

STATE OF MICHIGAN  
IN THE SUPREME COURT

T.E.S. FILER CITY STATION LIMITED  
PARTNERSHIP,

Appellant,

v

MICHIGAN PUBLIC SERVICE  
COMMISSION, and ATTORNEY  
GENERAL BILL SCHUETTE,

Appellees.

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**Supreme Court No. 150395**

Court of Appeals No. 305066

MPSC Case No. U-15675-R

**MICHIGAN PUBLIC SERVICE COMMISSION'S BRIEF IN OPPOSITION  
TO TES FILER CITY STATION LIMITED PARTNERSHIP'S  
APPLICATION FOR LEAVE TO APPEAL**

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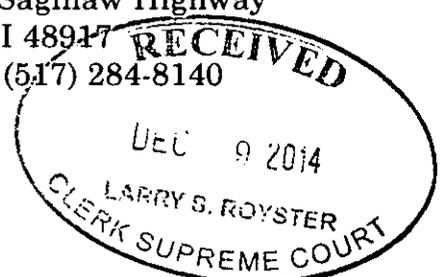
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Dated: December 9, 2014



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## COUNTER-STATEMENT OF QUESTION PRESENTED

1. MCL 460.6a(8) allows biomass plants recovery of costs incurred due to changes in federal or state environmental laws or regulations implemented after the effective date of the act, or October 6, 2008. Michigan law enacted in 2007 required biomass plants to purchase NOx emissions allowances during the 2009 NOx season, and Appellant incurred such costs. Did the Michigan Public Service Commission act lawfully and reasonably in declining to allow Appellant recovery of these costs?

Appellant's answer: No.

Appellee's answer: Yes.

MPSC's answer: Yes.

Court of Appeals' answer: Yes.

## CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

### **MCL 460.6a(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.* [Emphasis added.]

### **Mich Admin Code, R 336.1803(3)(o):**

"Newly-affected EGUs," for allocation purposes under R 336.1821 to R 336.1834, means existing EGUs located outside the Michigan fine grid zone or existing EGUs located within the Michigan fine grid zone which were exempt from the federal NOX budget program. This definition is applicable for the 2009 CAIR NOX ozone season program only and after that time the newly affected EGUs are considered existing EGUs. This definition excludes the Harbor Beach power plant which was previously included as an EGU in the NOX SIP Budget trading program and is considered existing for the purposes of CAIR NOX ozone season program.

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

Appellant TES Filer City Station Limited Partnership (TES) seeks leave to appeal from the September 25, 2014 published Opinion, On Reconsideration, of the Court of Appeals, *In re Application of Consumers Energy Co*, \_\_ Mich App \_\_; \_\_ NW2d \_\_ (2014) (Docket No. 305066) (Attachment A, hereinafter referred to as the “Opinion”). TES challenges the Court of Appeals’ ruling, which affirmed the June 16, 2011 Order of the Michigan Public Service Commission (MPSC or Commission) denying TES’s petition for recovery of \$636,073 from Consumers Energy Company for the purchase of seasonal and annual NOx allowances (the “Commission Order”). This Court should deny the Application for Leave to Appeal.

## REASONS FOR DENYING THE APPLICATION

In this case, TES seeks to take advantage of what it perceives to be a loophole in 2008 PA 286 (Act 286), section 6a(8), in a way that would allow it to recover amounts never intended by the legislature. In its wisdom, Congress passed laws to encourage and promote energy creation by small electric generators known as qualifying facilities (QFs). To effectuate this mandate, the Federal Energy Regulatory Commission (FERC) required electric utilities to sell power to and buy power from QFs, and required electric utilities to compensate the QFs for avoided costs. These requirements sometimes ran afoul of existing contracts between QFs and electric utilities.

In 2008, Michigan's legislature enacted legislation to allow QFs, which include biomass plants like TES, to recover avoided costs from the utilities, above and beyond the payments specified in their contracts. The legislature placed a \$1 Million per month aggregate cap on the amount of additional expenses QFs could recover. This monthly amount was presumed sufficient to cover known and anticipated additional costs incurred by QFs, and avoided by the electric utilities, under state and federal environmental laws and regulations in place at the time.

The Michigan legislature was also aware that there could be future changes in federal and state environmental regulations it could not anticipate at the time it enacted Act 286. To prevent QFs from being harmed by future changes, the legislature provided that if changes in state or federal environmental laws and regulations were implemented after Act 286 became effective on October 6, 2008,

QFs could recover amounts incurred due to those changes even if they were in excess of the \$1 Million aggregate per month cap. MCL 460.6a(8).

