COUNTER-STATEMENT OF JUDGMENT / ORDER  
APPEALED FROM AND RELIEF SOUGHT**

This appeal arises out of orders and opinions issued by the Michigan Public Service Commission and the Michigan Court of Appeals. On June 16, 2011, the Commission issued its final order. *In Re Application of Consumers Energy Co*, Order of the Public Service Commission entered June 16, 2011 (Case No. U-15675-R) **(Attorney General's Appendix A)**.

TES Filer City filed a claim of appeal in Court of Appeals Docket No. 305066. On April 29, 2014, the Court of Appeals issued an unpublished opinion affirming the Commission's final order. *TES Filer City Station Limited Partnership v Consumers Energy Co* (Court of Appeals No. 305066) **(Attorney General's Appendix B)**.

TES Filer City filed a motion for reconsideration, and on September 25, 2014, the Court of Appeals issued an order vacating the prior opinion **(Attorney General's Appendix C)**. On the same date, Judges Ronayne Krause and Fitzgerald issued a published majority opinion modifying the vacated opinion and affirming the Commission's final order, and Judge Whitbeck issued an opinion concurring in part and dissenting in part. *TES Filer City v Consumers Energy Co* (On Reconsideration), \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_; 2014 Mich App LEXIS 1825 (2014) **(Attorney General's Appendix D)**.

## REASONS FOR DENYING THE APPLICATION

This case presents an extremely narrow dispute involving the application of one sentence in an obscure statute to a single power plant that does not merit review by this Court. The issue turns on whether changes in environmental regulations affecting that plant were “implemented” before or after a date—October 6, 2008—that passed more than six years ago. Apart from the particular air quality regulations issued by the Department of Environmental Quality in 2007 that are involved here, there is no reason to believe that the interpretation of this time-dependent statutory exception to limits on utility cost recovery will be disputed by anyone in the future.

The Court of Appeals decision applied well-established principles of statutory interpretation and does raise any jurisprudentially significant issue. Although the panel divided on the application of those principles to the circumstances of this case, the judges did not substantively disagree on the controlling legal standards or even the meaning of the statutory exception in MCL 460.6a(8). Judge Whitbeck’s dissent instead narrowly focused on his interpretation of the specific air quality regulation and when it was approved by the federal government.

The application for leave to appeal does not cite MCR 7.302(B), nor demonstrate that one or more of the grounds for leave to appeal listed in the rule are met here. On the contrary:

- MCR 7.302(B)(2) is not satisfied. While this appeal is against a state agency, the Public Service Commission, the issue lacks significant public interest. As noted above, the dispute is extremely narrow in scope and potential application. And only one party, TES

Filer City, has been or is likely to be affected by the interpretation of MCL 460.6a(8).

- MCR 7.302(B)(3) is not satisfied because the issues do not involve legal principles of major significance to the state's jurisprudence. The relevant principles of statutory interpretation are well settled and not contested here.

The dispute in this appeal concerns when the rule issued by the MDEQ in 2007 was "implemented" within the meaning of MCL 460.6a(8). TES Filer City argues that because TES Filer City first complied with the rule and did not implement it until after October 6, 2008 and because the rule promulgated in 2007 was subject to federal approval, which was not granted until after October 6, 2008 the exception in MCL 460.6a(8) applies.

The Commission's final order and all three judges in the Court of Appeals agreed the relevant date is when the federal government or the state government implements a law or rule—not when a party, such as TES Filer City, first complies with and implements it. The narrow grounds on which Judge Whitbeck dissented involved the interpretation of the specific environmental regulation and do not significantly affect Michigan's jurisprudence.

- MCR 7.302(B)(5) is not satisfied because the application for leave to appeal does not demonstrate clear error and material injustice, and it does not demonstrate the decision in this case conflicts with a prior decision by the Supreme Court or the Court of Appeals.

Accordingly, this Court should deny leave to appeal.

## COUNTER-STATEMENT OF FACTS

Appellant TES Filer City Station Limited Partnership operates a power plant in Manistee County. It is referred to as a “merchant plant” because TES Filer City sells the electricity produced to a public utility—Consumers Energy—under long term contracts. And because the plant burns some wood waste as fuel<sup>1</sup>, it is also described as a “biomass” merchant plant.

### 2008 PA 286

As the Court of Appeals noted, 2008 PA 286, which became effective on October 6, 2008, enacted provisions to allow certain biomass plants to recover certain fuel and operation and maintenance costs that are not covered by existing contracts with electric utilities (Appendix D, p 4). The relevant subsections are MCL 460.6a(7) to (9).

MCL 460.6a(7) applies to a merchant plant that entered into long term contract before 2008 to sell electricity generated at least in part from wood waste to a large electric utility regulated by the Public Service Commission. Subject to limits specified in MCL 460.6a(8), such a merchant plant is entitled to recover the plant’s “reasonably and prudently incurred actual fuel and variable operation and maintenance costs” in excess of the amount paid to the utility under the contract. A biomass merchant plant must petition the Public Service Commission for recovery of such costs which, if approved, are effectively passed on the ratepayers of the public utility. MCL 460.6a(9). And, as discussed below, the Commission has

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<sup>1</sup> In the underlying administrative proceeding, the Public Service Commission noted that the TES plant burned both coal and wood waste. (Appendix A, p 25).

established a procedure where these costs are addressed in the power supply cost recovery case filed each year by the relevant utility.

MCL 460.6a(8) limits the total amount of these “excess” costs recoverable from the customers of the electric utility:

The total aggregate additional amounts recoverable by merchant Plants pursuant to subsection (7) in excess of the amounts paid under the contracts shall not exceed \$1,000,000.00 per month for each affected electric utility.

This \$1 million monthly total limit is subject to annual review and adjustment by the Commission. If the total amount of excess costs sought by eligible biomass merchant plants from the customers of the utility is more than the limit, the Commission is to allocate the \$1 million total amount among the plants that have qualifying contracts with the utility. MCL 460.6a(8).

