

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

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In re Application of CONSUMERS ENERGY COMPANY  
For Reconciliation of 2009 Costs.

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TES FILER CITY STATION LIMITED  
PARTNERSHIP

Supreme Court No. 150395

Appellant,

Court of Appeals No. 305066

v

Michigan Public Service Commission  
Case No. U-15675-R

MICHIGAN PUBLIC SERVICE  
COMMISSION AND ATTORNEY  
GENERAL,

Appellees.

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**SUPPLEMENTAL BRIEF**

**OF**

**APPELLANT TES FILER CITY STATION LIMITED PARTNERSHIP**

*Respectfully submitted by*

Dated: July 17, 2015

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**ORAL ARGUMENT REQUESTED**

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## **INCORPORATION BY REFERENCE OF APPELLANT'S PRIOR FILINGS**

Because this is a Supplemental Brief and this Court has specifically directed that the parties "should not submit mere restatements of their application papers"<sup>1</sup>, Appellant TES hereby incorporates by reference the Statement of Questions Presented, the Statement of Material Proceedings and Facts, and the Arguments contained in its Application for Leave to Appeal, as well as the full content of the Reply Briefs that TES filed in this docket.

Appellant TES continues to rely on those prior filings and notes that much of what is contained in those filings is directly responsive to the question of when the relevant MDEQ rules were "implemented". Consistent with this Court's order, however, this Supplemental Brief is intended to supplement, rather than reiterate, TES's prior submissions.

## **ARGUMENT**

### **I. INTRODUCTION & CLARIFICATION.**

This Court's order of June 5, 2015 directs the parties to file supplemental briefs "addressing when the Michigan Department of Environmental Quality's administrative rules requiring generators to purchase NOx allowances were "implemented", as that term is used in MCL 460.6a(8)."

To be precise, it is important to point out that there was not one single date when all types of generators were subjected to regulation of their NOx emissions. The process of environmental regulation is far from static. Rather, it involves the promulgation and

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<sup>1</sup> This Court's Order of June 5, 2015 in the instant appeal.

implementation of increasingly stringent air quality regulations over time.<sup>2</sup> With respect to electric generators, there were a series of regulatory changes at various times which incrementally expanded the classes of generators that were required to purchase NOx allowances if they wanted to emit more than an allotted amount of NOx. Thus, there are various dates when different classes of generators were first subject to regulation of their NOx emissions.

Large utility-owned generators and most generators located in certain Michigan counties, known as the "fine grid zone", were subject to regulation of their NOx emissions under the "NOx Budget Trading Program" for several years prior to 2009. Appellant TES was not one of the generators subject to the NOx Budget Trading Program. In 2009, however, the MDEQ implemented new rules pursuant to the EPA's "Clean Air Interstate Rule" ("CAIR"). The MDEQ's new CAIR rules replaced the NOx Budget Trading Program and expanded NOx regulation to cover "newly affected" electric generating units ("EGUs") located outside of Michigan's fine grid zone.<sup>3</sup> Appellant TES was one of the "newly affected EGUs" that was subjected to NOx regulation for the very first time in 2009.

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<sup>2</sup> For example, the some of the first NOx regulations applied to motor vehicles. When the Federal Clean Air Act was enacted in 1970, a section of the law called for large cuts in NOx emissions from motor vehicles, eventually leading to the installation of catalytic converters on automobiles. In response to lobbying from the automobile industry, however, a postponement clause was added, delaying implementation of the new NOx rules until 1983. Regulations to limit NOx emissions from coal-fired electric generators may be traced to the 1990 amendments to the Federal Clean Air Act. The initial regulations, however, applied only to large point source generators located in certain "non-attainment" areas. Today, the EPA is beginning to explore methods of controlling NOx emissions from lawn mowers. <http://yosemite.epa.gov/opa/admpress.nsf/2dd7f669225439b78525735900400c31/01ae78a0ae72dab885257d7200690cb7!opendocument>.

<sup>3</sup> The rules implemented in 2009 also extended NOx regulations to some existing EGUs that were located within the fine grid zone, but were exempt from regulation under the NOx Budget Trading Program for reasons other than their location.

The facts stated above are specifically confirmed in subpart (3) of MDEQ Rule 803<sup>4</sup>, the relevant portions of which are attached to this Supplemental Brief as Attachment 1. Subpart (3)(l) of that rule lists all of the counties that were considered to be in Michigan's "fine grid zone" for purposes of the new CAIR rules. Notably, Manistee County is not on the list. It is undisputed that TES is located in Manistee County. Therefore, TES is located outside of the fine grid zone.

Subpart (3)(o) of MDEQ Rule 803 specifically refers to electric generating units located outside the fine grid zone as being "newly-affected EGUs":

"(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."<sup>5</sup>

This rule also makes it clear that newly-affected EGUs are newly affected as of 2009. Before that year, they were not subject to regulation. In years after 2009, entities known as newly affected in 2009 were treated as "existing EGUs".