Prior to the passage of Act 286, in 2007 the Michigan Department of Environmental Quality (MDEQ) adopted and published with the Michigan Secretary of State environmental regulations that required biomass plants like TES to purchase NOx emission allowances during the 2009 NOx season. The MDEQ's 2007 rules were approved by the Environmental Protection Agency (EPA) in 2007, and were in full force when the Michigan legislature enacted Act 286, and on its effective date, October 6, 2008.

Subsequently, in November and December of 2009, TES purchased the NOx emission allowances that the MDEQ's 2007 rules required. Now, TES argues that the state NOx emission laws were not implemented until 2009, the year when the 2007 rules required TES to purchase allowances, and so constitute a change in environmental law post-2008. TES's argument must fail; there was no *change* in what the MDEQ required TES to do (buy allowances) between the time Act 286 was effective (October 6, 2008), and the time TES purchased the allowances. Even if the MDEQ rules were somehow viewed as a change in the law, the change in the law was implemented when the new law took effect, in 2007.

Alternatively, TES argues that because the EPA's approval of the MDEQ's 2007 rules was conditional on Michigan making minor changes by December 20, 2008, and the EPA's approval lapsed when Michigan missed that deadline, the 2007 rules did not go into effect in 2007. This argument is specious because the EPA approval was in place at the time Act 286 became effective, and, because the EPA

explicitly re-approved the 2007 rules in August of 2009, before TES incurred NOx emission allowance expenses in November and December of 2009.

Consideration of the factors set forth by this Court in MCR 7.302(B) favors denial of the Application:

- The issue does not involve a substantial question as to the validity of a legislative act because TES is not arguing that Act 286 is invalid.
- Though the case is against a state agency, the issue does not have significant public interest because the agency merely applied Michigan law as written, which the Court of Appeals has affirmed in a published opinion that will resolve the identical issue raised by TES in its three other pending appeals on the identical issue.<sup>1</sup> No biomass plant other than TES has shown any interest in this argument.
- The issue does not involve legal principles of major significance to the State's jurisprudence.
- The decision is neither clearly erroneous nor will it cause material injustice, nor does it conflict with any other decisions of either the Supreme Court or Court of Appeals.

This case raises no new or novel issues for this Court's consideration. There are no snarls in the fabric of this state's jurisprudence that need unraveling. Rather, TES has seized upon language in a statute, taken it out of context, and is trying to profit therefrom. TES's Application has not shown any of the grounds enumerated in MCR 7.302, and in fact makes little or no attempt to do so, save the single paragraph on page 48 of the Application, in which TES alleges there are three other pending appeals on this issue. TES, however, fails to disclose that the

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<sup>1</sup> TES alleges at page 48 of its Application that similar issues have been raised in the following Court of Appeals dockets: 314361, 316868, and 321877, in which TES makes identical arguments.

party appellant making the arguments in each case is TES itself. TES's crusade to recover costs the legislature never intended it to recover is of no public interest and is unworthy of the time and attention of this Court.

## COUNTER-STATEMENT OF FACTS

TES Filer City's Statement of Facts largely presents argument rather than a clear and concise chronological narrative of the facts. Therefore, the Commission offers the following Counter-Statement of Facts.

**A. The Clean Air Act and the Clean Air Interstate Rule allow states to retain primary responsibility for setting air quality standards.**

Under the federal Clean Air Act (CAA), states retain primary responsibility for setting air quality standards within their borders, so long as they comply with national standards established under the CAA. 42 USC 7410 provides for EPA-approved "State Implementation Plans" or "SIPs". The MDEQ sets air quality standards pursuant to Part 55 of the Natural Resources and Environmental Protection Act, MCL 324.5501 *et seq.* The EPA approved Michigan's first SIP in 1972. 37 Fed Reg 10873 (May 31, 1972). The Clean Air Interstate Rule (CAIR), promulgated by the EPA in 2005, required states to revise their SIPs to reduce emissions of both mono-nitrogen oxides (NO<sub>x</sub>)<sup>2</sup> and sulfur dioxide (SO<sub>2</sub>). The EPA also promulgated a "Federal Implementation Plan" (FIP) that would apply to state sources in the absence of an approved SIP. 71 Fed Reg 25328.

The MDEQ's NO<sub>x</sub> Budget Trading Program first began to cover some NO<sub>x</sub> emissions in specific geographic locations, defined as the "fine grid zone," in 2004. Mich Admin Code, R 336.1803(1)(c). To implement CAIR, the MDEQ amended its rules in 2007, including Rule 336.1803(3)(o), which requires generators outside the

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<sup>2</sup> NO<sub>x</sub> is a generic term for the air pollutant mono-nitrogen oxides NO and NO<sub>2</sub> (nitric oxide and nitrogen dioxide).

fine grid zone to comply with the budget trading program for the 2009 NO<sub>x</sub> season. These rules were published in 2007 Michigan Register 12, on July 15, 2007, which states: "These rules were filed with Secretary of State on June 25, 2007" and that they would become effective immediately upon filing. This brief refers to these rules as the "2007 Rules." The EPA conditionally approved Michigan's air quality control rules in December of 2007, requiring Michigan to make minor revisions by December 20, 2008. 72 Fed Reg 72256.