But, the statutory provision that is the focus of this appeal, one sentence in MCL 460.6a(8), provides a limited exception to the \$1 million cap involving changes in state or federal environmental laws or regulations after 2008 PA 286 took effect on October 6, 2008:

The \$1,000,000.00 limit specified in this subsection, as adjusted, shall not apply with respect to actual fuel and variable operation and maintenance costs that are incurred due to changes in federal or state environmental laws or regulations that are implemented after the effective date of the amendatory act that added this subsection (Emphasis added).

In this case, TES Filer City sought, but was denied, recovery of \$636,073 in costs it incurred in 2009 to purchase “NO<sub>x</sub> allowances” (authorizations to emit air pollutants called nitrogen oxides) from its plant, as required in air pollution

regulations, Part 8. Emission Limitations and Prohibitions—Oxides of Nitrogen, amending Mich Admin Code R 336.1803 and adding R 336.1802, R 336.21-R 336.34 (Appendix E), issued by the Department of Environmental Quality in 2007. 2007 MR 12 (July 15, 2007). The context and nature of these state regulations and related federal regulations are briefly summarized below.

### **Environmental Laws and Regulations**

Both the State of Michigan and the federal government possess and independently exercise the authority to regulate air pollution. At the state level, the Legislature has charged the Department of Environmental Quality with that responsibility in Part 55 (Air Pollution Control) of the Natural Resources and Environmental Protection Act, MCL 324.5501 *et seq.* Among other things, Part 55 authorizes the Department to promulgate administrative rules to control air pollution and to comply with the federal Clean Air Act<sup>2</sup>. MCL 324.5502 and MCL 324.5512. Pursuant to Part 55, the Department has promulgated rules to control various types and sources of air pollutants R 336.201-336.2908, including *inter alia*, nitrogen oxides R336.1801-336.1834. Subject to certain exceptions not relevant here, the Clean Air Act expressly preserves and does not preempt state air pollution laws and regulations, unless they are less stringent than corresponding requirements established under federal law. 42 USC 7416.

At the federal level, the Clean Air Act establishes various limitations, standards, requirements and programs to control air pollution that are

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<sup>2</sup> 42 USC 7401 *et seq.*

administered by the Environmental Protection Agency. Certain of these provisions are carried into effect through plans developed by states—state implementation plans (or “SIPs”) under 42 USC 7410(a) or by EPA—federal implementation plans (or “FIPs”) under 42 USC 7410(c). Under the structure of the Clean Air Act, state implementation plans are developed by the states, exercising legal authority under their own respective state laws, in order to both protect the health and welfare of their citizens and to meet federal requirements. Once state implementation plans are approved by EPA they also become enforceable under the Clean Air Act as a matter of federal law.

In 2005, exercising authority under the Clean Air Act, EPA issued a regulation referred to as the Clean Air Interstate Rule (or “CAIR”) that was intended to address its finding that emissions of air pollutants from certain states (including Michigan) 70 Fed Reg 25162 (May 12, 2005). This Rule required the identified “upwind” states to revise their state implementation plans to reduce emissions of certain pollutants, including nitrogen oxides (NO<sub>x</sub>) that contribute to the ozone and fine particulate problems.

In 2006, EPA issued federal implementation plans or FIPs for all states covered by the Clean Air Interstate Rule, including Michigan. 71 Fed Reg 25328 (April 28, 2006). The FIPs required electric generating units to participate in the EPA-administered NO<sub>x</sub> seasonal and NO<sub>x</sub> annual cap and trading programs. Under these programs, the regulated units purchase allowances for NO<sub>x</sub> emissions.

As EPA has explained, the CAIR FIP trading programs impose essentially the same requirements as, and are integrated with, the respective CAIR SIP trading programs required under the 2005 CAIR. 74 Fed Reg 41638 (Appendix F, p 2). Although the FIPs provided for phasing in compliance in beginning in 2009, the obligation to comply with the FIP was established in 2006. And, by its terms, the FIP for Michigan was to remain in place until Michigan's corresponding SIP revisions were finally approved by EPA.<sup>3</sup>

In July, 2007, pursuant to MCL 324.5503 and MCL 324.5512, the Department of Environmental Quality revised its administrative rules entitled "Part 8. Emission Limitations and Prohibitions—Oxides of Nitrogen" R 336.1801-1834. 2007 MR 12 (July 15, 2007). Those rules were filed with the Secretary of State on June 25, 2007, and by their terms became immediately effective upon that date. (Appendix E).

Among other things, 2007 state regulations defined "electric generating unit", R 336.1803(3)(d)(ii), in a manner that includes the TES Filer City plant, and required such an "electric generating unit" to participate in the NOx cap and trade program adopted by reference from federal regulations. R 336.1821-R 336.1834.

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<sup>3</sup> As a result of legal challenges, the CAIR and the associated CAIR FIPs were held unlawful in July, 2008. *North Carolina v EPA*, 531 F3d 836 (DC Cir 2008) (*North Carolina I*). But on rehearing, before the order vacating the CAIR took effect, the DC Circuit instead remanded the CAIR to EPA, without vacating either the CAIR or the CAIR FIPs, leaving them in place in order to "temporarily preserve the environmental values covered by the CAIR" until EPA replaced the CAIR. *North Carolina v EPA*, 550 F3d 1176, 1178 (DC Cir 2008) (*North Carolina II*). Consequently, as of August, 2009, EPA noted that until EPA fully approved a CAIR SIP for Michigan, the CAIR FIP promulgated by EPA remained in effect. 74 Fed Reg 41639 (Appendix F, p 2)

Under this program, like the FIP put in place by EPA in 2006, the regulated “unit” would be required to purchase seasonal and annual NOx allowances beginning in 2009. Again, although the deadline for compliance was in 2009, the requirement to comply was established in 2007.