Thus, it is clear that the first MDEQ NOx regulations that ever applied to TES were the MDEQ's CAIR NOx rules. Accordingly, to address Appellant TES's situation, this Court must

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<sup>4</sup> R 336.1803(3)(l). In the MDEQ's 2007 NOx Rules, which were disapproved by the U.S. EPA in 2008 and then revised in 2009, Rule 803(3)(l) was Rule 803(3)(h). Both the disapproved 2007 Rule and the approved 2009 Rule make it clear that EGUs outside the fine grid zone would be newly-affected starting in 2009.

<sup>5</sup> R 336.1803(3)(o). In the MDEQ's 2007 NOx Rules, which were disapproved by the U.S. EPA in 2008 and then revised in 2009, Rule 803(3)(o) was Rule 803(3)(j). Both the disapproved 2007 Rule and the approved 2009 Rule make it clear that EGUs outside the fine grid zone would be newly-affected starting in 2009.

determine when the MDEQ's CAIR NO<sub>x</sub> rules were "implemented", as that term is used in MCL 460.6a(8).

**II. THE MDEQ AGREES WITH APPELLANT TES THAT THE PERTINENT RULES WERE IMPLEMENTED IN 2009.**

Given the fact that this Court has requested supplemental briefs on the question of when the pertinent MDEQ rules were implemented, logic dictates that the Court would be well-advised to consider when the MDEQ itself considers the rules to have been implemented. Indeed, what entity is better qualified to address this question than the agency that actually promulgated and implemented the rules in question?

In this regard, the MDEQ's current website states as follows:

"There are 3 program components for CAIR **implementation** that will be done in two phases:

- Phase I for the NO<sub>x</sub> Annual trading program started January 1, **2009**, the NO<sub>x</sub> Ozone trading program started May 1, **2009**, and the SO<sub>2</sub> Annual trading program started January 1, 2010.
- Phase II for the NO<sub>x</sub> and SO<sub>2</sub> annual trading programs starts January 1, 2015 and the NO<sub>x</sub> Ozone trading program starts May 1, 2015." (*See Attachment 2, emphasis added*).

As shown on Attachment 2, the MDEQ's website also confirms that the MDEQ adopted the Federal CAIR, with modifications, pending final approval from the EPA. In addition, the MDEQ website confirms that, in 2009, the MDEQ replaced the old NO<sub>x</sub> Budget Trading Program rules with the new NO<sub>x</sub> Annual Trading Program and the new NO<sub>x</sub> Ozone Trading Program under CAIR. Notably, the MDEQ website refers to the starting dates of those CAIR programs as being the dates of "implementation."<sup>6</sup>

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<sup>6</sup> See Attachment 2.

Thus, the MDEQ website directly answers this Court's question and confirms that the new Phase 1 CAIR NO<sub>x</sub> Rules were "implemented" starting in 2009, which, importantly, is after October 6, 2008 (the effective date of 2008 PA 286).

In addition to the website, it should be remembered that the MDEQ analyst directly involved in drafting, amending and enforcing the MDEQ's NO<sub>x</sub> Rules also specifically confirmed that Appellant TES was not subject to the new Phase 1 CAIR NO<sub>x</sub> Rules until October 19, 2009.<sup>7</sup>

In summary, the MDEQ itself, both on its official website and in the words of one of its key officials, has specifically confirmed that the MDEQ's new Phase 1 CAIR NO<sub>x</sub> regulations did not apply to "newly-affected EGUs" such as TES until 2009. Notably, the MDEQ refers to 2009 as the year of "implementation".<sup>8</sup>

**III. MCL 8.3A ALSO SUPPORTS TES'S POSITION REGARDING THE CORRECT WAY TO INTERPRET THE WORD, "IMPLEMENTED", AS USED IN MCL 460.6A(8).**

In using the words "implementation" and "implemented" to refer to the year when the new Phase 1 CAIR NO<sub>x</sub> Rules first had any practical effect on newly-affected electric generating units such as TES, both the MDEQ and the EPA used those words in accordance with their commonly accepted meaning, which is to fulfill, carry out or put into effect according to a definite plan. As explained in TES's Application for Leave to Appeal, there is ample precedent

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<sup>7</sup> The MDEQ official's statement is attached as Appendix A to the Reply Brief that Appellant TES filed with this Court in response to the Brief filed by the Michigan Public Service Commission.

