

ORIGINAL

**STATE OF MICHIGAN
IN THE SUPREME COURT**

In re Application of CONSUMERS ENERGY CO
for Reconciliation of 2009 Costs.

TES FILER CITY STATION LIMITED
PARTNERSHIP,

Appellant,

v

CONSUMERS ENERGY COMPANY,

Petitioner-Appellee,

and

MICHIGAN PUBLIC SERVICE COMMISSION
and ATTORNEY GENERAL,

Appellees.

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150395 TES FILER CITY STATION LIMITED PARTNERSHIP

APAC

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THE ORDERS APPEALED FROM AND RELIEF SOUGHT

This Application relates to a split decision of the Michigan Court of Appeals affirming parts of an order issued by the Michigan Public Service Commission ("MPSC"). The MPSC's Order addresses a myriad of issues that are completely unrelated to the narrow issues in this case. With respect to the issues that are the subject of this appeal, the only relevant pages of MPSC's order are pages 22-25. There, the MPSC interpreted a new statutory provision, MCL 460.6a(8), that governs the Appellant's right to recover certain environmental costs.

Appellant TES Filer City Station Limited Partnership ("TES") seeks leave to appeal the split decision of the Michigan Court of Appeals issued on September 25, 2014, in Court of Appeals Docket No. 305066, and the order of the Michigan Public Service Commission affirmed in that split decision. The Court of Appeals' majority decision is attached to this Application as Appendix A. The dissenting opinion¹ of the Honorable William C. Whitbeck is attached to this Application as Appendix B.

The underlying MPSC Opinion and Order in Case No. U-15675-R, dated June 16, 2011, is attached as Appendix C.

For all of the reasons discussed in greater detail below, Appellant TES respectfully requests that this Honorable Court grant its Application for Leave to Appeal and issue an order (1) reversing that portion of the MPSC's order dated June 16, 2011, which denied Appellant's request for recovery of its 2009 NOx allowance costs; (2) remanding this case to the MPSC with directions to approve full recovery of Appellant's 2009 NOx allowance costs,

¹ The Court of Appeals addressed two consolidated appeals arising out of the same MPSC case, but involving completely different and unrelated issues. Judge Whitbeck's separate decision dissented with respect to the decision that is the subject of this Application for Leave to Appeal (Court of Appeals Docket No. 305066), and concurred with respect to the decision in the unrelated appeal (Court of Appeals Docket No. 305083).

plus interest; and (3) granting all costs, fees, and other such relief as the Court deems just and reasonable under the circumstances.

Alternatively, Appellant TES respectfully requests that this Court enter an Order granting appropriate peremptory relief in lieu of granting leave to appeal. The Court of Appeals' split decision in this case is ripe for peremptory reversal based on the well-reasoned analysis set forth in the dissenting opinion of the Honorable William C. Whitbeck.

STATEMENT OF QUESTIONS PRESENTED

1. Where, in response to a directive from the U.S. Environmental Protection Agency, the MDEQ amended its "State Implementation Plan" to provide for the implementation of new environmental requirements in 2009, was it reversible error for the MPSC to decide that the new requirements were "implemented" in 2007 when the MDEQ promulgated its revised implementation plan, rather than in 2009 when the implementation plan was actually carried out and put into effect?

The Appellant answers "YES".

Appellee MPSC, by its decision, answered "NO".

The Court of Appeals, in a split decision, answered "NO".

The dissenting Judge (The Honorable William C. Whitbeck) answered "YES".

2. Where the MDEQ's 2007 rules were, by their terms, effectively conditioned on EPA approval, and where those rules became ineffective when they were disapproved by the EPA in 2008, was it reversible error for the MPSC to decide that Appellant TES incurred the costs at issue in this case due to those conditional and disapproved 2007 rules, rather than the amended and approved 2009 rules?

The Appellant answers "YES".

Appellee MPSC, by its decision, answered "NO".

The Court of Appeals, in a split decision, answered "NO".

The dissenting Judge (The Honorable William C. Whitbeck) answered "YES".

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Appellant TES operates an electric generating facility that is known as a "merchant plant" because it sells its power to Consumers Energy Company, a Michigan utility, for resale to Consumer's customers. TES is also known as a "biomass merchant plant" or "BMP" because it generates its electricity, in part, from burning wood wastes.²

In 2008, the Michigan Legislature enacted Public Act 286, MCL 460.4a, *et seq.*, which made numerous changes to the law regulating utilities in Michigan. One of the many changes in PA 286 was a provision to remedy a situation where BMPs were receiving contractual energy payments from Consumers Energy that were insufficient to cover the BMPs' out-of-pocket costs for fuel and related expenses.³ To promote renewable biomass energy and protect Michigan jobs, the Legislature inserted a provision in PA 286 to allow BMPs such as TES to recover more than the amounts that they would otherwise be paid for energy under their power purchase agreements with Consumers Energy Company if and when those contractual energy payments are insufficient to cover their out-of-pocket fuel-related costs.⁴

When PA 286 was being drafted,⁵ it was suggested that the BMPs' cost recovery should be capped at a level roughly equal to the losses that the BMPs were experiencing at that time, which was approximately \$1 million per month in the aggregate⁶, so this figure was

² TES also burns other fuels at its plant in Filer City, Michigan, a small town located southeast of Manistee.

³ MCL 460.6a (7)-(9). See Appendix D to this Application. The related expenses are known as variable operations and maintenance or "O&M" expenses. MCL 460.6a(7).

⁴ *Id.* Because the BMPs are "qualifying facilities" under federal law, the rates and terms in their power purchase agreements are not the product of arm's length negotiations, but are heavily regulated by the MPSC. See, *e.g.*, MPSC Case No. U-10127.

⁵ PA 286 started as House Bill 5524, which was introduced on December 19, 2007.