The Department of Environmental Quality submitted the revised NOx regulations to EPA for approval as a SIP revision on July 16, 2007. 72 Fed Reg 52038. On December 20, 2007, EPA conditionally approved the Michigan regulations, subject to Michigan’s correction, within one year, of certain minor typographical and technical deficiencies identified by EPA. 72 Fed Reg 72256. Apparently because of the uncertainty regarding the legal status of the CAIR in late 2008 arising from the decision in *North Carolina v EPA*, 531 F3d 836 (2008) (*North Carolina I*) noted above, the Department of Environmental Quality did not submit the minor revisions to the 2007 regulations identified by EPA within the time period prescribed by EPA in its conditional approval. As a result, the conditional approval automatically converted to a disapproval on December, 2008. See 74 Fed Reg 41639 (Appendix F, p 3). On June 10, 2009, the Department of Environmental Quality submitted the minor revisions to the rules 2009 MR 10 (June 15, 2009, pp 16-40) previously requested by EPA. Those minor rule revisions did not substantively change the requirements for electric generating units such as TES Filer City to control or offset NOx emissions as provided in EPA’s 2006 FIP for Michigan or in the 2007 Michigan regulations. On August 18, 2009, EPA announced that, effective October 19, 2009, it approved both the July 2007 and June

2009 submittals by Michigan in combination, as meeting the CAIR requirements, noting that the 2008 automatic disapproval was “inconsequential.” 74 Fed Reg 41637-8, 41640 (Appendix F, pp 1-2, 4).

### **Public Service Commission Proceedings**

In the underlying administrative proceeding, Consumers Energy requested the Public Service Commission to approve the Company’s proposed 2009 reconciliation of power supply cost recovery revenues and expenses. Among other things, Consumers Energy reported and proposed to recover \$15,474,782 for payments to biomass merchant plants under MCL 460.6a(7)-(9) (Exhibit A-25, line 56 and 2 T 53 & 102).

Seven biomass merchant plants, including TES Filer City, sell electricity to Consumers Energy under contracts that qualify for potential excess cost recovery under MCL 460.6a(7)-(9). They filed testimony and exhibits sponsored by eight witnesses to support recovery of reported excess costs (2 T 156-299). Exhibits BMP-3 through BMP-9 reported revenues received and costs incurred by each of the seven plants for the period from October 2009 through December 2009. Lines 1-8 in Exhibit BMP-1 reported a total \$21,279,559 difference between revenues the merchant plants received under contract prices and actual expenses they incurred. Lines 11-18 in Exhibit BMP-1 reported and requested approval to recover a statutorily capped total of \$14,838,711.

Only one of the biomass merchant plants, TES Filer City, sought recovery of costs under the exception to the statutory cap in MCL 460.6(8), involving costs

incurred due to changes in environmental regulations implemented after the October 6, 2008 effective date of 2008 PA 286. TES Filer City sought recovery of \$636,073 for NOx emission allowance costs it incurred in 2009. (Exhibit BMP-7, line 13). The sum of the capped total and the \$636,073 is \$15,474,784. Allowing for mathematical rounding, this sum matches the \$15,474,782 originally reported by Consumers Energy on line 56 in Exhibit A-25. The Commission's order approved payment and recovery of \$14,838,711 (**Attorney General's Appendix A, p 28**) and disallowed the \$636,073 difference.

With regard to the request for recovery of \$636,073, Mr. Robert Joe Tondu testified that in November and December 2009, TES Filer City incurred costs of \$636,073 in 2009 for the purchase of both seasonal and annual NOx allowances related to plant emissions. (2 T 162 & 166).

Mr. Tondu also presented rebuttal testimony stating that the NOx allowances were purchased pursuant to the Clean Air Act, the United States Environmental Protection Agency's ("US EPA") Clean Air Interstate Rule ("CAIR") and Michigan's State Implementation Plan ("SIP"). (2 T 175-184). The seasonal allowances cover the months of May through September. (2 T 178-180).

In the course of the Commission proceedings, TES Filer City argued that the relevant sections of the Michigan State Implementation Plan (SIP) became effective October 19, 2009, which was the date of its approval by the U.S. Environmental Protection Agency (EPA), or became effective November 30, 2009, which was the date by which generators of NOx were required to have purchased their 2009

seasonal allowances. The Staff responded that TES Filer City was required to participate in the EPA's NOx trading program well before the 2009 SIP approval date. **(Attorney General's Appendix A, p 22).**

The parties submitted briefs and reply briefs, and the Administrative Law Judge (ALJ) issued a proposal for decision (PFD) pursuant to MCL 24.281. The ALJ rejected TES's claim based on the timing of the effective date of the regulation requiring TES Filer City to make these NOx allowance purchases. The ALJ noted that TES Filer City failed to show that there were any post-October 6, 2008 changes to the applicable state or federal environmental laws or regulations that required these purchases. MCL 460.6a(8). The ALJ found that TES's obligation to make these purchases dated back at least to rules promulgated in 2007. **(Attorney General's Appendix A, p 23).**

After considering TES's exceptions to the PFD, the Commission issued a final order on June 16, 2011 **(Attorney General's Appendix A)**. The Commission, like the ALJ, concluded that the exception to the \$1 million cap in MCL 460.6a (8) did not apply to the costs incurred by TES Filer City in 2009 for NOx allowances:

The operative language to be interpreted here is the exemption from the \$1 million limit, which states that the limit does not apply to costs incurred as a result of "changes in federal or *state environmental laws or regulations* that are implemented after [October 6, 2008]." MCL 460.6a(7)[sic] (emphasis added). TES argues that the change in law that required the company to begin purchasing NOx allowances did not take place until August 18, 2009.