Michigan did not file revisions to the 2007 rules with the EPA until April 13, 2009 (the "revised rules"), and promulgated those revised rules on May 28, 2009. The EPA approved both the revised rules and the 2007 rules on August 18, 2009. 74 Fed Reg 41638. The EPA noted that because Michigan did not submit its revisions by the December 20, 2008 deadline, the "conditional approval automatically converted to a disapproval on December 20, 2008." *Id.* The EPA explained that "[t]he automatic disapproval of the July 16, 2007, submittal is inconsequential because . . . we are approving both the July 16, 2007, and June 10, 2009 submittals." *Id.* The EPA rule became effective on October 19, 2009. *Id.* at 41640. The EPA noted that "this action approves pre-existing requirements under *State* law and would not impose any additional enforceable duty beyond that required by *State* law . . ." *Id.*

**B. The Public Utility Regulatory Policy Act encouraged power production by biomass plants and Michigan followed suit.**

The Public Utility Regulatory Policy Act (PURPA), 16 USC 824 *et seq.*, in part, encourages power production by small power production facilities known as qualifying facilities. Biomass plants<sup>3</sup> like that operated by TES are qualifying facilities under PURPA. Pursuant to 16 USC 824a-3(f), the Federal Energy Regulatory Commission (FERC) promulgated rules requiring electric utilities to sell electricity to and purchase electricity from qualifying facilities like TES. 18 CFR 292.304 limits payment requirements from electric utilities to qualifying facilities to “avoided costs for purchases,” or “the incremental costs to an electric facility or qualifying facilities, such utility would generate itself or purchase from another source.” 18 CFR 292.101(b)(6).

Against this backdrop, the Michigan Legislature passed 2008 PA 286 (Act 286), effective October 6, 2008, which allowed qualifying facilities like TES to recover fuel and operation and maintenance expenses not covered by existing contracts with utility companies under certain circumstances, not to exceed recovery of \$1 Million per month. MCL 460.6a(8) provides an exception to the \$1 Million aggregate monthly cap for certain “costs that are incurred due to changes in federal or state environmental laws or regulations that are implemented after [October 6, 2008].”

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<sup>3</sup> Biomass plants, often referred to as BMPs, are plants that generate electricity in whole or in part from wood waste.

**C. TES sought to take advantage of the exception in Act 286 to recover its environmental compliance costs.**

Following the EPA's approval of the 2007 rules and the revised rules, TES incurred NOx costs of \$636,073 in November and December of 2009 for the purchase of both seasonal and annual NOx allowances<sup>4</sup> related to plant emissions. 2 TR 173.

In March of 2010, Consumers Energy Company filed an Application to reconcile its 2009 power supply costs with its 2009 power supply revenues that it collected in 2009. These yearly reconciliation proceedings are conducted pursuant to 1982 PA 304 (Act 304). MCL 460.6j *et seq.*

On April 26, 2010, seven electric generator companies that supply electric power to Consumers Energy, including TES, filed a joint petition pursuant to Act 286 for Commission approval of an additional amount of \$1 million per month plus interest for the year 2009 beyond what they were entitled to recover under their contracts with Consumers Energy.<sup>5</sup> In addition to the \$1 Million, TES also sought Commission approval for \$636,000 associated with the payments it made for NOx allowances in late 2009.

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<sup>4</sup> NOx allowances are the right of a generator to emit a certain amount of NOx, an air pollutant, per year. 2 TR 177.

<sup>5</sup> Each of the seven electric generators has a history of attempting to obtain more money under their contracts than the Commission has found that they are entitled to. 2 TR 203-205.

**D. Evidentiary proceedings, Case No. U-15675-R**

Certain parties filed testimony opposing the relief that these electric generator companies requested to obtain more money than their power contracts with Consumers Energy provided for. The Attorney General presented the testimony and exhibits of Michael J. McGarry, Sr. who opposed all of the requested recovery of \$15,474,783. A portion of that amount was TES' NOx expense of \$636,073. 3 TR 631. Mr. McGarry testified that he did not think that the seven companies demonstrated that these excess costs were reasonable and prudent as required by the statute, MCL 460.6a(8). 3 TR 631-638. Mr. McGarry also testified that he opposed TES' request to obtain an additional \$636,073 associated with NOx costs. 3 TR 632-633. Mr. McGarry testified that the witness for TES simply stated that TES incurred the costs but did not state why they incurred them. 3 TR 633.