<sup>8</sup> Similarly, it is also worth noting that the United States Environmental Protection Agency ("EPA") also refers to 2009 as the year when the new Phase 1 CAIR NO<sub>x</sub> Rules were to be "implemented". The EPA stated, "The CAIR requires that the emission reductions be *implemented* in two phases. The first phase of CAIR NO<sub>x</sub> reductions *starts in 2009* (covering 2009-2014) and the first phase of CAIR SO<sub>2</sub> reduction starts in 2010 (covering 2010-2014); the second phase of CAIR reductions for both NO<sub>x</sub> and SO<sub>2</sub> starts in 2015, covering 2015 and thereafter. 70 Fed Reg 49721 (August 24, 2005). (Emphasis added).

for the proposition that courts should interpret non-technical words in a statute in accordance with their commonly accepted meaning. This precedent (which need not be repeated here) includes the 14 reported court decisions and multiple dictionary definitions that TES cited at pages 27 to 33 of its Application for Leave to Appeal. It is worth noting that the numerous citations in TES's Application have never been rebutted, distinguished, or even addressed by the Appellees.

In addition to the citations already provided, it should also be noted that there is a Michigan statute which supports the same proposition. In particular, MCL 8.3a states as follows:

"MCL 8.3a Approved usage; technical words and phrases.

All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."

The statutory provision quoted above obviously provides even more support for TES's position regarding the correct way to interpret the word, "implemented", as it is used in MCL 460.6a(8).

#### **IV. ADDITIONAL COURT PRECEDENT NOT CITED IN TES'S EARLIER FILINGS.**

In addition to the citations in the Application for Leave to Appeal, and the statute cited above, there is another recent court decision supporting the well-established interpretation of the word, "implemented". That decision is *Edwards Aquifer Authority v. Bragg*, 421 S.W.3d 118 (Tex. App.-San Antonio 2013). In that case, two farmers (Glenn & JoLynn Bragg) applied to the Edwards Aquifer Authority ("Authority") seeking water permits for two pecan orchards. When the Authority denied a permit for one orchard and granted only a limited permit for the other one,

the Braggs filed suit alleging a taking of their property. The trial court ruled in favor of the Plaintiffs.

On appeal, the Texas Court of Appeals addressed a number of issues, two of which involved the "implementation" of the Edwards Aquifer Act<sup>9</sup>, which states, in pertinent part, as follows:

"The legislature intends that just compensation be paid if implementation of this article causes a taking of private property or the impairment of a contract in contravention of the Texas or federal constitution."<sup>10</sup>

The court in Edwards Aquifer first addressed the meaning of "implementation" in connection with the Authority's argument that the Bragg's claims were barred by the Statute of Limitations. The Authority claimed that "it was the enactment of the Act, and not its application, that injured the Braggs' property values or usefulness and started the running of the statute of limitations."<sup>11</sup> In essence, the Authority argued that the Act was "implemented" when it was enacted. The Texas Court of Appeals rejected that argument, holding that the Act was not implemented until it was actually applied to the Braggs:

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<sup>9</sup> Act of May 30, 1993, 73d Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, amended by Act of May 16, 1995, 74th Leg., R.S., ch. 524, 1995 Tex. Gen. Laws 3280; Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Gen. Laws 2505; Act of May 6, 1999, 76th Leg., R.S., ch. 163, 1999 Tex. Gen. Laws 634; Act of May 25, 2001, 77th Leg., R.S., ch. 1192, 2001 Tex. Gen. Laws 2696; Act of May 28, 2001, 77th Leg., R.S., ch. 966, §§ 2.60-.62 and 6.01-.05, 2001 Tex. Gen. Laws 1991, 2021-2022, 2075-2076; Act of May 25, 2001, 77th Leg., R.S., ch. 1192, 2001 Tex. Gen. Laws 2696; Act of June 1, 2003, 78th Leg., R.S., ch. 1112, § 6.01(4), 2003 Tex. Gen. Laws 3188, 3193; Act of May 23, 2007, 80th Leg., R.S., ch. 510, 2007 Tex. Gen. Laws 900; Act of May 28, 2007, 80th Leg., R.S., ch. 1351, §§ 2.01-2.12, 2007 Tex. Gen. Laws 4612, 4627-4634; Act of May 28, 2007, 80th Leg. R.S., ch. 1430, §§ 12.01-12.12, 2007 Tex. Gen. Laws 5848, 5901-5909; Act of May 21, 2009, 81st Leg., R.S., ch. 1080, 2009 Tex. Gen. Laws 2818 [hereinafter "the Act"]. Citations are to the Act's current sections, without separate references to amending enactments. The Act remains uncodified, but an unofficial compilation can be found on the Authority's website, at <http://www.edwardsaquifer.org/files/EAAact.pdf>.

<sup>10</sup> *Id.*, at section 1.07 (emphasis added), cited by the court in Edwards Aquifer, *supra*, at 421 S.W.3d 118, 137.

<sup>11</sup> Edwards Aquifer, *supra*, at p 131.