While it is true that the EPA did not approve of Michigan's revised SIP until that date, TES does nothing to refute the ALJ's point that the change to state environmental regulations took place on June 25, 2007,

when the revised Part 8 rules were filed with the Secretary of State. See, 2007 MR 12 (July 15, 2007).

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The Commission recognizes that the changes to the state law were made in order to comply with the CAIR requirements, and the changes to Part 8 did not become part of the federally-approved SIP until August 18, 2009. However, that does not mean that the Commission can ignore the fact that state environmental regulations had already been changed, well before October 6, 2008. States are free to enforce clean air laws (with respect to stationary sources) that are not part of the SIP, or that go beyond federal requirements. 42 USC 7416. The Commission finds that Michigan implemented the CAIR requirements by making these revisions to Part 8 on June 25, 2007. The Commission agrees with the ALJ that the change in state law took place before October 6, 2008, and therefore the petition for TES's 2009 NOx allowance costs must be denied.

**(Attorney General's Appendix A, pp 24-25)** (Footnotes omitted).

### **Proceedings in the Court of Appeals**

After the Commission issued this final order, TES Filer City filed a claim of appeal in Court of Appeals Docket No. 305066. It argued that the exception in MCL 460.6a(8) applies to TES Filer City because the Company first complied with the regulation concerning NOx emissions after October 6, 2008 and because the 2007 Michigan rule revisions did not take effect until EPA finally approved them in 2009. On April 29, 2014, the Court of Appeals issued an unpublished opinion affirming the Commission's final order **(Attorney General's Appendix B)**. TES Filer City filed a motion for reconsideration, and on September 25, 2014, the Court of Appeals issued an order vacating the prior opinion **(Attorney General's Appendix C)**. On the same date, Judges Ronayne Krause and Fitzgerald issued a published majority opinion replacing the vacated opinion and affirming the

Commission's final order. Judge Whitbeck issued an opinion concurring in part and dissenting in part (**Attorney General's Appendix D**).

The majority opinion affirmed the Commission's decision that the costs of NOx allowances incurred by TES Filer City in 2009 did not qualify for the exception in MCL 460.6a(8). Reading the relevant statutory language in context, the majority concluded that the changes to environmental law that caused TES Filer City to incur the costs were "implemented" when those regulations took effect rather than when TES Filer City complied with them:

On appeal, TES Filer argues that the PSC erred by ignoring the significance of the word "implemented" in MCL 460.6a(8). TES Filer asserts that the common meaning of the word "implemented" is "to have carried out, fulfilled, or effectuated a plan." TES Filer notes that the rules promulgated by the Michigan Department of Environmental Quality (MDEQ) in 2007 did not impose new regulations at that time, but were intended to do so in 2009; thus, the PSC should have concluded that the 2007 rules, even if in effect during the relevant period, were not implemented during that same period. The rules were implemented after MCL 460.6a(8) went into effect; therefore, TES Filer was entitled to recover its costs. We disagree.

TES Filer ignores the context surrounding the word "implemented" in the statutory scheme. This Court does not read statutory provisions in isolation, but instead considers them in context. *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). The NOx emission rules that were applicable to TES Filer did not change after October 6, 2008, the date that MCL 460.6a(8) went into effect. At issue in this case is not the meaning of the term "implemented," but rather on what date TES Filer was affected by the NOx emission rules. In context, MCL 460.6a(8) provides that the limit does not apply to specified costs "that are incurred *due to changes* in federal or state environmental laws or regulations that are *implemented after the effective date* of the amendatory act that added this subsection." MCL 460.6a(8) compares the effective date of the statute and the date of any changes in state or federal environmental rules. It is undisputed that MCL 460.6a(8) went into effect on October 6, 2008. The MDEQ promulgated rules by filing them with the Secretary of

State on June 25, 2007. MCL 24.246(1). The MDEQ's rules became effective prior to October 6, 2008.

(Attorney General's Appendix C, p 8).

The majority opinion also explained that it agreed with the dissenting opinion's conclusion that "promulgation" of an administrative rule is not necessarily the same as "implementation" of the rule, and that ultimately, for purposes of MCL 460.6a(8), a change in law or regulation is "implemented" on the day it takes effect:

Our dissenting colleague accurately points out that "promulgation" is a term of art, defined as "that step in the processing of a rule consisting of filing of the rule with the secretary of state." MCL 24.205(9).

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[W]e agree with our dissenting colleague that a rule is not *necessarily* "implemented" when it is "promulgated," because by statute, promulgation is merely the final procedural stage of processing a rule to the point of filing it with the secretary of state. Because "implement" is not defined by statute, we consider it to have its common dictionary meaning. *Oakland Co Bd of Co Road Comm'rs v Michigan Property & Casualty Guarantee Assn*, 456 Mich 590, 604; 575 NW2d 751 (1998). As a verb, to "implement" means "to fulfill; carry out" or "to put into effect according to a definite plan or procedure." *Random House Webster's College Dictionary* (2001). We do not believe that any particular person or entity needs to feel the effect of a law or a rule for it to be "implemented." Rather, we conclude that the most principled way to determine when a rule or law has been "implemented" is to refer to the effective date thereof. It may be that this will often coincide with the date it is promulgated, but there is no reason why such contemporaneousness should be necessary. We therefore do not treat "implement" and "promulgate" as synonyms.

The MDEQ rule at issue, R 336.1803, was published in 2007 Michigan Register 12, on July 15, 2007. It states that "[t]hese rules were filed with Secretary of State on June 25, 2007" and that they would become effective immediately upon filing. Because the MDEQ's rules became effective in 2007, we conclude that the rules were "implemented" in 2007. The fact that TES Filer only became subject to those rules in

2009 does not affect when the rules were implemented because no substantive change to the rules occurred at that time. The rules were therefore implemented prior to October 6, 2008.