⁶ This \$1MM figure is not a cap on each individual BMP's cost recovery, but rather a cap on the total amount that all of the BMPs, as a group, can recover in the aggregate.

inserted in the draft as a cap.⁷ TES responded to the suggested cap with two major concerns. The first concern was the effect of future inflation, which was addressed by adding a provision to the bill allowing for annual CPI adjustments to the cap.⁸ TES's second concern was that a hard cap, even if adjusted for inflation, might preclude TES's recovery of new costs that it expected to incur due to the future implementation of changes in environmental laws and regulations, including those costs that TES expected to incur starting in 2009 due to regulatory changes that had been promulgated, but not yet implemented.⁹ This second concern was addressed by creating an exception to the \$1 million per month cap in order to allow for *uncapped* recovery of costs incurred due to changes in environmental rules or statutes that are implemented after the effective date of PA 286.¹⁰ The purpose of the exception was to make certain that the cap did not prevent recovery of future environmental costs which had not been factored into the initial cap.¹¹

After PA 286 was enacted, the MPSC issued an order¹² directing that the statutory provisions related to cost recovery by the BMPs should be implemented each year in Consumers Energy's annual PSCR reconciliation proceedings.¹³ Accordingly, TES filed its

⁷ MCL 460.6a(8), attached as Appendix D.

⁸ *Id.*

⁹ When PA 286 was being drafted, it was public knowledge that the EPA and the MDEQ had already promulgated rules which would likely expose TES to additional costs starting in 2009. *E.g.*, 70 Fed Reg 25162 (May 12, 2005); 70 Fed Reg 49721 (August 24, 2005); 2007 MR 12 – July 15, 2007.

¹⁰ MCL 460.6a(8), attached as Appendix D.

¹¹ While it was known that TES would incur new costs once the existing rules were implemented, the amount of those future costs was unknown. Therefore, it was more logical to create an exception to the \$1MM cap, rather than raise the cap itself.

¹² Order dated August 11, 2009 in MPSC Case No. U-16048.

¹³ In very general terms, PSCR cases involve annual filings by each of Michigan's electric utilities seeking approval from the MPSC to include certain costs in the utility's charges to its retail customers. The costs at issue in PSCR cases are the costs that the utility incurs to purchase its own fuel and the costs that the utility pays to other companies (including

first annual cost recovery petition in Consumers Energy's 2009 PSCR reconciliation case.¹⁴ It is the MPSC's final order in that case that is the subject of this appeal. The MPSC's order covered numerous other issues, but none of those other issues are relevant to this appeal. The only relevant portions of the MPSC's order are pages 22-25.¹⁵ There, the MPSC addressed Appellant TES's request for uncapped recovery of certain environmental costs which it incurred in 2009 to purchase "NOx allowances" (which are described below). In its order, the MPSC interpreted, for the first time, the following provision in PA 286:

"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 [*i.e.*, October 6, 2008]."¹⁶

This appeal relates to the MPSC's interpretation of the above-quoted statutory provision.

In the context of this appeal, the following facts are not disputed:

1. "NOx allowances" are governmental authorizations to emit a certain amount of air pollutants known as nitrogen oxides. (40 CFR §97.102; 40 CFR §97.302; Tr., p.177). The MDEQ issues allowances to electric generating units authorizing them to emit a certain amount of NOx within a given time period. To emit more than that amount of NOx during the specified time period, a generator such as TES must purchase additional NOx allowances.

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merchant plants such as the BMPs) that generate electricity and sell it to the utility for resale to the utility's customers (*i.e.*, "purchased power").

¹⁴ MPSC Case No.U-15675-R.

¹⁵ Appendix C.

¹⁶ Appendix D. MCL 460.6a(8).

(71 Fed Reg 253435-25365 (April 28, 2006); 40 CFR §97.106; §97.154; §97.160; §97.306; §97.354; §97.360).

2. Appellant TES incurred \$636,073 in costs during 2009 to purchase NOx allowances related to the generation of electric power that TES sold to Consumers Energy Company. (Tr., pp.166, 173, & 180).

3. These costs were reasonably and prudently incurred by TES (Tr., pp.173 & 180-184; MPSC Order in U-15675-R dated June 16, 2011, at p 20).

4. Nothing in state or federal law or regulations required TES to purchase NOx allowances at any time prior to 2009. (Tr., p.179; 74 Fed Reg 41638-41639 (August 18, 2009)).

5. TES did not purchase NOx allowances at any time prior to 2009. (Tr., p. 201).

6. NOx allowance costs are variable operation and maintenance costs ("O&M costs") that TES is entitled to recover in the instant case *if* the costs were incurred "due to changes in federal or state environmental laws or regulations implemented after October 6, 2008." (MCL §460.6a(8); MPSC Order in U-15675-R, dated June 16, 2011, at p.11).

7. The reason that TES purchased NOx allowances for the first time during 2009 was due to changes in federal or state environmental laws or regulations. (Tr., pp.178-180; 74 Fed Reg 41638-41639 (August 18, 2009); Mich Admin Code R 336.1803(3)(o)).

While it is undisputed that Appellant TES incurred costs in 2009 in order to comply with new rules requiring TES to purchase NOx allowances for the first time in 2009¹⁷, the parties disagree as to whether TES incurred its costs "due to" regulatory changes that were

¹⁷ This fact is not only undisputed, but is indisputable in light of the fact that Mich Admin Code R 336.1803(3)(o) clearly classifies TES as being "newly-affected" by the NOx regulations as of the 2009 CAIR NOx ozone season.

"implemented" after October 6, 2008. To properly address these issues, it is necessary to review the history of the administrative rule-making process that ultimately produced the rules that required Appellant TES to incur the costs of purchasing NOx allowances for the first time in 2009. In this regard, the relevant chronology is as follows:

2004 to 2008: The Michigan Department of Environmental Quality ("MDEQ") NOx Budget Trading Program governed NOx emissions in a specified geographic location known as the "Fine Grid Zone", which did not include the area where the TES plant is located. These regulations did not apply to Appellant TES (Mich Admin Code R 336.1802; R 336.1803(1); R 336.1821(5); See also, Mich Admin Code R 336.1803(3)(o)).¹⁸

May 12, 2005: The United States Environmental Protection Agency ("EPA") initially promulgated the Clean Air Interstate Rule ("CAIR") requiring states to change their existing "State Implementation Plans" ("SIPs") to include control measures to reduce emissions of NOx. (70 Fed Reg 25162 (May 12, 2005). States were not required to implement the requirements of the CAIR for NOx allowances until 2009. The EPA's official description of the CAIR, as published in the Federal Register, states:

"The CAIR requires that the emission

¹⁸ The MDEQ Rules expressly state that the NOx Budget Trading Program terminated on December 31, 2008: "Effective January 1, 2009, the provisions of R 336.1802, R 336.1803(1) and R 336.1803(2), R 336.1804, R 336.1806, R 336.1807, R 336.1808, R 336.1809, R 336.1810, R 336.1811, R 336.1812, R 336.1813, R 336.1814, R 336.1815, and R 336.1816 shall not apply to the control period beginning in 2009 or any control period thereafter." R 336.1821(5).

reductions be *implemented* in two phases. The first phase of CAIR NO_x reductions starts *in 2009* (covering 2009-2014) and the first phase of CAIR SO₂ reduction starts in 2010 (covering 2010-2014); the second phase of CAIR reductions for both NO_x and SO₂ starts in 2015, covering 2015 and thereafter." 70 Fed Reg 49721 (August 24, 2005). (Emphasis added).