"Therefore, we conclude the Bragg's taking claims did not become ripe, and therefore did not accrue, until the Authority made its final decisions regarding the application of the Act to the Bragg's permit applications. We do not disagree that the Authority may have had no discretion with respect to its decision or that the Braggs knew all there was to know about the Act when it was enacted. However, significant to our conclusion is that the Legislature expressly required just compensation be paid if "implementation" of the Act resulted in a taking. See Act § 1.07. The Act does not define "implementation"; therefore, we give it its common meaning. See TEX. GOV'T CODE ANN. § 311.011(a) (West 2005) (terms not specifically defined by statute are construed according to rules of grammar and common usage). Dictionaries determine a word's common use, and, "implement" means "1: CARRY OUT, ACCOMPLISH esp: to give practical effect to and ensure of actual fulfillment by concrete measures...." WEBSTER'S NINTH COLLEGIATE DICTIONARY 604 (1983). As to the Braggs, the provisions of the Act were not implemented or applied until 2004 and 2005 [when the permits were denied]. Therefore, the Braggs' claims are not time-barred."<sup>12</sup>

Thus, the court in *Edwards Aquifer* held that the statute in question was not implemented when the statute was enacted in 1993, or even when it became effective in 1996.<sup>13</sup> Rather, the court held that the Act was implemented when it was actually applied to the Braggs in 2004 and 2005.

Later in the same opinion, the Texas Court of Appeals addressed the proper time for determining the value of the property taken. "According to the Authority, any taking occurred on either May 30, 1993 when the Act was enacted, or on June 28, 1996 when the Act became effective following the various legal challenges."<sup>14</sup> The Braggs, on the other hand, asserted that the date of the taking was when the Authority took final action on their permit applications. The court held:

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<sup>12</sup> *Id.*, at p 137.

<sup>13</sup> "Although legislatively decreed to become effective on September 1, 1993, due to several lawsuits, the Act did not become effective until 1996." *Edwards Aquifer*, *supra*, at p 126.

<sup>14</sup> *Edwards Aquifer*, *supra*, at p 147.

"As discussed above in our analysis of the statute of limitations issue, we agree with the Braggs that the takings occurred when the provisions of the Act were implemented or applied in 2004 for the D'Hanis Orchard and in 2005 for the Home Place Orchard."<sup>15</sup>

Thus, with respect to this second issue, the court in *Edwards Aquifer* again held that the statute in question was not implemented when the statute was enacted or when it became effective, but, rather, the statute was implemented when it was actually applied and given practical effect.

As applied to the instant appeal, this precedent constitutes further support for TES's position that the pertinent changes to the MDEQ's rules were not "implemented" when the rules were promulgated, but, rather, the rules were implemented when they were actually applied and given practical effect. By their express terms, the MDEQ's rules did not apply to TES or have any other practical effect on any "newly affected EGU" until 2009, which was clearly after the effective date of 2008 PA 286.

V. **NEITHER TES NOR ANY OTHER "NEWLY-AFFECTED EGU" WAS SUBJECT TO NOX REGULATION PRIOR TO 2009.**

To avoid any possible confusion regarding TES's position in this case, it is important to make it clear that the MDEQ's rules had no effect whatsoever on TES or any other "newly-affected EGU" until 2009. This is not a situation where TES was subject to the MDEQ's NOx Rules before 2009, but simply failed to comply until 2009. Nor is this a situation where TES was subject to the NOx Rules before 2009, but did not take any actions to trigger the effects of the rules until 2009. Rather, this is a situation where the rules themselves expressly stated that "newly-affected EGUs" such as TES were not subject to the rules until 2009.

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<sup>15</sup> *Id.*

Thus, even if the 2007 rules embodying the MDEQ's State Implementation Plan had been effective in 2009 (which they were not), the Implementation Plan for the Phase I CAIR NOx regulations, by its express terms, was not "fulfilled, carried out, or executed" until 2009. That is why both the EPA and the MDEQ refer to 2009 as the year when Phase I of the CAIR NOx regulations were "implemented".

**VI. NEW SPLIT DECISION ISSUED BY COURT OF APPEALS.**

It should be noted that, on May 28, 2015, the Michigan Court of Appeals issued another split decision regarding the same issue presented in the instant appeal. Copies of the Majority Opinion and the Dissenting Opinion are attached as Attachment 3 to this Supplemental Brief.

As noted in TES's prior filings, Michigan law requires that Consumers Energy Company must file a new PSCR case every year. The instant appeal involves the first PSCR reconciliation case decided by the MPSC after the enactment of 2008 PA 286. In each subsequent PSCR case, the same issue has arisen and the MPSC has continued to simply rely on its erroneous decision in the first case. To preserve its rights, TES has filed appeals of each of the MPSC's successive decisions.

Two of those appeals (involving the 2010 PSCR reconciliation and the 2011 PSCR reconciliation) were consolidated at the Court of Appeals. Those appeals (COA Docket No. 314361 and COA Docket No. 316868) are the subject of the new Opinions attached to this Supplemental Brief. There, as here, the Court of Appeals issued a split decision, with Judges Krause and Stephens ruling against TES's right to recover its NOx allowance costs, and Judge Wilder filing a Dissenting Opinion based on Judge Whitbeck's dissent in the instant case.