**(Attorney General's Appendix D, pp 8-9) (Footnote omitted).**

Finally, the majority opinion explains that the Court of Appeals granted reconsideration to explicitly address a second argument raised by TES Filer City not mentioned in the initial opinion concerning the 2009 effective date of EPA's approval of the 2007 changes to the Michigan rules, but found that argument without merit:

In our prior opinion, we neglected to make explicit mention of TES Filer's alternative argument, that the 2007 rules were not enforceable at the time it incurred its first NOx allowance cost, arguing that the 2007 rules were unenforceable until approved by the EPA, that the EPA disapproved the 2007 rules, and that the NOx costs were incurred pursuant to the revised 2009 rules. We granted reconsideration to correct this oversight. However, TES Filer's argument in part merely restates its previously discussed confusion between the date a law is changed and the date it becomes enforceable, and in fact by the time TES Filer incurred NOx costs, the EPA had explicitly approved the 2007 rules. See 74 Fed Reg 41640. In essence, TES Filer's "alternative" argument is simply a variation on its argument that the rules were "implemented" in 2009 because that was when TES Filer became subject to those rules. As discussed, we find that the rules were substantively changed in 2007, irrespective of when TES Filer became subject to them. Therefore, although we granted reconsideration to correct an erroneous omission of mentioning this argument, TES Filer's motion for reconsideration has not established a substantive palpable error, and our conclusions remain unchanged. We conclude that TES Filer was not entitled to recover its NOx emission costs. **(Attorney General's Appendix D, 9-10).**

The dissenting opinion states:

I respectfully disagree with the majority's conclusion in Docket No. 305066 that the administrative rules requiring generators to purchase NOx allowances were implemented in 2007. Accordingly, I would reverse with respect to the Public Service Commission's

determination that the rules were implemented in 2007 and that T.E.S. Filer City Station Limited Partnership (T.E.S. Filer) was not entitled to recover its costs under MCL 460.6a(8) because those rules were not in effect at the time that T.E.S. Filer purchased its 2009 NOx allowances. In all other respects, I concur in the majority's opinion **(Attorney General's Appendix D, p 13)**.

The dissenting opinion noted that "promulgation" of a rule is a legal term of art, with a specific meaning in the Administrative Procedures Act, MCL 24.201 *et seq* and that MCL 460.6a(8) used the word "implemented" not "promulgated."

Here, if the Legislature had meant "implemented" to have the meaning of the word "promulgated," the Legislature would have used the word "promulgated." We must presume that the Legislature was aware that the term existed. Indeed, it was defined in another statute: the Administrative Procedures Act, an act that sets out the procedures for rulemaking. Thus, promulgation is defined in a statute that bears directly on the subject of MCL 460.6a.

But here the Legislature did not choose to use the word promulgated. Instead, the Legislature used the general term "implemented." We may not presume that this choice was an error. Accordingly, I conclude that the Legislature did not mean MCL 460.6a to apply on the basis of when a rule was promulgated, but rather intended it to apply on the basis of when the rule was *implemented*.

When used as a transitive verb, implement means "to fulfill; carry out" or "to put into effect according to a definite plan or procedure." Applying these definitions of the word "implemented," I read MCL 460.6a as stating that the \$1,000,000 limit does not apply with respect to costs that are incurred due to changes in laws or regulations that are *put into effect* after October 6, 2008. I conclude that MCL 460.6a(8) controls, and it clearly provides that the limit does not apply to T.E.S. Filer if it incurred costs due to a rule change that was *put into effect* after October 6, 2008, the effective date of MCL 460.6a.

**(Attorney General's Appendix D, p 15).**

The dissenting opinion concluded that 2007 change to the Michigan rules was not effective until it was approved by EPA in 2009:

I conclude that Rule 336.1803(3) was not effective until 2009. Rule 336.1803(3) adopted the federal definition of NOx allowance. The federal definition provided that such an allowance was a limited authorization *under the provisions of a state implementation plan*.<sup>22</sup> The Environmental Protection Agency did not approve Michigan's state implementation plan until 2009. Accordingly, there was no stated implementation plan under which NOx allowances existed. To put it another way, there were no limited NOx allowances under a state implementation plan because no such plan existed.

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<sup>22</sup> 40 CFR 97.102.

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TES Filer City has filed an application for leave to appeal from the Court of Appeals' decision on reconsideration.

## ARGUMENT

**I. MCL 460.6a(8) limits the costs that may be recovered by certain merchant plants that sell electricity to a public utility, except for costs that are incurred due to changes in federal or state environmental laws or regulations that are implemented after [October 6, 2008]. In this case, a single merchant plant sought recovery of costs incurred in 2009 to comply with a 2006 federal regulation as well as a state air pollution regulation that, by its terms, took effect in 2007. The Public Service Commission and the Court of Appeals correctly determined that the exception depends on the date when the regulation takes effect not to the date when a party subject to the regulation first complies with it.**

**A. Standard of Review**

The Attorney General agrees that this first issue is a question of law concerning interpretation of MCL 460.6a(7)-(9) and that the determination of such legal questions is subject to de novo review.

**B. Analysis**

The central issue raised in this case is whether TES Filer City was entitled to recover from Consumers Energy's ratepayers environmental compliance costs it incurred in 2009 under a narrow statutory exception to the normal limits on recovery established by 2008 PA 286 in MCL 460.6a(8). Contrary to the arguments advanced by TES Filer City, that exception does not apply to the costs at issue for at least two reasons. First, the focus of the exception is on when changes in laws or regulation are implemented, not when the costs are incurred. The Court of Appeals properly concluded that for purposes of MCL 460.6a(8), such changes in laws or regulations are "implemented" when the laws or regulations take effect, not when the plant in question complies with them. Second, the changes in environmental

regulations that caused TES Filer City to incur the costs at issue took effect before, not after, the October 6, 2008 effective date of 2008 PA 286. And, in any event, TES Filer City has not shown that the narrow issue raised warrants review by this Court under the standards of MCR 7.302(B).