June 25, 2007: The MDEQ promulgated proposed amendments to its State Implementation Plan pursuant to the CAIR. The MDEQ's proposal called for the changes to be implemented in 2009, but only if the proposed changes were first approved by the EPA. Moreover, the 2007 proposal, by its terms, was effectively contingent on EPA approval (2007 MR 12 – July 15, 2007).

July 16, 2007: The MDEQ submitted its proposed State Implementation Plan to the EPA pursuant to the CAIR. The submission called for the changes to be implemented in 2009 if they were approved by the EPA. (74 Fed Reg 41637-41641 (August 18, 2009)).

December 20, 2007: The EPA decided that it would conditionally approve the MDEQ's proposal, but only if Michigan made certain revisions to the proposal by December 20, 2008. *Id.* 72 Fed Reg 72256-722631 (December 20, 2007).

December 20, 2008: Because the MDEQ had not made the revisions required by the

EPA,¹⁹ the EPA's conditional approval of the MDEQ's incomplete proposal was automatically converted into a disapproval. (74 Fed Reg 41637-41641 (August 18, 2009)).

April 13, 2009:

The MDEQ submitted to the EPA a new proposal for a revised State Implementation Plan. The MDEQ requested that the EPA process the proposal while the MDEQ continued to work on completing the process of promulgating the proposed rules containing the proposal. *Id.*

May 28, 2009:

The MDEQ finally promulgated revised 2009 rules addressing the deficiencies in the 2007 rules that had been disapproved by the EPA. *Id.*

June 10, 2009:

The MDEQ submitted the 2009 revised rules to the EPA for approval. *Id.*

August 18, 2009:

The EPA announced that it would approve Michigan's proposed State Implementation Plan effective on October 19, 2009. *Id.* at p. 41638.

October 19, 2009:

Effective date of the EPA's approval of Michigan's NOx allowance requirements. *Id.* at p.41640. The new rules refer to electric generating units ("EGUs") such as TES as being

¹⁹ The apparent reason why the MDEQ did not make the required revisions was that the United States Court of Appeals for the District of Columbia issued an opinion dated July 11, 2008, vacating CAIR and its associated FIP based on "more than several fatal flaws in the rule". *North Carolina v EPA*, 531 F3d 896, 901, on rehearing in part, 550 F3d 1176 (DC Cir 2008).

"*newly-affected* EGUs". Mich Admin Code R 336.1803(3)(o)
(emphasis added).

November 30, 2009: Deadline for TES to actually take action under the new rules by acquiring NOx allowances. (Mich Admin Code R 336.1803(3), incorporating by reference 40 CFR §97.302). Pursuant to the new regulatory requirements, TES incurred NOx allowance expenses for the first time in its history during the month of November, 2009. (Tr., p.180).

Thus, the public record leaves no doubt that there were changes in "federal or state environmental laws or regulations". It is also undisputed that these regulatory changes required Appellant TES to purchase NOx allowances if, at any time in 2009 or after, TES decided to emit more than a specified amount of NOx. Further, the new rules clearly provided that TES was not required to take any action until November of 2009. Moreover, the rules were, by their own terms, effectively contingent on EPA approval, which did not occur until 2009. Finally, it is undisputed that the rules that caused TES to incur NOx costs in 2009 were the MDEQ rules, as amended in 2009 and approved by the EPA in 2009 rather than the unamended and unapproved 2007 rules, which were not in effect when TES incurred its costs. (Tr., pp. 177-180). The key disputed question, however, is whether the relevant regulatory changes were "implemented" on June 25, 2007 when the MDEQ's proposed State Implementation Plan was first promulgated, or were "implemented" at some point after October 6, 2008 when the contingent rules were amended by the MDEQ, approved by the EPA and became operative; *i.e.*, when the Implementation Plan was actually carried out.

During the hearings before the MPSC in this case, TES presented the most detailed testimony on this specific issue. Robert Joe Tondu testified, among other things, that TES purchased NOx allowances in 2009 due to changes in federal or state environmental laws that went into effect after October 6, 2008. (2Tr., pp. 166, 176, & 178-180). Specifically, Mr. Tondu testified that TES purchased its NOx allowances due to changes in the MDEQ's State Implementation Plan that became effective on October 17, 2009.²⁰ Those changes required TES to purchase its first NOx allowances by November 30, 2009.²¹

In addition to TES, other parties also filed testimony in this proceeding. While Consumers Energy Company's testimony did not specifically address the issue of when the NOx allowance rules were "implemented", Consumers Energy did, in effect, support TES' position because it requested MPSC approval to pay the Biomass Merchant Plants a total amount that included the \$636,073 due to TES for its NOx allowance costs. (Testimony of David R. Ronk, Jr., Tr., p. 53; Exhibit A-25, line 56. See also, Tr., pp. 631-632).

The MPSC Staff also filed testimony supporting TES. In particular, the MPSC Staff witness supported Consumers Energy's request to pay the amounts due to the BMPs, including the full amount of the payment that TES is seeking for its NOx allowance costs, *i.e.*, \$636,073. (Testimony of Alan Droz, as adopted by Elizabeth Rakowski, Tr., p. 679, line 15 & p. 680, line 11).²²

²⁰ 2Tr. pp. 175-180, attached hereto as Appendix E.