Consumers Energy did not offer any testimony in support of TES' request to obtain an additional amount of \$636,073 in addition to the amount that it was entitled to recover under its contract with the utility other than to request recovery of this amount.<sup>6</sup> The MPSC Staff opposed recovery of this amount in its brief.<sup>7</sup>

TES presented the testimony of Robert Joe Tondeu who testified as one of the two General Partners of TES. 2 TR 159-174 and 175-184. He testified regarding the NOx costs of \$636,073 TES incurred in November and December of 2009. 2 TR

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<sup>6</sup> CMS Enterprises owns a 50 percent interest in TES, according to TES' witness Robert Joe Tondeu. 2 TR 200. CMS is Consumers Energy's parent corporation.

<sup>7</sup> Staff did include the \$636,073 amount in its calculation in testimony; however, Staff did not provide testimony or analysis on the purely legal issue of whether TES could recover these amounts under the statute.

173. Mr. Tondu further testified regarding his opinion of why the costs that TES incurred were due to changes in federal or state environmental laws implemented after October 6, 2008. 2 TR 178-179. Mr. Tondu stated upon cross-examination that he was not a lawyer, however. 2 TR 201.

**E. The ALJ rejected TES's arguments.**

On March 30, 2011, the Administrative Law Judge (ALJ) issued her Proposal for a Decision (PFD). The ALJ rejected the argument of TES (PFD, pp 56-59) and found that TES failed to show that the costs it incurred in 2009 “were due to changes in the applicable environmental laws or regulations that were put into effect after October 6, 2008.” PFD, p 58.

The ALJ rejected TES' argument that the Michigan “SIP” requiring it to acquire NO<sub>x</sub> allowances became effective in 2009, either on the effective date of the EPA's approval of rules promulgated by the MDEQ, or, in the alternative, on the date generators of such emissions were required to have purchased their 2009 seasonal allowances. PFD, pp 57-58. The ALJ concluded that TES had failed to explain what, if any, post-2008 changes in the regulatory scheme constituted changed regulations. PFD, p 58. The ALJ also noted, at pages 58-59 of the PFD, that TES, by offering and focusing on the definition of “implement,” did not address the statute's focus on changes in federal or state environmental laws:

Nonetheless, even using the definition proffered by TES, the statutory focus is still on *changes* in federal or state environmental laws. The regulatory history presented by TES does not show that the costs it incurred in 2009 were due to changes in the applicable environmental laws or regulations that were put into effect after

October 6, 2008. TES cites the August 18, 2009 EPA approval of Michigan's SIP, but in granting that approval, EPA recognized:

This action merely approves State law as meeting Federal requirements **and would impose no additional requirements beyond those imposed by State law. . . .**  
[Footnote omitted; emphasis added.]

The ALJ also rejected TES' argument with respect to the lapse in EPA's approval of Michigan's SIP in December of 2008, because the EPA's approval stated that "[w]here, as here, the final rule relieves obligations rather than imposes obligations, affected parties, such as the State of Michigan and CAIR sources within the State, do not need time to adjust and prepare before the rule takes effect." PFD, p. 59 (footnote omitted).

The ALJ held that TES had failed to demonstrate any substantive changes in the law:

TES has not identified in any of the rules and regulations taking effect after October 6, 2008, any substantive change that required TES to obtain the NOx allowances. **Instead, it appears that TES's obligations can be traced to rules promulgated by the MDEQ effective June 25, 2007, and may have been imposed by regulations adopted even earlier.** For this reason, this PFD agrees with Staff's analysis, that TES has failed to show that the costs it incurred in 2009 were attributable to changes in the environmental laws implemented after the effective date of Act 286. [PFD, p 59 (footnote omitted)(emphasis added).]

**F. The Commission rejected TES's arguments.**

On June 16, 2011, the Commission issued its Order in Case No. U-15675-R addressing all the issues before it in Consumers Energy's 2009 power supply cost reconciliation, and in the Joint Petition of the seven companies seeking \$15 million in additional recovery from Consumers and its ratepayers beyond what their

contracts provided for and an additional \$636,073 for TES' NOx costs. The Commission rejected TES' request for an additional \$636,073 at pages 22-25 of its Order.

The Commission noted that TES contended that NOx emissions from sources located in Manistee County where its generating facility is located were not regulated until October 19, 2009. Nevertheless, the Commission concluded that state environmental regulations that required TES to purchase NOx allowances were in effect well before October 6, 2008, and in fact, were in effect on June 25, 2007. The Commission noted that MCL 460.6a(8) exempts costs incurred as a result of "changes in federal or *state environmental laws or regulations* that are implemented after [October 6, 2008]" from the \$1 Million cap. Commission Order, p. 24, citing MCL 460.6a(8) (emphasis added). The Commission explained that though the EPA did not approve Michigan's revised SIP until August 18, 2009, "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 to State." Commission Order, pp. 24-25, citing 2007 Michigan Register 12 (July 15, 2007). The Commission explained that TES is correct in arguing that Manistee County was never added to the fine grid zone, but also explained that "as of June 25, 2007, R 336.1803(3)(j) defined 'newly-affected EGUs' to include 'existing EGUs located outside the Michigan fine grid zone,' and specifically made that definition applicable for 'the 2009 CAIR NOx ozone season program only.'" Commission Order, p. 25.