1. **Read in context, the term “implemented” in MCL 460.6a(8) refers to “changes in federal or state environmental laws or regulation” and the limited exception applies only to costs incurred because of legal or regulatory changes that took effect after October 6, 2008.**

Statutory analysis must begin with the wording of the statute. Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence. *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). Courts consider the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme, and statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999).

In this case, focusing on when TES Filer City complied with regulations and then incurred costs it is seeking to recover instead of focusing upon when the relevant regulations took effect takes the word “implemented” out of the statutory context in which the Legislature placed it in MCL 460.6a(8). Again, the statutory exception states:

The \$1,000,000.00 limit specified in this subsection, as adjusted, shall not apply with respect to actual fuel and variable operation and

*maintenance costs that are incurred due to changes in federal or state environmental laws or regulations that are implemented after the effective date of the amendatory act that added this subsection.*  
(Emphasis added).

The clause “that are implemented after the effective date of the amendatory act that added this subsection” modifies the preceding clause “that are incurred due to changes in federal or state environmental laws or regulations.” The date the legal or regulatory changes are implemented is the date that MCL 460.6a(8) compares with the October 6, 2008 effective date of 2008 PA 286. As the Court of Appeals held, “MCL 460.6a(8) compares the effective date of the statute and the date of any changes in state or federal environmental rules.” (**Attorney General’s Appendix D, p 8**). The construction advanced by TES Filer City—the date costs are incurred by a party for implementing previously adopted changes in environment laws or regulations—is not consistent with the language the Legislature adopted in MCL 460.6a(8).

Contrary to the suggestions by TES Filer City and in the dissenting opinion (**Attorney General’s Appendix D, p 15**), distinctions between the definitions of words “implemented,” and “promulgated” and the fact that “promulgated” was not used in MCL 460.6a(8) are not truly relevant. To begin, it seems unlikely that the Legislature would have chosen to use the term “promulgation,” which as noted in the dissent has a specific meaning with regard to administrative rules in Michigan, to refer to changes in the much broader category of “federal or state environmental laws or regulations” in MCL 460.6a(8). Moreover, no intent may be imputed to the Legislature in the enactment of a law other than one supported by the face of the

law itself. Courts may not speculate as to the probable intent of the Legislature beyond the words employed in the act. *City of Lansing v Lansing Twp*, 356 Mich 641, 649-650; 97 NW2d 804 (1959). Accord *Pohutski v City of Allen Park*, 465 Mich 675, 684; 641 NW2d 219 (2002). In any event, the majority opinion made clear that it was not equating “implemented” with “promulgated:”

In other words, we agree with our dissenting colleague that a rule is not *necessarily* “implemented” when it is “promulgated,” because by statute, promulgation is merely the final procedural stage of processing a rule to the point of filing it with the secretary of state. Because “implement” is not defined by statute, we consider it to have its common dictionary meaning. *Oakland Co Bd of Co Road Comm’rs v Michigan Property & Casualty Guarantee Assn*, 456 Mich 590, 604; 575 NW2d 751 (1998). As a verb, to “implement” means “to fulfill; carry out” or “to put into effect according to a definite plan or procedure.” *Random House Webster’s College Dictionary* (2001). We do not believe that any particular person or entity needs to feel the effect of a law or a rule for it to be “implemented.” Rather, we conclude that the most principled way to determine when a rule or law has been “implemented” is to refer to the effective date thereof. It may be that this will often coincide with the date it is promulgated, but there is no reason why such contemporaneousness should be necessary. We therefore do not treat “implement” and “promulgate” as synonyms. **(Attorney General’s Appendix D, p 9).**

Notably, the dictionary definition of “implement” cited and used in the majority opinion is the same as that relied upon by dissenting opinion. **(Attorney General’s Appendix D, p 15).** Thus, all three members of the Court of Appeals panel agreed that under that definition, for purposes of MCL 460.6a(8), a change in a law or regulation is “implemented” when it takes effect. As discussed below, Judge Whitbeck’s substantive disagreement with the majority was ultimately not about the interpretation of MCL 460.6a(8), but a still narrower question focused on his interpretation of the specific air pollution regulations adopted by the Department of

Environmental Quality in 2007, and the timing of EPA's approval of those state regulations.

**2. The changes in environmental regulations that caused TES Filer City to incur the NOx allowance costs in 2009 took effect before, not after, the October 6, 2008 effective date of 2008 PA 286.**

It is undisputed that TES Filer City's obligation to buy the NOx allowances it purchased in 2009 arose from the Clean Air Interstate Rule (or "CAIR") issued by the EPA in 2005, 70 Fed Reg 25,162 (May 12, 2005) under the Clean Air Act, 42 USC 7410(a). Because EPA had determined that emissions of air pollutants in certain "upwind" states, including Michigan interfered with the attainment of air quality standards for fine particulate matter and/or ozone in "downwind" states it required the "upwind" states to develop amendments to their state implementation plans or "SIPs" for attaining air quality standards under the Clean Air Act. See *North Carolina I*, 531 F3d at 903-904. Among other things, the EPA rule provided that states could satisfy the requirement by adopting model provisions for an interstate "cap and trade" system for NOx emissions, using the purchase of "NOx allowances." *Id.*

In a related 2006 rulemaking, the EPA itself issued federal implementation plans ("FIPs") for each of the states covered by the 2005 rule, including Michigan. 71 Fed Reg 25328 (April 28, 2006). The FIPs required electric generating units to participate in the EPA-administered NOx seasonal and NOx annual cap and

As discussed above, in June, 2007, the Department of Environmental Quality issued revisions to air pollution control administrative rules, “Part 8. Emission Limitations and Prohibitions-Oxides of Nitrogen”, amending R 336.1803 and adding R 336.1802a, R 336.1821, R 336.1822, R 336.1823, R 336.1824, R 336.1825, R 336.1826, R 336.1830, R 336.1831, R 336.1832, R 336.1833 and R 336.1834, 2007 MR 12 (July 15, 2007) (**Attorney General’s Appendix E**). Those rules, on their face, stated: “[t]hese were filed with the Secretary of State on June 25, 2007” and that they would become effective immediately upon filing. Accordingly, the Court of Appeals majority opinion correctly held:

Because the MDEQ’s rules became effective in 2007, we conclude that the rules were “implemented” in 2007. The fact that TES Filer only became subject to those rules in 2009 does not affect when the rules were implemented because no substantive change to the rules occurred at that time. The rules were therefore implemented prior to October 6, 2008. (**Attorney General’s Appendix D, p 9**).