The good news was that the Court unanimously ruled in TES's favor on a separate issue where the Court correctly recognized that the MPSC's interpretation of the CPI adjustment clause

in PA 286 was "not logical"<sup>16</sup> and "would lead to a potentially absurd result seemingly at odds with legislative intent."<sup>17</sup> On the NOx cost issue, however, Judge Krause (who also wrote the Majority Opinion in the instant case) was joined by Judge Stephens in ruling that PA 286 was ambiguous and should be read to mean that the MDEQ's State Implementation Plan was "implemented" when the plan was first promulgated rather than when the Implementation Plan was actually carried out, fulfilled and given practical effect.

In this regard, the majority failed to recognize the obvious fact that adopting a plan to implement a future change is not the same as actually implementing the change. The majority also failed to recognize the significance of the fact that PA 286 allows uncapped recovery of environmental costs incurred "due to" regulatory changes implemented after October 6, 2008. When a rule is changed, it is not possible for a BMP to incur costs due to that changed rule unless and until the rule change is actually implemented, *i.e.*, given practical effect by direct application to the BMP. Thus, it does not matter when the rule itself was changed because it is the implementation of the change (*i.e.*, its practical application to a BMP) that creates the need for the BMP to incur costs. That is why PA 286 refers to the implementation of regulatory changes and not to the mere promulgation or enactment of plans calling for the future implementation of regulatory changes.

**VII. THIS COURT SHOULD INTERPRET MCL 460.6A(8) IN A MANNER THAT IS CONSISTENT WITH THE LEGISLATIVE INTENT OF THAT PROVISION.**

Attached as Appendix B to the Reply Brief that Appellant TES filed with the Court in response to the MPSC's Brief, is the un rebutted sworn testimony of Joe Tondu.<sup>18</sup> In his

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<sup>16</sup> Attachment 3 at p. 10.

<sup>17</sup> *Id.* at p. 11.

<sup>18</sup> TES hereby incorporates by reference the complete description of this testimony, as set forth on pages 3, 4 & 5 of the above-referenced Reply Brief.

testimony, Mr. Tondu explains the history and purpose of the statutory provision at issue in this case. In short, MCL 460.6a(7)-(9) was enacted for the purpose of enabling TES (and other Biomass Merchant Plants ("BMPs")) to recover the shortfall between their reasonable out-of-pocket costs and the contractual payments that they received for those costs.<sup>19</sup> To add an element of cost control, the legislative drafters capped the cost recovery at the approximate level of the shortfall as of the effective date of PA 286 (*i.e.*, October 6, 2008). Recognizing that the BMPs' costs could reasonably increase over time, the drafters added a CPI adjustment clause to account for future inflation and an exception clause to account for cost increases due to the future implementation of changes in environmental laws and regulations.

Given this legislative history, it becomes clear that the majority opinion below is inconsistent with the intent of the Legislature. Because the \$1 million cap was set on the basis of the costs being incurred by the BMPs as of the effective date of the Act, it is illogical to conclude that the cap was intended to preclude recovery of future, unknown and unquantified environmental costs that were not being incurred at that time and were not going to be incurred until new regulations were implemented after the cap was established. In this regard, it reasonably can be assumed that the Legislature had actual or imputed knowledge of the fact that a series of environmental regulations were scheduled to be implemented after the effective date of PA 286.<sup>20</sup> Because the legislative drafters knew that these new environmental regulations

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<sup>19</sup> The recoverable costs are fuel and variable operation and maintenance costs.

<sup>20</sup> *E.g.*, *People v. Rahilly*, 247 Mich App 108, 112; 635 NW2d 227, 230 (2001) ("The Legislature is presumed to be aware of and legislate in harmony with existing laws when enacting new laws."). Certainly, the individuals involved in drafting the law were aware that new environmental regulations with uncertain cost implications were scheduled to be implemented after 2008. Mr. Tondu's testimony confirms that fact. (See Appendix B to TES's Reply Brief Responding to the MPSC).

could cause the BMPs to incur costs in addition to those factored into the cap, the drafters created an exception to the cap so that affected BMPs could recover those future costs.

When weighing the importance of this legislative intent, it is important to remember that the primary objective of statutory interpretation is to effectuate the intent of the Legislature.<sup>21</sup> Since the Legislature based the cap on the level of costs being incurred in 2008, and expressly provided that environmental costs incurred due to regulatory changes implemented after 2008 are not subject to the cap, it is inconsistent with the legislative intent for the majority below to conclude that the cap precludes recovery of new types of environmental costs were not being incurred in 2008, but were incurred for the first time after 2008.