The Commission recognized that the changes to the state law were made to comply with CAIR requirements, and the changes to Part 8 did not become part of the federally approved SIP until August 18, 2009. The Commission explained however that this “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.” Commission Order, p. 25, citing 42 USC 7416. Thus, the Commission found that “Michigan implemented the CAIR requirements by making these revisions to Part 8 on June 25, 2007.” *Id.* Ultimately, the Commission agreed with the ALJ “that the change in state law took place before October 6, 2008, and therefore the petition for TES’s 2009 NO<sub>x</sub> allowance costs must be denied.” *Id.*

**G. The Court of Appeals rejected TES’s arguments.**

TES appealed the Commission’s Order to the Court of Appeals, which issued a per curiam opinion on April 29, 2014. TES sought rehearing on May 19, 2014. On September 25, 2014, the Court of Appeals granted reconsideration, vacated the April 29, 2014 opinion, and issued an Opinion on reconsideration, including a partial concurrence and dissent.

Like the ALJ and the Commission, the Court of Appeals rejected TES’s argument that its costs were incurred due to changes in the law that were implemented in 2009. The Opinion noted that “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.”

Opinion, p. 7 (citation omitted). The Court of Appeals held that because 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” there was no change implemented after October 6, 2008. *Id.* The Court of Appeals found that:

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. [*Id.*]

Citing the *Random House Webster’s College Dictionary* (2001), the Court of Appeals observed that “[a]s a verb, to ‘implement’ means ‘to fulfill; carry out’ or ‘to put into effect according to a definite plan or procedure.’” *Id.* at 8. The Court concluded that the most principled way to determine when a rule or law has been “implemented” is to refer to the effective date thereof. *Id.* The Court held that because the MDEQ rules became effective on June 25, 2007, there were no changes in state environmental laws implemented after the effective date of Act 286, October 6, 2008. *Id.*

The Court of Appeals also rejected TES’s argument that the 2007 rules were not enforceable until after the effective date of Act 286 because the EPA had disapproved the 2007 rules and that it incurred the NOx costs pursuant to the 2009 revised rules. The Court of Appeals explained its rejection of this argument:

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. [*Id.* at 8-9.]

The Court of Appeals concluded that TES was not entitled to recover its NOx emission costs.<sup>8</sup> *Id.*

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<sup>8</sup> In his dissenting opinion, Judge Whitbeck argued the majority conflated the terms implemented and promulgated, and found that because the EPA had not approved the rules until 2009, the rules were implemented after October 6, 2008.

## STANDARD OF REVIEW

The standard of review for Commission orders is narrow in scope and limited to determining whether the Commission's order is lawful and reasonable. State courts give respectful consideration to State agency interpretations of the statutes that the agency administers and enforces, and, if persuasive, an agency's interpretation of a statute it administers should not be overruled without "cogent reasons." *Younkin v Zimmer*, — Mich —; — NW2d —; (2104) (Docket No. 149355). When the agency's interpretation does not conflict with the Legislature's intent as expressed in the language of the statute, there are no such "cogent reasons" to overrule it. *Id.* See also *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 93; 754 NW2d 259 (2008). The burden of proof rests on appellants, like TES, to establish by clear and satisfactory evidence that the order is unlawful or unreasonable.

The Legislature has prescribed both the manner and standard by which MPSC orders are to be reviewed. In Section 25 of the Railroad Act, the Legislature provided that all rates, classifications, regulations, practices, and services fixed by the Commission are deemed *prima facie* lawful and reasonable:

All rates, fares, charges, classification and joint rates fixed by the commission and all regulations, practices and services prescribed by the commission shall be in force and shall be *prima facie*, lawful and reasonable until finally found otherwise in an action brought for the purpose pursuant to the provisions of section 26 of this act, or until changed or modified by the commission as provided for in section 24 of this act. [1909 PA 300; MCL 462.25.]

Section 26(8) of the Railroad Act places a heavy burden of proof upon an appellant to show by clear and satisfactory evidence that the Commission's orders are unlawful or unreasonable:

In all appeals under this section the burden of proof shall be upon the appellant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable. [1909 PA 300; MCL 462.26(8).]