As noted above, Judge Whitbeck ultimately dissented on the narrow ground that the 2007 Michigan rule was not legally effective until 2009, after it was approved by EPA as part of Michigan’s state implementation plan or SIP. (**Attorney General’s Appendix D, p 16-17**). Judge Whitbeck apparently accepted TES Filer City’s argument (repeated in its application for leave to appeal in this Court at pp 40-43) that:

(1) the 2007 state regulations, at R 336.1803 (3) incorporated by reference certain definitions from EPA regulations, including the definition of “CAIR NOx allowance” in 40 CFR 97.102;

(2) under that definition there could supposedly only be such a “CAIR Nox allowance” for sources in Michigan if it is issued “under provisions of a State implementation plan that are approved by [EPA]...;

(3) the EPA did not approve Michigan's state implementation plan under the CAIR rule until August, 2009; and therefore

(4) no NO<sub>x</sub> allowances existed until EPA approved the Michigan SIP in 2009 and the NO<sub>x</sub> limitations were not be implemented until 2009.

Leaving aside the issue, discussed in Argument II below, of whether the 2007 state regulations were independently legally effective as a matter of state law before they were approved by EPA in 2009, TES's argument and the dissent's acceptance of it suffer from a fatal flaw. Contrary to the second point in the argument outlined above, the federal and state definitions of "CAIR NO<sub>x</sub> allowance" are *not* limited to authorizations issued under the provisions of an EPA-approved state implementation plan. In fact, the federal (and therefore state) definition contained in 40 CFR 97.102 more broadly defines the term to include, among other things authorizations "issued by a permitting authority or the Administrator [EPA] under subpart EE of this part or § 97.188, or under provisions of a State implementation plan that are approved..." (Emphasis added). The referenced regulation, 40 CFR 97.188, is part of the CAIR federal implementation plan of "FIP" rule issued by EPA in 2006. 71 Fed Reg 25328, 25421 (April 28, 2006). Consequently, a mechanism for issuance of a "CAIR NO<sub>x</sub> allowance" was established even before the 2007 Michigan rules were issued and existed independently of EPA's ultimate approval of Michigan's state implementation plan revisions in 2009.

In sum, premise of TES's argument and the dissent's conclusion that the 2007 Michigan regulations could not and did not take effect until 2009 is without merit. Moreover, the highly technical nature of this argument concerning the

interpretation of various EPA rules further illustrates that this case simply does not present any issue of broad public interest or significance to Michigan jurisprudence, or clear legal error coupled with manifest injustice that warrants review by this Court under MCR 7.302(B).

**II. In addition to issuing its own rule in 2006, the U S Environmental Protection Agency finally approved the 2007 state regulations at issue in 2009, then making the state regulations also enforceable under federal law. The Commission and the Court of Appeals correctly determined that—irrespective of when the federal approval occurred—environmental regulations that required TES Filer City to incur the costs at issue were “implemented” before October 6, 2008 within the meaning of MCL 460.6a(8), and therefore, TES Filer City did not qualify for the recovery under the statutory exception.**

**A. Standard of Review**

To the extent that TES Filer City’s second issue involves a question of statutory interpretation, the determination of any such issue is reviewed de novo.

**B. Analysis**

Contrary to TES Filer City’s contentions, the 2007 air quality regulations issued by the Department of Environmental Quality took effect immediately under state law and were therefore “implemented” within the meaning of MCL 460.6a(8), even before October 6, 2008, and before EPA approved them.

**1. The 2007 regulations were independently effective under state law.**

Federal law and regulations require EPA approval before air quality regulations issued by a state agency become a part of a state’s implementation plan

or SIP enforceable under federal law. 42 USC 7410(a). But the Clean Air Act does not preempt state regulation of stationary sources of air pollution, so long as the state regulations are no less stringent than corresponding federal requirements, nor does it make implementing a state rule as a matter of state law contingent upon EPA approval.

42 USC 7416 provides:

Except as otherwise provided in sections 119(c), (e), and (f) (as in effect before the date of the enactment of the Clean Air Act Amendments of 1977 [enacted Aug. 7, 1977]), 209, 211(c)(4), and 233 [42 USCS §§ 7543, 7545(c)(4), and 7573] (preempting certain State regulation of moving sources) *nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112 [42 USCS § 7411 or 7412], such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.* [Emphasis added.]

Under this statutory framework, Michigan can adopt and enforce, under state law such as Part 55 of the Natural Resources and Environmental Protection Act, MCL 324.5501 *et seq*, independent emissions standards and controls for stationary sources of air pollution such as TES Filer City plant, provided they do not conflict with federal law. The Department of Environmental Quality's 2007 rule revisions (**Attorney General's Appendix E**) were an exercise of that independent state authority; and became enforceable as a matter of state law, even in the absence of EPA approval.

TES Filer City argues (Application, p 3) that the 2007 rules were disapproved by the EPA in 2008, so they were not in effect when TES Filer City purchased its NOx allowances in 2009. This argument is without merit. Page 30 in the application for leave to appeal selectively quotes statements contained in the EPA's rule published in 74 Fed Reg 41637-41641 on August 18, 2009 finally approving Michigan's NOx rule revisions (**Attorney General's Appendix F**) but ignores other relevant statements in the rule.