²¹ *Id.*

²² The MPSC Staff witness did have one criticism of the BMPs' initial position, but that point was completely unrelated to the NOx cost issue. The Staff witness objected to the manner in which the BMPs had calculated their proposed CPI adjustment. (Tr., p. 679). During the hearing, the BMPs stipulated that they would not oppose the Staff's proposed methodology (*i.e.*, calculating the CPI adjustment based on annual average indices rather than December monthly indices.) (Tr., pp. 207 & 512). Therefore, except for a \$2 difference attributable to rounding, the BMPs' final cost figure of \$15,474,784 matched Consumers Energy's cost figure

The Michigan Attorney General's only witness did not specifically address the issue of when the NOx allowance rules were "implemented", but he did criticize Mr. Tondu's pre-filed direct testimony by stating as follows:

"The witness for TES Filer City, Robert Joe Tondu, simply states that TES incurred the NOx expense and its amount. Mr. Tondu does not state why TES Filer City incurred that expense...." (Testimony of Michael J. McGarry, Sr., Tr., p. 633).

To the extent that there was any merit to this initial criticism, Mr. Tondu thoroughly remedied that alleged deficiency by presenting rebuttal testimony wherein he clearly explained why TES incurred its NOx expenses. (2Tr., pp. 175-180, attached as Appendix E).

Thus, the testimonial record regarding the issue of relevance to the instant appeal contains (1) extensive testimony presented by TES in support of NOx cost recovery, (2) a supportive request by Consumers Energy Company seeking MPSC approval to pay TES the full amount that TES requested for its NOx costs, (3) support from the MPSC Staff witness for recovery of the full amount of the NOx allowance costs requested by TES, and (4) a short statement in the direct testimony of the Attorney General's witness noting the need for additional information, which was subsequently provided in Mr. Tondu's detailed rebuttal testimony. Other than those four parties, no other party presented any testimony or exhibits that even touched on the issue of TES's right to recover its NOx costs.

Thus, when the record closed, all of the parties to the case either supported TES's right to recover its NOx costs or took no position on the issue. Notably, both the MPSC Staff and

of \$15,474,782, and both figures included the full amount of the \$636,073 requested by TES for recovery of its NOx costs. While the Staff witness supported the full recovery of the amount sought by TES, the witness did not expressly address the issue of when the NOx allowance rules were implemented.

Consumers Energy filed testimony that was supportive of TES's position.

After the hearings concluded, all of the parties had the opportunity to file briefs.²³ During the initial briefing process, the MPSC Staff attorney took the position, for the first time, that the MDEQ's NOx allowance rules were "implemented" in 2007 and, therefore, TES was not eligible to recover its 2009 NOx allowance costs in this proceeding. In a short two-paragraph argument, the MPSC Staff attorney asserted that, "TES's requirement to participate in the EPA's NOx trading program began before the 2009 SIP approval." (MPSC Staff Brief dated 2/11/11, at p. 6)²⁴ The Staff attorney did not provide any explanation or citations of any kind to support the new and unsubstantiated assertion that TES was supposedly not eligible to recover its NOx costs. Moreover, the Staff attorney did not even attempt to explain the inconsistency between the Staff's brief and the contrary testimony of the Staff's only witness, who supported full recovery of Appellant TES's NOx costs.

In his Reply Brief, the Attorney General expressed support for the MPSC Staff's new position.²⁵ The Attorney General incorrectly referred to the NOx cost issue as being "apparently no longer disputed".²⁶ He also made an enigmatic reference to non-existent testimony which was never discussed, offered, or presented.²⁷ He falsely claimed that the MPSC Staff's witness had supposedly testified "that the NOx trading requirement, which was implemented in 2009 was established before 2008, and therefore, that the 2009 NOx trading

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²³ All briefs and other documents filed at the MPSC in this case are available to the Court on the MPSC's website by entering 15675-R in the blank field labeled "search by case #" on the following web page: <http://efile.mpsc.state.mi.us/efile/>.

²⁴ Brief available at this website: <http://efile.mpsc.state.mi.us/efile/docs/15675-R/0095.pdf>

²⁵ Attorney General's Reply Brief, dated 2/25/11, at pp. 1-2. Available at this website: <http://efile.mpsc.state.mi.us/efile/docs/15675-R/0102.pdf>

²⁶ Attorney General's Reply Brief, dated 2/25/11, at p.1.

²⁷ Attorney General's Reply Brief, dated 2/25/11, at p.2.

costs do not qualify for recovery above the statutory cap set by MCL §460.6a(8).²⁸ It is quite revealing that the Attorney General, while attempting to defeat TES's claim by citing this fictional testimony, chose to use wording that actually supported TES because he clearly stated that the NOx trading requirement "was *implemented* in 2009".²⁹

The only other parties to brief the specific issue of TES's request for recovery of NOx costs were TES and the other BMPs, who supported recovery of TES's NOx costs.³⁰

Following submission of the parties' briefs and reply briefs, the Administrative Law Judge ("ALJ") issued a Proposal for Decision ("PFD") on March 20, 2011. While the bulk of the PFD addressed other issues that are unrelated to the question of statutory construction that is relevant to this appeal, a small portion of the PFD did address TES's entitlement to recovery of its NOx allowance costs.³¹ There, the ALJ stated that "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."³² Based on that superficial "analysis", the ALJ concluded that the NOx reporting requirements applicable to TES were "implemented" on June 25, 2007 when the MDEQ's proposed State Implementation Plan was first promulgated contingent on EPA approval, rather than at some point during 2009 when (a) the revised rules

²⁸ *Id.* Available at this website: <http://efile.mpsc.state.mi.us/efile/docs/15675-R/0102.pdf>

²⁹ *Id.* (emphasis added). The fact that the NOx trading requirement was implemented in 2009 is the central point of this appeal.

³⁰ In its Reply Brief, the Michigan Environmental Council ("MEC") expressed support for the Attorney General's contention that the BMPs had not met their burden of proving that their fuel and variable O&M costs were reasonably and prudently incurred. In that argument, however, the MEC made no specific reference to TES's NOx costs or the implementation date issue. The Reply Brief expressly stated that, "MEC takes no position on the Attorney General's other arguments related to the recovery of these costs by the BMPs." (MEC Reply Brief, dated 2/25/11, at p. 24).