The Michigan Supreme Court has explained how difficult it is for an appellant to prove that an MPSC order is unlawful or unreasonable. In *In re MCI Telecommunications Complaint*, the Michigan Supreme Court, after citing Section 26 of the Railroad Act as governing its standard of review of an MPSC order, explained:

Against this background, we have held:

To declare an order of the commission unlawful there must be a showing that the commission failed to follow some mandatory provision of the statute or was guilty of an abuse of discretion in the exercise of its judgment. [*Giaras v Public Service Comm*, 301 Mich 262, 269; 3 NW2d 268 (1942).]

The hurdle of unreasonableness is equally high. Within the confines of its jurisdiction, there is a broad range or "zone" of reasonableness within which the PSC may operate. [*In re MCI*, 460 Mich 396, 427; 596 NW2d 164 (1999).]

While an appellant always has the burden of proving that a Commission order is unlawful or unreasonable, courts may apply different standards of review when evaluating the appellant's arguments depending on the nature of the agency decision involved.

Applying these standards to the issue in question, TES has the heavy burden of proving that the Commission's order is unlawful or unreasonable. See MCL 462.26(8). TES has not shown by clear and satisfactory evidence that the Commission failed to follow a mandatory statutory provision or that it abused its discretion in any way. See *In re MCI Telecommunications Complaint*, 460 Mich at 427; see also MCL 462.26(8). The Commission's interpretation of Act 286 is entitled to the most respectful consideration; it is consistent with the Legislature's intent as expressed in the text; and there are no cogent reasons to overturn it.

## ARGUMENT

**I. The Commission acted lawfully and reasonably in denying TES' application to recover \$636,073 in NOx allowance costs because TES did not incur this liability as a result of a change in federal or state law after October 6, 2008.**

The Commission properly concluded that TES was not entitled to recover \$636,073 for its claimed NOx allowance costs. As the Commission concluded, because TES was subject to the NOx emissions requirement before October 6, 2008 pursuant to Michigan law, the NOx costs that TES paid in 2009 were not incurred because of “changes” in federal or state environmental law or regulation implemented after October 6, 2008. TES’s NOx emission obligations did not change from 2007 to 2009.

TES argues that its \$636,073 in NOx allowance costs are recoverable under MCL 460.6a(8) because a clause in that subsection exempts from the \$1 million cap amounts incurred due to changes in federal or state environmental laws or regulations implemented after October 6, 2008. The statute provides in relevant part:

The \$1,000,000 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. [MCL 460.6a(8); emphasis added.]

TES devotes a considerable portion of its brief to addressing the meaning of the word “implement” that appears in Section 6a(8). Construing these words, however, requires an analysis of the usual rules of grammatical construction. See *Sun Valley Foods Company v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (“The

statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended.”) and *Curry v Meijer, Inc.*, 286 Mich App 586, 592-593; 780 NW2d 603 (2009).

The phrase “that are incurred due to” is completed with the word “changes,” and the changes must be “in federal or state environmental laws or regulations.” Only after one determines that a changed federal or state law or regulation exists is it possible to move on to determine if the legislature or agency implemented the change after the effective date of Act 286, or October 6, 2008. In other words, the first requirement for qualifying expenses is that a change in the law, from that in place at the time Act 286 became effective, cause the expenses.

But TES’s NO<sub>x</sub> emissions obligations did not change. In this case, both the ALJ and the Commission, utilizing their administrative expertise<sup>9</sup> and review of applicable law and regulations, determined that NO<sub>x</sub> emission requirements were in place prior to October 6, 2008. Therefore, the NO<sub>x</sub> payments do not fall within this provision because the MDEQ regulated TES’s NO<sub>x</sub> emission prior to the adoption of Act 286. The Court of Appeals agreed. Opinion, pp. 7-8.

The “law or regulation” that in TES’s assertion was “implemented” after October 6, 2008 is Michigan’s State Implementation Plan (“SIP”) that was promulgated in accordance with CAIR. TES argues that the SIP—and accordingly its NO<sub>x</sub> emission obligations—was not “implemented” until 2009, based on the date

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<sup>9</sup> The Commission is permitted to rely upon facts drawn from its expertise and its general knowledge in determining the issue here. *Great Lakes Steel v Public Service Comm.*, 94 Mich App 694, 701; 290 NW2d 54 (1980) and *Great Lakes Steel v PSC*, 130 Mich App 470, 482; 344 NW2d 321 (1983).

of the EPA's final approval. Even if this Court accepts TES's argument that "implementation" is tied to the EPA's final approval of the SIP—which it should not for the reasons discussed in Sections II and III—the EPA-approved SIP did not impose new costs on TES. TES's requirement to participate in the EPA's NO<sub>x</sub> trading program began before the 2009 SIP approval, and continued after. TES has failed to explain what, if any, post-2008 changes in the regulatory scheme caused any additional expenses. Rather, TES focuses all of its attention on its futile argument that the MDEQ's regulations were not implemented until TES had to comply with them, or at least, until the EPA confirmed they met federal requirements under CAIR.