Whether the MDEQ's plan to implement new requirements after 2008 was promulgated before the effective date of PA 286 is not determinative. The relevant point is that the Legislature created an exception to the cap in order to make it clear that there is no cap on the recovery of environmental costs incurred due to the implementation of new environmental requirements after October 6, 2008. The undisputed facts demonstrate that the MDEQ's NOx regulations did not apply to TES (or any other "newly-affected EGUs") until after 2008 and, accordingly, TES never incurred any NOx costs until after 2008. Thus, the legislative intent of PA 286 is effectuated by allowing recovery of the costs at issue in this case and, conversely, the legislative intent is utterly frustrated by denying recovery of costs incurred due to regulatory changes that never applied to TES until after 2008.

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<sup>21</sup> *E.g.*, *Brightwell v. Fifth Third Bank*, 487 Mich 151, 157; 790 NW2d 591 (2010); *Browne v. Detroit Mayor*, 478 Mich 589, 593; 734 NW2d 514 (2007).

**VIII. THE MAJORITY'S OPINION IN THE CASE BELOW CONFLICTS WITH THE LEGAL PRINCIPLE THAT REMEDIAL STATUTES ARE TO BE LIBERALLY CONSTRUED IN FAVOR OF THE PERSONS INTENDED TO BE BENEFITED.**

To the extent that the word, "implemented", might be considered ambiguous in a vacuum, it is important to recognize that, in PA 286, the word is not used in a vacuum. Rather, it is used in the context of a remedial statute that is clearly intended to help the BMPs, not hurt them. It is a time-honored rule of statutory construction that remedial statutes must be liberally construed in favor of the persons intended to be benefited by the statute. In support of this principle, Michigan courts have ruled as follows:

"We liberally construe remedial statutes in favor of the persons intended to be benefited." *Empson-Lavolette v. Crago*, 280 Mich App 620, 629; 760 NW2d 793 (2008).

"The canon of statutory construction that remedial statutes are to be liberally construed is deeply imbedded in American jurisprudence. Indeed, all 50 states and courts in each federal circuit have endorsed it. Even the United States Supreme Court has adopted the canon and construed many federal laws using it. This long-established canon still has a place in Michigan law. Though it cannot be relied on to reach a result that is inconsistent with statutory language, it is otherwise entitled to consideration. Plaintiff brought suit under the Michigan Civil Rights Act. As we have stated on prior occasions, the CRA is a broad, remedial statute. When interpreting this statute and similar remedial statutes, it is important to remember the 'well-established rule that remedial statutes are to be liberally construed to suppress the evil and advance the remedy.'" *Haynes v Neshewat*, 477 Mich 29, 43-44; 729 NW2d 488 (2007) (concurring opinion) (internal citations omitted).

"[R]emedial statutes are to be liberally construed to suppress the evil and advance the remedy." *Eide v Kelsey-Hayes Co*, 431 Mich 26, 34; 427 NW2d 488 (1988).

The provisions of MCL 460.6a(7)-(9) are clearly remedial in nature, and, therefore, must be interpreted in a manner that is consistent with the legislature's remedial intent. The obvious intent of the legislature in enacting MCL 460.6a(7)-(9) was to remedy a situation where the

BMPs were receiving contractual energy payments that were insufficient to cover the BMPs' out-of-pocket costs for fuel and variable O&M expenses, including environmental costs. Addressing this problem would promote renewable biomass energy and protect Michigan jobs. The Legislature elected to accomplish these worthy goals by allowing the BMPs to recover their out-of-pocket fuel and variable O&M costs if and when those costs are greater than their contractual energy payments. To assure full recovery of all reasonable costs, while also providing a safeguard against any possible future excesses, the Legislature established a cap at the level of the costs being incurred in 2008 and added two additional provisions to make certain that the cap did not interfere with the BMPs' ability to fully recover all of their reasonable costs. First, the Legislature provided for a series of annual CPI adjustments to protect the BMPS from the effects of inflation. Second, the Legislature provided for full uncapped recovery of all new costs that would be incurred after 2008 due to the implementation of changes in environmental laws and regulations. Thus, the Legislature's clear remedial intent permeates and defines the statutory provision at issue in the instant appeal.

As this Court interprets the exception to the cap, it is important to bear in mind that the exception is not intended to preclude recovery of new environmental costs, but to allow for recovery of new environmental costs. Specifically, the exception is designed to allow BMPs such as TES to fully recover any new environmental costs that they were not incurring in 2008 when the cap was established. Accordingly, the statute provides for recovery of costs incurred due to changes in federal or state environmental laws or regulations that are implemented after October 6, 2008.