³¹ Proposal for Decision in MPSC Case No. U-15675-R, dated 3/20/11, at pp.56-59. Available at <https://efile.mpsc.state.mi.us/efile/docs/15675-R/0107.pdf>

³² *Id.*, at p.59, citing 2007 MR 12, R 360.1802a et seq.

were promulgated (May 28, 2009), (b) the EPA announced that it would be approving the new rules (August 18, 2009), (c) the EPA's approval became effective (October 19, 2009), and (d) the regulatory changes were actually effectuated (November, 2009).

After the ALJ issued the PFD, the parties filed Exceptions on May 4, 2011 and Replies to Exceptions on May 18, 2011. The record was then submitted to the MPSC for a final decision. The Commission issued its order on June 16, 2011.

With respect to the issue that is the subject of this appeal, the only pertinent pages of the MPSC Order under review are pages 22-25 of the final order. On those four pages, the MPSC addressed the implementation of the MDEQ's NOx rules and then held as follows:

"The Commission finds that Michigan implemented the CAIR requirements by making these revisions to Part 8 on June 25, 2007. The Commission agrees with the ALJ that the **change in state law took place** before October 6, 2008, and therefore the petition for TES's 2009 NOx allowance costs must be denied."³³

Notably, the MPSC did not specifically address the issue of how to define the word, "implemented" in the context of MCL §460.6a(8), but instead simply stated that the relevant regulatory change "took place" before the relevant cut-off date of October 6, 2008.

On July 15, 2011, TES filed a timely Claim of Appeal with the Michigan Court of Appeals. On April 29, 2014, the Michigan Court of Appeals issued an unpublished opinion. Following TES's submission of a timely Motion for Reconsideration, the Court of Appeals granted TES's motion, vacated its prior opinion, and issued a Published Opinion dated September 25, 2014. The Court of Appeals' Opinion was a split decision, with Judges Krause

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³³ MPSC Order at pg. 25, footnote omitted, emphasis added.

and Fitzgerald holding against TES and Judge Whitbeck issuing a Dissenting Opinion³⁴ concluding as follows:

"I conclude that the word "implemented" in MCL 460.6a(8) does not have the same meaning as the word "promulgated." I also conclude that the NOx requirements were not implemented until 2009 because they were not effective until 2009. Therefore, the exception in MCL 460.6a(8) applied to TES Filer. I conclude that the Public Service Commission erred when it determined that TES Filer was not allowed to recover the costs of purchasing NOx allowances. I therefore respectfully dissent from the majority's contrary conclusion in Docket No. 305066." (*See Appendix B*).

In the Argument section of this Application, as set forth below, Appellant TES will argue that MCL §460.6a(8) must be applied as written and interpreted in accordance with its common meaning. Accordingly, the relevant date is not the date in 2007 when the MDEQ first proposed to change its implementation plan, but the date in 2009 when the regulatory changes were actually implemented.

ARGUMENT

I. THE APPLICABLE STANDARD OF REVIEW IS *DE NOVO*.

This appeal involves the proper interpretation of one sentence in MCL §460.6a(8). Because statutory construction is a question of law, the applicable standard of review in this appeal is *de novo*. *In Re MCI Telecom Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999); *Attorney Gen v Pub Serv C'omm*, 247 Mich App 35, 39; 634 NW2d 710 (2001).

This court need not afford any deference to the Michigan Public Service Commission's ("MPSC's") interpretation of that word. While Michigan courts apply different standards of

³⁴ The Court of Appeals addressed two consolidated appeals arising out of the same MPSC case, but involving completely different and unrelated issues. Judge Whitbeck's separate decision dissented with respect to the decision that is the subject of this Application for Leave to Appeal (Court of Appeals Docket No. 305066), and concurred with respect to the decision in the unrelated appeal (Court of Appeals Docket No. 305083).

review for different agency functions, the Michigan Supreme Court has uniformly held that where, as in this case, the appeal involves an issue of statutory interpretation, the court must review the agency's interpretation *de novo*:

"This Court has uniformly held that statutory interpretation is a question of law that this Court reviews *de novo*. Thus, concepts such as "abuse of discretion" or "clear error," which are similar to the standards of review applicable to other agency functions, simply do not apply to a court's review of an agency's construction of a statute." *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 102; 754 NW2d 259 (2008), on remand, 2008 WL 4978685 (Mich PSC 2008).

Indeed, to apply any standard of review other than *de novo* in this case would "threaten the separation of powers principles . . . by allowing the agency to usurp the judiciary's constitutional authority to construe the law and [would] infringe on the Legislature's lawmaking authority." *Id.* An agency cannot assume the Court's "constitutional role as the final arbiter of the meaning of a statute." *Id.* at 100.

Applying a *de novo* standard of review, this Court is not bound by the MPSC's statutory interpretation and should instead review the meaning of MCL §460.6a(8) anew. An "agency's interpretation [of a statute] is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 103; 754 NW2d 259 (2008), on remand, 2008 WL 4978685 (Mich PSC 2008).

In its recent decision in *In re Complaint of Rovas, supra*, the Supreme Court made it clear that a reviewing court need not afford any deference to an agency's interpretation of a statute, but, instead, must merely "give 'respectful consideration' to the agency's construction of the statute and provide 'cogent reasons' for overruling an agency's interpretation. *Id.* at

p.103. The Court expressly confirmed that "[r]espectful consideration is not equal to deference." *Id.*

Consistent with this precedent, the Michigan Supreme Court subsequently held as follows:

"When considering an agency's statutory construction, the primary question presented is whether the interpretation is consistent with or contrary to the plain language of the statute. While a court must consider an agency's interpretation, the court's ultimate concern is a proper construction of the plain language of the statute." *Great Wolf Lodge of Traverse City, LLC v Public Service Comm'n*, 489 Mich 27, 47-48; 799 NW2d 155 (2011), rehearing denied, 489 Mich 964; 798 NW2d 765 (2011).