To insure implementation of the first phase of the Clean Air Act by 2009, the EPA in April of 2006 promulgated a Federal Implementation Plan ("FIP") for all states covered by the CAIR, and required Electric Generating Units to participate in the EPA-administered trading programs. The EPA directed States to amend their current implementation plans, which would replace the FIP as the SIPs received EPA approval. The federal implementation plan imposes "essentially the same requirements as, and are integrated with, the respective CAIR SIP trading Programs." 74 FR 41638.

The current SIP was not materially different from its predecessor, which the MDEQ submitted to the EPA in July of 2007, and which had received conditional approval. This approval lapsed when Michigan failed to meet a deadline to correct minor deficiencies. As both the PFD and Commission noted, while approving the current SIP in 2009, the EPA made clear that the difference between the current

and former rules were inconsequential, and that in fact the old SIP was being re-approved as well:

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 rule that correct typographical errors and that clarify Michigan's CAIR rule. [PFD, pp. 56-59 citing 74 FR 41640 (emphasis added); Commission Order, pp. 22-25.]

The crucial phrase of MCL 460a(8) is whether these were costs "incurred due to changes . . . ." If the regulatory scheme under which TES operated required TES to incur these costs, both before and after the EPA approved the second Michigan SIP, then these costs cannot be said to be incurred because of a changes in the law or regulation, and the Commission properly interpreted the statute in this manner.

The Court of Appeals agreed, finding that:

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. [Opinion, p. 7.]

The Court of Appeals found that because the MDEQ rules were effective on June 25, 2007, there were no changes in state environmental laws after the effective date of Act 286, October 6, 2008. *Id.* The Court of Appeals did not err in affirming the Commission's Order.

**II. The Commission acted lawfully and reasonably in denying TES' application to recover \$636,073 in NOx allowance costs because TES's liability did not result from a law implemented after October 6, 2008.**

The administrative bodies below and the Court of Appeals properly held that the law that changed TES' NOx emission obligations was implemented in 2007.

TES argues at page 29 of its Application "the English language distinguishes between the adoption of a plan or a set of procedures and the implementation of that plan or set of procedures." TES goes on to state at page 29 of its Application:

As applied to the facts of the instant case, this important distinction between promulgation and implementation compels the conclusion that the MDEQ's State Implementation Plan was not "implemented" when the initial proposal was promulgated in 2007, but, rather, it was "implemented" in 2009 when the plan was actually fulfilled, carried out and put into effect."

These arguments ignore the fundamental fact that carrying out a plan or procedure is not at issue, but instead what does it mean to implement a change in the law. The statute does not ask when a plan was or procedure was carried out. Act 286 instead asks when "*changes in federal or state environmental laws or regulations . . . are implemented.*" MCL 460.6a(8) (emphasis added). As the Court of Appeals explained, a law is "implemented" when it becomes law, or in other words, on the effective date of the law, whether a statute or a regulation. TES confuses the effective date of a changed law with the occurrence of the obligations imposed by that law.

Further, TES' own description of the SIP's promulgation and publication in 2007 demonstrates that the law governing NOx emissions became effective in 2007, not post-October 6, 2008. TES Application, pp. 8-11. The fact that those affected by

the law enacted in 2007 did not have to carry out certain responsibilities until a later date does not alter the fact that the MDEQ implemented the SIP regulations in 2007.

And, if a law is “implemented” every time an entity required to make payments under the law made those payments, the law would be “implemented” endlessly so long as it was in effect. The most reasonable construction of the statute is that it is implemented on the date it became effective.

Citing the *Random House Webster's College Dictionary* (2001), the Court of Appeals observed that “[a]s a verb, to ‘implement’ means ‘to fulfill; carry out’ or ‘to put into effect according to a definite plan or procedure.’” *Id.* at 8. The Court concluded that the most principled way to determine when a rule or law has been “implemented” is to refer to the effective date thereof. *Id.* The Court of Appeals’ interpretation is consistent with this Court’s interpretation of the word “implement” in the *Brightwell* case cited by TES. In *Brightwell*, the Court considered the meaning of the word “implemented” in determining the proper venue for hearing a civil rights case. *Brightwell v Fifth Third Bank of Michigan*, 487 Mich 151; 790 NW2d 591 (2010). As explained by TES in its Application, “The Court determined that a violation of the Civil Rights Act occurs when a discriminatory employment decision is made and implemented.” TES Application, p. 32 citing *Brightwell*, 487 Mich at 168. TES continued: “The Court then held that the allegedly discriminatory firing in that case was not ‘implemented’ when the employer made the decision to fire the employee. Rather, the plan was ‘implemented’ when the plan was actually carried out.” *Id.* citing *Brightwell*, 487 Mich at 161 n28.