It would be inconsistent with the remedial intent of the legislation to interpret the statute to deny TES the right to recover new types of environmental costs that it incurred for the first

time after the cap was set. It should be clear that the remedial legislative intent of MCL 460.6a(7)-(9) is best effectuated by interpreting those provisions in a manner that protects the BMPs and the renewable energy jobs that they provide. The Legislature's remedial intent will be frustrated if the statute is interpreted in a manner that denies recovery of new environmental costs incurred due to changes in environmental regulations that had no practical effect until after 2008.

**IX. THE WORD, "IMPLEMENTED" MUST BE READ IN THE CONTEXT OF THE PHRASE IN WHICH IT IS USED.**

Not only should the word, "implemented", be interpreted in the context of the Legislature's remedial intent, but it also should be interpreted in the context of the phrase in which it is used. As this Court has held, statutory provisions should not be read in isolation, but should be considered in context.<sup>22</sup> In the instant appeal, the context of the word, "implemented", makes it clear that the Legislature was concerned with those changes, the implementation of which would cause a BMP to incur costs. Specifically, the phrase allows for recovery of "**costs incurred due to changes ... that are implemented [after October 6, 2008].**" Given this legislative intent, it is significant to note that neither the enactment of a statute nor the promulgation of an implementation plan is a change that, in and of itself, would necessarily cause a BMP to incur costs. Instead, it is the actual fulfillment, carrying out, or effectuation of the statute or implementation plan by putting it into practical effect which causes a BMP to incur costs. Therefore, when the word, "implemented" is read in the context of the full phrase in which it used, it becomes evident that the word reflects an intent to allow for recovery of environmental costs that are incurred due to regulatory changes that are first put into practical

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<sup>22</sup> *E.g., Robinson v. City of Lansing*, 486 Mich. 1, 15; 782 NW2d 171 (2010).

effect, carried out or fulfilled after October 6, 2008, regardless of when the underlying rule was changed.<sup>23</sup>

**X. THE CONCEPT OF DELAYED IMPLEMENTATION IS WIDELY RECOGNIZED.**

A regulatory statute or rule is implemented at the time when the entities to be regulated are actually subject to the new regulatory requirements. Of course, there are situations where a statute or rule requires compliance from a regulated entity immediately upon enactment or promulgation. In those instances, the regulatory change may be said to have been implemented simultaneously with the enactment or promulgation. Where, however, there is a temporal separation between the time when a rule is promulgated and the time when the rule first has the practical effect of requiring compliance from the entities to be regulated, the regulatory change is not "implemented" until it actually imposes a regulatory obligation on the regulated entities.

For example, if a hypothetical rule were promulgated in 2016 stating that the speed limit on I-96 will be changed to 75 mph as of January 1, 2020, it would be universally recognized that the regulatory change would be "implemented" on January 1, 2020, when, for the first time, the rule would have practical effect. Prior to that date, the old speed limit would remain in effect, and the new rule, while promulgated, would have no practical effect on any drivers. Indeed, the new rule might never have any practical effect if it were to be revised or rescinded before 2020. Thus, a rule is not necessarily implemented when it is promulgated, but rather when it is actually given practical effect. This is plain English. It is also common sense and, in this appeal, it is the correct decision.

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<sup>23</sup> As addressed in TES's earlier filings with this Court, it is also very significant that the statute uses the word, "implemented", rather than the words, "promulgated or enacted". Courts must presume that the Legislature had a reason for referring to the "implementation" of a regulatory change, rather than the promulgation or enactment of a regulatory change.

Where a rule or statute does not require compliance until some future date, the regulatory situation is often referred to as "delayed implementation". For example, the article attached as Attachment 4, is a short "practice update" from a health care website. The article is entitled, "ICD-10 implementation delayed until October 2015". It states the following with respect to the impact of the "Protecting Access to Medicare Act of 2014" on a regulatory mandate for the use of certain new medical billing codes:

"[The statute] also contained a provision that **delays implementation** of the ICD-10-CM code set until Oct. 1, 2015. Before the April 1 law was enacted, ICD-10-CM **implementation** had been scheduled for Oct. 1, 2014.

....

ICD-9-CM remains the Health Insurance Portability and Accountability Act-compliant code set for billing purposes in the United States until the new October 2015 **implementation** date for ICD-10-CM."<sup>24</sup>

As demonstrated by the above-quoted article, the concept of delayed implementation is a commonly understood concept. Another example is an article on the website for "mortgage news daily" that states:

"**Implementation** of the Know Before You Owe mortgage disclosure rule has been **delayed** until October 1. The rule was originally supposed to be **implemented** on August 1 although the Consumer Financial Protection Bureau had recently announced that enforcement of the rule and use of the associated TRID disclosure forms would not begin until January 1, 2016."<sup>25</sup>

Note that the article above implicitly recognizes that one of the key factors in determining when a rule has been implemented is the time when the regulator has the right to enforce the new rule. In the instant appeal, even if the MDEQ's 2007 rules had been in effect at the time when TES incurred its costs (which they were not), the rules clearly indicated that the MDEQ could

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<sup>24</sup> Attachment 4 (emphasis added).