In conformance with the Supreme Court's consistent rulings on this issue, the Michigan Court of Appeals recently held that "even a longstanding administrative interpretation cannot overcome the plain language of a statute." *Michigan Farm Bureau v DEQ*, 292 Mich App 106; 807 NW2d 866 (2011). In the context of the instant appeal, as explained below, there is no history of any longstanding administrative interpretation. In fact, the order on appeal represents the first time that the MPSC has ever interpreted this new statutory provision.³⁵ Hence, the MPSC's interpretation of the term "implemented" in MCL §460.a(8) is an issue of first impression and not a longstanding administrative interpretation. This is significant because, even prior to the Supreme Court's recent pronouncements regarding the difference between respectful consideration and deference, it was well-established that a reviewing court should "not afford the same measure of deference to an agency's initial interpretation of new legislation as it does to a longstanding interpretation." *Attorney General v Public Service Com'n*, 269 Mich App 473, 480; 713 NW2d 290 (Mich

³⁵ The issue, however, will arise again on an annual basis in Consumers' Energy's yearly PSCR Reconciliation Cases.

App 2005), appeal denied, 475 Mich 883; 715 NW2d 821 (2006), on remand 253 PUR 4th 174; 2006 WL 2128675 (Mich PSC 2006).

Accordingly, where, as here, an MPSC is interpreting a newly effective statutory provision for the first time, this court should review the issue *de novo* and should not provide any deference whatsoever to the agency's interpretation when conducting its review. "Statutory construction is the domain of the judiciary" and this Court may not abandon or delegate its responsibility to interpret statutory language and legislative intent. *Attorney General v Public Service Commission*, 231 Mich App 76, 78; 585 NW2d 310 (1998) appeal denied, 459 Mich 967; 590 NW2d 577 (1999); *Basic Prop Ins Ass'n v OFIR*, 288 Mich App 552, 808 NW2d 456 (2010), appeal granted, 488 Mich 1034; 793 NW2d 232 (2011).

As explained below, the MPSC's interpretation of MCL §460.6a(8) clearly ignores the plain language and meaning of that statutory provision and must be reversed.

II. SUMMARY OF ARGUMENTS.

The instant appeal involves a decision of the MPSC and a subsequent split decision of the Court of Appeals that misinterpreted a statutory provision which entitles Appellant TES to recover certain environmental costs if those costs were "incurred due to changes in federal or state environmental laws or regulations that are implemented after [October 6, 2008]".³⁶ Appellant TES incurred such costs in 2009 due to certain rules that were promulgated by the MDEQ in response to a directive from the U.S. EPA. The EPA directed the MDEQ to amend its State Implementation Plan to provide for new NOx requirements in 2009. The MDEQ first responded to the EPA directive by promulgating amendments to its State Implementation Plan

³⁶ MCL §460.6a(8). Supporting citations for the statements in this Summary section are provided in the Statement of Facts and in the following Argument sections of this Application and need not be repeated here.

in 2007. These amendments were, by their terms, contingent on EPA approval before they could take effect. The EPA did not finally approve the contingent rules until after the rules were revised in 2009. Both the 2007 contingent rules and the 2009 revised rules provided for implementation of the new NOx requirements in 2009.

Since the relevant rules were implemented in 2009 (*i.e.*, after the statutory cut-off date of October 6, 2008), the applicable statute entitles Appellant TES to recover its costs. The MPSC, however, wrongly concluded that the "changes in federal or state environmental laws or regulations" that required Appellant TES to incur its costs in 2009 were implemented by the MDEQ in 2007 (*i.e.*, before the statutory cut-off date of October 6, 2008). Based on that error, the MPSC denied Appellant's claim for recovery of its environmental costs.

The MPSC's decision is legally defective for at least two reasons. First, the MPSC erroneously concluded that the 2007 rules were implemented when they were promulgated. Second, the MPSC erroneously concluded that TES incurred its costs due to the MDEQ's contingent and unapproved 2007 rules, rather than the revised rules that were approved in 2009. Each of these errors constitutes an independently sufficient reason for reversing the MPSC's decision.

The MPSC's first legal error arose because the MPSC chose to ignore the significance of the word, "implemented", in the governing statute. Under well-established precedent, every word in a statute is presumed to have meaning, and, therefore, full effect must be given to the word, "implemented", as used in the governing statute. Thus, it is not appropriate to ignore the word, "implemented", in the statute or to assume that the Legislature intended to use the word, "promulgated", when it used the word, "implemented".

Moreover, the law is clear that a word used in a statute should be construed and understood according to the common and approved usage of that word. As reflected in numerous dictionaries, the common and approved usage of the word, "implemented", is to have fulfilled, carried out, or effectuated a plan. Numerous courts have adopted this same widely recognized definition of the word, "implemented", in decisions holding that various plans are not considered to be "implemented" when they are adopted, but instead "implementation" occurs when the plans are actually carried out. All of these many court decisions are not only consistent with the dictionary definition of the word, "implement", but are also consistent with common sense.³⁷

The MDEQ's 2007 rules did not purport to impose any new environmental requirements on Appellant TES in 2007, but rather expressed a plan to impose such requirements in 2009. Based on that fact, the MPSC should have recognized that the 2007 rules, even if they were assumed to be in effect during the relevant time period (which they were not), were not "implemented" within the meaning of the statute until the plan embodied in the rules was actually carried out in 2009. Since the implementation date came after the statutory cut-off date of October 6, 2008, the MPSC should have granted Appellant TES' request for cost recovery.

The second legal error in the MPSC's decision was the conclusion that the MDEQ's 2007 rules were in effect during the time period when Appellant TES incurred its NOx allowance costs. In fact, contrary to the MPSC's conclusion, the MDEQ's 2007 rules had no

³⁷ The MDEQ rules of relevance to this appeal constitute a "state implementation plan" under federal law, thus underscoring the fact that the rules constitute a plan for future implementation of new requirements. Also, the Federal Register expressly states that the first phase of the new NOx regulations were to be "implemented" in 2009.

force and effect at the time when Appellant TES incurred its NOx allowance costs in 2009. This is true because the MDEQ's 2007 rules, by their terms, were effectively contingent on EPA approval. Absent such approval, the 2007 rules were non-functional and had no force and effect. Because the MDEQ's 2007 NOx allowance rules were disapproved by the EPA in 2008, they were not in effect when Appellant TES incurred its NOx allowance costs in 2009.