TES's example actually supports the Court of Appeals' Opinion in this case. The bank did not implement a discriminatory employment decision by merely making a decision to fire an employee. The bank implemented the decision when it actually fired the employee, or put another way, when the decision to fire the employee took effect—not later, after the employee had packed his belongings and walked out the door pursuant to the firing. Here, the MDEQ did not implement the 2007 rules when it drafted them. It implemented the 2007 rules when it filed them with the Secretary of State with the provision that they would have immediate effect, i.e., they were implemented when the rules took effect.

The Commission reasonably interpreted the statute to mean that an entity like TES could only recover an additional amount if expenses resulted from a changed environmental state or federal law implemented, i.e., effective, after October 6, 2008. This Court should affirm the Court of Appeals Opinion affirming the Commission.

**III. The lapse in EPA approval of MDEQ's air quality regulations did not rob them of their force and effect under Michigan law.**

The retroactive lapse in EPA approval of Michigan's SIP is irrelevant. TES argues the fact that the EPA's approval of the MDEQ air quality regulations lapsed on December 20, 2008, after passage of Act 286, means the 2007 regulations were not "in effect" when TES purchased its NO<sub>x</sub> allowances. Application, p. 39. Even accepting TES' premise that the state law was ineffective and unenforceable in Michigan until it received EPA approval—which premise the Commission rejects for the reasons discussed below—TES's argument fails anyway because the EPA

conditionally approved the 2007 rules before October 6, 2008, and the EPA re-approved the 2007 rules in August of 2009, before TES purchased NOx allowances in November and December of 2009. The law in effect on October 6, 2008 was the 2007 rules. 72 Fed Reg 72256; 2007 Michigan Register 12 (July 15, 2007). The law in effect at the time of TES' purchase of allowances was the 2007 rules and the 2009 revised rules (which did not make any material changes from the 2007 rules). 74 Fed Reg 41640; 2009 Michigan Register 10 (May 28, 2009). The intervening period of technical disapproval of the 2007 rules did not change the fact that there was no change in the law that required TES to purchase NOx allowances (same rules applied pre-ACT 286 and at the time TES purchased the NOx allowances). As set out more fully above, a *change* in federal or state environmental regulations is a prerequisite to recovery. There was no change. And, as the Court of Appeals explained:

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. 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. [Opinion, p. 9 (citation omitted).]

Moreover, as the Commission held below, the MDEQ regulations had independent force outside of EPA approval. This Court need not reach this argument if it agrees with the Court of Appeals' analysis. But the Commission correctly held that "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.” Commission Order, p. 25, citing 42 USC 7416. TES makes a convoluted argument that since the MDEQ adopted the definitions found in CAIR, and CAIR defines “CAIR NOx allowance” as “a limited authorization issued by a permitting authority . . . under provisions of a State implementation plan that are approved [by the EPA],” 40 CFR 97.102, then none of the state regulations have any force if they are not approved by the EPA. This argument stretches statutory construction too far. And, in any event, since the EPA explicitly re-approved the 2007 rules in August of 2009, before TES incurred expenses in November and December of 2009, there can be no argument that the rules were not in effect at the time TES incurred expenses. 74 Fed Reg 41640.

This Court should reject TES’s argument that the MDEQ rules were not in effect at the time they incurred expenses, and affirm the Court of Appeals Opinion affirming the Commission.<sup>10</sup>

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<sup>10</sup> The Commission also notes that its order was based on a finding that the costs involved were not due to a changed statute, and thus, the Commission did not reach the question of whether these costs were prudently incurred or whether they met other eligibility requirements for recovery given that TES, a Biomass Plant, could have incurred these costs as a result of it burning coal, and not wood fiber.

## CONCLUSION AND RELIEF REQUESTED

MCL 460.6a(8) allows biomass plants recovery of costs incurred due to changes in federal or state environmental laws or regulations implemented after the effective date of the act, or October 6, 2008. Michigan law enacted in 2007 required biomass plants to purchase NOx emissions allowances during the 2009 NOx season, which TES did in November and December of 2009. The Michigan Public Service Commission acted lawfully and reasonably in declining to allow TES recovery of an additional \$636,073 in recovery from Consumers Energy since TES did not incur the costs due to changes in environmental regulations that were implemented, or put into effect, after October 6, 2008.

Therefore, the Michigan Public Service Commission respectfully requests that this Honorable Court deny TES's Application for Leave to Appeal.

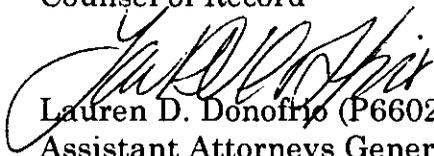
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Dated: December 9, 2014