<sup>25</sup> [http://www.mortgagenewsdaily.com/06182015\\_cfpb\\_trid.asp](http://www.mortgagenewsdaily.com/06182015_cfpb_trid.asp)

not enforce the new NOx requirements on TES until 2009 because that was the first year when they applied to "newly-affected EGUs".

Yet another example of the commonly understood distinction between adopting a rule and implementing a rule is found in a sports article regarding the NCAA's change to a 30-second shot clock for college basketball games. The article states, "If the change is approved by the NCAA's Playing Rules Oversight Committee next month, it could be **implemented** next season."<sup>26</sup> This article represents further evidence that the word, "implemented", when used in a regulatory context, refers to the date when a new regulation is actually in force and has a practical effect on the entities to be regulated.

In summary, it is widely, if not universally, recognized that a regulatory change is not "implemented" when the regulatory change is promulgated or enacted, but rather when the new regulatory requirements are actually in force. Until such time as a new regulatory requirement actually has some practical effect and is enforceable, it has not been "implemented", as that word is commonly understood. As applied to the instant appeal, these examples provide further support for TES's position that the word, "implemented", in the context of the statutory phrase at issue, should be given its common meaning.

**XI. THERE IS AN ALTERNATE BASIS FOR DECIDING THIS APPEAL, BUT A DECISION BASED ON THE MEANING OF "IMPLEMENTED" WOULD BE PREFERABLE.**

As explained in TES's Application for Leave to Appeal (at pages 39-45), there is a very convincing alternate basis for deciding the instant appeal in favor of Appellant TES. In short, this Court could decide this appeal in favor of TES based on the fact that the MDEQ's 2007 NOx Rules were effectively contingent on EPA approval. Because the EPA disapproved those rules in 2008, the rules were not in effect at the time when Appellant TES incurred its NOx allowance

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<sup>26</sup> [http://www.mlive.com/spartans/index.ssf/2015/05/tom\\_izzo\\_expects\\_minimal\\_chang\\_1.html](http://www.mlive.com/spartans/index.ssf/2015/05/tom_izzo_expects_minimal_chang_1.html)

costs in 2009. Consequently, TES could not have incurred its 2009 NO<sub>x</sub> costs "due to" the MDEQ's 2007 rules because those rules were not even in effect at that time.

While this Court certainly would be on very solid ground if it were to decide the instant appeal in favor of TES on the basis of this alternate argument, TES respectfully suggests that it would be preferable if this Court were to base its decision on the meaning of the word, "implemented".

The reason for this request is that the MDEQ's Phase 1 CAIR NO<sub>x</sub> regulations are not the only environmental regulations applicable to TES. Changes to other environmental laws and regulations also have been, or will be, implemented after the statutory cutoff date of October 6, 2008. For example, as noted on the MDEQ's website (Attachment 2), Phase 1 of the CAIR NO<sub>x</sub> regulations were implemented in 2009, while Phase 1 of the SO<sub>2</sub> regulations were implemented in 2010. Phase 2 of both the NO<sub>x</sub> and SO<sub>2</sub> regulations were implemented in 2015. In other words, various changes to environmental laws and regulations have been, or will be, given practical effect and applied for the very first time to TES and other newly-affected generators after the effective date of 2008 PA 286. If this Court were to simply confirm that the word, "implemented", as used in PA 286, means implemented, and not promulgated or enacted, then there should be no need for a series of further disputes and appeals addressing each of the various regulatory changes implemented and to be implemented after October 6, 2008.

The case law in support of such a decision is overwhelming. Indeed, there appears to be universal agreement among all reported court decisions that the word, "implemented" means implemented; *i.e.*, given practical effect, fulfilled, or carried out. In the context of the instant appeal, this definition compels the conclusion that, under PA 286, a regulatory change is implemented when it first applies to the entities to be regulated and has the practical effect of

requiring those entities to conform their behavior to the new rules. A clear and straightforward decision defining when a regulatory change is "implemented" within the context of MCL 460.6a(8) would resolve this issue once and for all.<sup>27</sup>

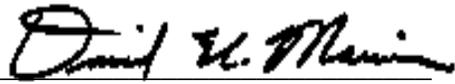
**RELIEF REQUESTED**

Appellant TES respectfully requests that this Court peremptorily reverse the erroneous split decision of the Court of Appeals in this matter. In the alternative, TES respectfully requests that the Court grant TES's Application for Leave To Appeal.

*Respectfully submitted,*

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Dated: July 17, 2015

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<sup>27</sup> Of course, if the Court bases its decision solely on the fact that the MDEQ's 2007 rules were disapproved by the EPA in 2008 and, therefore, were not even in effect until 2009, at least the Court will have resolved the dispute over the recoverability of costs incurred due to the implementation of the Phase 1 CAIR NOx rules.