Most significantly, 74 Fed Reg at 41638 (**Attorney General's Appendix F, p 2**) states:

The July 16, 2007, submittal generally meets the CAIR requirements, and the June 10, 2009, submittal corrects certain deficiencies EPA found with the July 16, 2007, submittal. *The automatic disapproval of the July 16, 2007, submittal is inconsequential* because, as explained above, we are approving both the July 16, 2007, and June 10, 2009, submittals. (Emphasis added).

74 Fed Reg at 41639 (**Attorney General's Appendix F, p 3**) states:

States may submit abbreviated SIP revisions. These SIP revisions will not replace the CAIR FIPs; however, the CAIR FIPs provide that, when approved, the provisions in these abbreviated SIP revisions will be used instead of, or, if appropriate, in conjunction with the corresponding provisions of the CAIR FIPs (e.g., the NOx allowance allocation methodology).

Michigan submitted its CAIR SIP submittals as an abbreviated CAIR SIP.

74 Fed Reg at 41640 (**Attorney General's Appendix F, p 4**) states:

EPA is providing notice that Michigan's July 16, 2007, abbreviated CAIR SIP submittal was automatically disapproved because MDEQ did not meet the December 20, 2008, deadline to correct certain deficiencies. This disapproval is inconsequential because EPA is approving both the July 16, 2007 and the June 10, 2009, submittals, in combination, as meeting the CAIR requirements.

The June 10, 2009, submittal makes the required changes to Michigan's CAIR SIP and also makes additional minor changes to Michigan's CAIR rule that correct typographical errors and that clarify Michigan's CAIR rule.

\* \* \* \* \*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and, therefore, is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). *This action merely approves State law as meeting Federal requirements and would impose no additional requirements beyond those imposed by State law.* Accordingly, the Administrator certifies that this rule would not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601, et seq.). Because *this action approves pre-existing requirements under State law and would not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) [Emphasis added.]*

In summary, reading the EPA's rule as a whole, the EPA expressly recognized it was merely approving Michigan's state rule as meeting federal requirements and was imposing no additional requirements beyond those that already existed under state law.

2. **EPA's description of the phased implementation of NOx compliance requirements under its Clean Air Interstate Rule does not alter the meaning of "implemented" in MCL 460.6a(8).**

The application for leave to appeal (pp 8-9) quotes from a single page (70 Fed Reg 49721) in a 157-page rulemaking published at 70 Fed Reg 49708-49833 in which EPA describes the Clean Air Interstate Rule and says: "The CAIR requires

that the emission reductions be implemented in two phases. The first phase of CAIR NOx reductions starts in 2009....” From this statement, page 36 in the application for leave to appeal draws a conclusion that the EPA used the word, “implemented” in exactly the same manner as the TES Filer City defines it in this appeal and that usage should inform the interpretation of MCL 460.6a(8).

There are at least two errors in the TES Filer City’s argument. First, EPA’s description of its rule can neither legally nor logically alter or determine the meaning of the term “implemented” intended by the Michigan Legislature in MCL 460.6a(8). Second, even if the meaning of the word “implemented” in the sentence contained in MCL 460.6a(8) and in the sentence quoted from the EPA rule were the same, the antecedents in the two contexts are not the same.

The antecedent in the statement from the federal rule is the term “emission reductions.” In MCL 460.6a(8), the antecedent to the clause “*that are implemented after the effective date of the amendatory act that added this subsection*” is the clause “*that are incurred due to changes in federal or state environmental laws or regulations.*” In summary, in the statute the antecedent is “changes,” while in the rule the antecedent is “emission reductions.”

In conclusion, the 2007 Michigan rule changes (**Attorney General’s Appendix E**) took effect immediately as a matter of state law, even without EPA approval and created a requirement that TES Filer City buy NOx allowances. Therefore, the costs TES Filer City incurred do not qualify for recovery under the exception in MCL 460.6a(8) because that statute refers to changes in federal or

state law implemented after October 6, 2008. Indeed, the changes here to *both* federal and state law that caused TES Filer City to incur the NOx allowance costs took effect before that date.

## CONCLUSION AND RELIEF REQUESTED

The Public Service Commission and the Court of Appeals correctly determined that the limited exception stated in MCL 460.6a(8) applies only to costs incurred due to changes in federal or state environmental laws or regulations that are implemented, i.e. take effect, after October 6, 2008. Here, the excess costs claimed by TES Filer City were incurred because of changes in federal and state regulations that took effect in 2006 and 2007 and therefore those costs do not qualify for the exception.

The legal issues raised in the application are extremely narrow, and lack significant public interest or importance to Michigan jurisprudence. Because no error, let alone clear error and manifest injustice in the Court of Appeals decision has been shown, this case does not merit review under MCR 7.302(B).

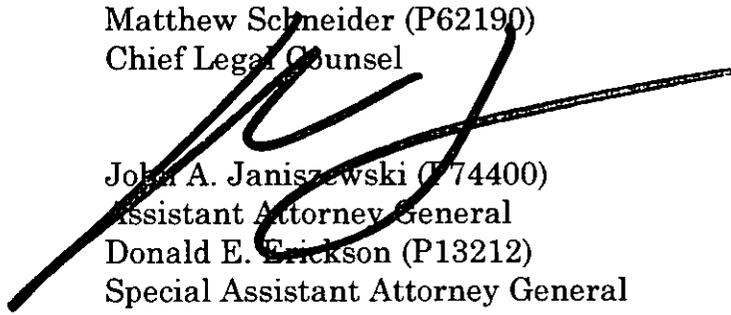
Accordingly, this Court should deny the application for leave to appeal.

Respectfully submitted,

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