The governing statutory provision, MCL §460.6a(8), makes it clear that the key question is whether Appellant TES incurred its 2009 NOx allowance costs "due to" the MDEQ's 2007 rules. Clearly, Appellant TES could not have incurred those 2009 costs "due to" the MDEQ's 2007 rules because those 2007 rules had been disapproved by the EPA in 2008 and were not in effect at the time when Appellant TES purchased its 2009 NOx allowances.

Contrary to the MPSC's erroneous ruling, Appellant TES incurred the costs at issue in the instant case due to the MDEQ's 2009 NOx allowance rules. Those 2009 rules became legally effective as of October 19, 2009, when they were approved by the EPA. That date, of course, came after the statutory cut-off date of October 6, 2008. Accordingly, Appellant TES is entitled to recover its 2009 NOx allowance costs in the instant case.

In summary, both the effective date and the implementation date of the rules that required TES to incur its NOx allowance costs came after the statutory cut-off date of October 6, 2008 that determines Appellant TES' rights to recover those costs under 2008 PA 286, MCL §460.6a(8). Thus, the MPSC erred as a matter of law when it denied Appellant TES' claim for cost recovery in the instant case. Similarly, as explained below, the Court of Appeals, in its split decision, erred when it affirmed the MPSC's erroneous decision.

III. THE MPSC ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE PERTINENT MDEQ RULES WERE IMPLEMENTED IN 2007.

A. The Statute At Issue Clearly Provides That The Appellant's Right To Recover Nox Allowance Costs Is Dependent On The Date When Changes In Federal Or State Environmental Laws Or Regulations Are Implemented.

The statutory provision that is the subject of this appeal provides, in pertinent part, as follows:

"(8) ... 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 [October 6, 2008]." MCL §460.6a(8). (emphasis added).

The wording of this statutory provision makes it clear that the relevant date with respect to changes in federal or state environmental laws or regulations is the date when changes in federal or state environmental laws or regulations were "implemented". The statute makes no reference to the date when changes are "promulgated", or "proposed".

B. Michigan Courts Have Consistently Held That Every Word In A Statute Is Presumed To Have Meaning, And, Therefore, Full Effect Must Be Given To The Words Used In A Statute.

Michigan case law makes it clear that this court must follow the established rules of statutory construction and discern and give effect to the intent of the Legislature when interpreting a statute. *People v Jackson*, 487 Mich 783, 790; 790 NW2d 340 (2010), appeal after new sentencing hearing, 2012 WL 5854200 (2012). As the Michigan Supreme Court

noted in *Brightwell v Fifth Third Bank*, 487 Mich 151, 157; 790 NW2d 591 (2010), "The primary goal of statutory interpretation is to give effect to the intent of the Legislature as expressed in the statute." *Id.* at p. 157 (citing *Brown v Detroit Mayor*, 478 Mich 589, 593; 734 NW2d 514 (2007)).

A court discerns the Legislature's intent by examining the plain language used and reading it in context and as a whole. *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011). Indeed, "the most reliable indicator of the Legislature's intent is the words in the statute." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011).

Consistent with these principles, the Michigan Supreme Court has held that every word in a statute must be presumed to have meaning:

"It is a cardinal rule of statutory construction that full effect shall be given to every part of the act under consideration. Every clause and every word is presumed to have some force and meaning." *Wyandotte Sav Bank v Eveland*, 347 Mich 33, 44; 78 NW2d 612 (1956) (internal citations omitted).

The Michigan Supreme Court reiterated this key principle in 2011 when it held that, "every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011).

Importantly, this basic principle of statutory construction requires that a court "should not speculate that the Legislature inadvertently used one word or phrase when it intended another." *People v Peals*, 476 Mich 636, 669; 720 NW2d 196 (2006). A court cannot read requirements into a statute that the Legislature did not put there. *In re Beck*, 287 Mich App 400, 402; 788 NW2d 697 (2010), appeal granted, 486 Mich 936; 782 NW2d 199 (2010), affirmed on other grounds, 488 Mich 6; 793 NW2d 562 (2010).

In the context of the instant appeal, this well-established principle of statutory construction makes it clear that neither the MPSC nor this court may speculate or assume that the Legislature inadvertently used the word, "implemented" in MCL §460.6a(8). Rather, the MPSC and the court must take guidance from the fact that the Legislature did not make the Appellant's rights dependent on when regulatory changes "took place" or were "promulgated" or "proposed" or "enacted" or "effective" or "approved" or "adopted". The Legislature could have selected any one of those words to use in MCL §460.6a(8), but it did not. Instead, the Legislature specifically selected and used the word, "implemented".

In accordance with the well-established precedent cited above, this court must presume that the word, "implemented", as used in MCL §460.6a(8), has meaning and must be given effect.

Since 2008 Public Act 286 does not define the term "implemented", the court must look to common law principles of statutory construction to interpret that word. The following section of this application summarizes the basic legal principle that must guide this court's decision as to the meaning of the word in question.

C. A Word Used In A Statute Should Be Construed And Understood According To The Common And Approved Usage Of That Word.

Michigan courts have consistently held that a non-technical word used in a statute should be construed and understood in accordance with the common and approved usage of that word. For example, in *Bowers v VanderMeulen-Bowers*, 278 Mich App 287, 294; 750 NW2d 597 (2008), appeal denied, 750 NW2d 166 (2008), the court held that a court should "presume that the Legislature intended the common meaning of the words used in the statute, and [the court] may not substitute alternative language for that used by the Legislature."

When reviewing a statute, non-technical "words and phrases shall be construed and understood according to the common and approved usage of the language." *McCormick v Carrier*, 487 Mich 180, 192; 795 NW2d 517 (2010).

Thus, this court's responsibility in connection with the instant appeal is to determine the common meaning of the word, "implemented". To determine the ordinary meaning of undefined words in a statute, a court may consult a dictionary. *People v Tennyson*, 487 Mich 730, 738; 790 NW2d 354 (2010); *United States v Groce*, 398 F 3d 679, 682 (4th Cir 2005). As explained in the following paragraphs, many courts have consulted various dictionaries to find the definitions of the words, "implemented" or "implement" or "implementation", and those courts have uniformly held that a plan or rule is not "implemented" until it is actually fulfilled, carried out, executed, or effectuated.

D. The Common And Approved Usage Of The Term, "Implemented", As Reflected In Numerous Dictionaries, Is To Have Fulfilled, Carried Out, Or Effectuated A Plan.

As noted above, courts may consult dictionaries to determine the ordinary meaning of a word used in a statute. Accordingly, it is instructive to note the following dictionary definitions of the word, "implement", when used as a verb:

THE RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2001) (as cited in *Brightwell v Fifth Third Bank of Michigan*, 487 Mich 151, 161 n28; 790 NW2d 591 (2010): "to fulfill; carry out [or] put into effect according to a definite plan or procedure."

THE OXFORD ENGLISH DICTIONARY (J.A. Simpson and E.S.C. Weiner, eds., 2nd ed. 1989, at 722): "[t]o complete, perform, carry into effect (a contract, agreement, etc.); to fulfil (an engagement or promise)."

THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH (R.E. Allen, ed., 8th ed. 1990, at 592): to "put (a decision, plan, etc.) into effect" or to "fulfill (an undertaking)".³⁸

ENCARTA WORLD ENGLISH DICTIONARY (Bloomsbury Publishing, PLC eds., 1999, at 904): "CARRY OUT OR FULFILL to put something into effect or action. *The plan has yet to be fully implemented.*"

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (Houghton Mifflin Company eds., 2000, at 880): "To put into practical effect; carry out: *implement the new procedures.*"

The online dictionary, [thefreedictionary.com](http://www.thefreedictionary.com): "to put into practical effect; carry out: *implement the new procedures.*" ([thefreedictionary.com](http://www.thefreedictionary.com), available at <http://www.thefreedictionary.com/implement>).

The online dictionary, dictionary.cambridge.org: "to put a plan or system into operation: *The changes to the national health system will be implemented next year.*" (dictionary.cambridge.org, available at <http://dictionary.cambridge.org/dictionary/british/implemented> 1).

These multiple dictionary definitions are strikingly consistent. All of them make it clear that a plan is not "implemented" when the plan is adopted. Rather, a plan is "implemented", in the common sense meaning of that word, when the plan is fulfilled, carried out and put into effect.

As quoted above, some dictionaries provide examples of how the word, "implemented" should be used in a proper sentence. These examples are very relevant to the instant appeal. For instance, the ENCARTA WORLD ENGLISH DICTIONARY, *supra*, provides this

³⁸ Similarly, the online version of the OXFORD ENGLISH DICTIONARY also defines the word as to "put (a decision, plan, agreement, etc.) into effect". (OXFORD ENGLISH DICTIONARY, at <http://oxforddictionaries.com/definition/implemented?region=us>)

example: "*The plan has yet to be fully implemented.*" Similarly, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, FOURTH EDITION, *supra*, gives this example: "*implement the new procedures.*" The online dictionary, [yourdictionary.com](http://www.yourdictionary.com), states that an example of something being "implemented" is "a manager enforcing a new set of procedures."³⁹ Each of these examples underscore the fact that 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.

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.

E. Numerous Courts Have Adopted This Same Widely Recognized Definition Of The Word, "Implemented", In Decisions Holding That Various Plans Are Not Considered To Be "Implemented" When They Are Adopted, But Instead "Implementation" Occurs When The Plans Are Actually Carried Out.

Numerous courts in Michigan and across the country have uniformly interpreted the word, "implemented", and its variants such as "implementation" and "implement" in accordance with the plain meaning of those terms, as reflected in the dictionary definitions cited above. For example, in *US v Hammer*, 121 FSupp2d 794, 798 (MD Pa 2000), a federal court relied on the definition of "implementation" in WEBSTER'S THIRD NEW INTERNATIONAL

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³⁹ Available at <http://www.yourdictionary.com/implement>

DICTIONARY when construing the meaning of a statute related to the death penalty. The court in *Hammer* held:

"The term "imposed" throughout the federal death penalty statute relates to the adjudication by the court and not the actual infliction of the punishment.

....

In contrast with respect to the actual infliction of the punishment the federal death penalty statute uses the term "implementation." "Implement" is defined as "to give practical effect to and ensure of actual fulfillment by concrete measures." Webster's Third New International Dictionary (1961). "Implementation" is defined as "the act of implementing or the state of being implemented." *Id.* (emphasis added).

After citing this dictionary definition, the court in *Hammer* held that a death sentence is not "implemented" when the sentence is imposed, but only when the punishment is actually inflicted. In essence, the court held that even though a death sentence is a clear and binding plan to execute a prisoner, that plan is not "implemented" until the plan is actually carried out and put into effect. While the facts in *Hammer* are obviously different from the facts in the instant appeal, the legal analogy between the issue in *Hammer* and the issue in the instant appeal is clear. The MDEQ's plan to require Appellant TES to purchase NOx allowances in 2009 was not "implemented" until that plan was carried out and put into effect in 2009.

Similarly, in *Gaalla v Citizens Medical Center*, 2010 WL 5387610, *1-2 (SD Tex 2010), a federal court, while construing the scope of a preliminary injunction, determined that the term, "implementing", means "to put into effect." There, the court was asked to determine whether the defendant had violated the terms of a preliminary injunction that, in relevant part, enjoined the defendant from "implementing Act 1 of the Board Resolution...."⁴⁰ When

⁴⁰ *Id.* at *1.

interpreting the term "implementing", the court referred to a dictionary definition of that term and found as follows:

"In this context, the term "implementing" is generally defined as 'to put into effect,' and thus contemplates more than actual, formal passage of the Board Resolution."⁴¹

Accordingly, the Court in *Gaalla* held that the defendants had implemented the Board Resolution by engaging in conduct that actually effectuated the terms of that Resolution. Again, as in *Hammer, supra*, the court's decision in *Gaalla* recognizes the important distinction between adopting a plan and implementing a plan. Implementation involves more than merely passing resolution or adopting a plan requiring future action. It involves actually carrying out the plan.

The same basic point was reiterated by the Sixth Circuit in *Hadix v Johnson*, 66 F3d 325; 1995 WL 559372, *7 (6th Cir 1995). There, the court addressed a series of issues related to enforcement of a consent decree pertaining to the conditions in a Michigan prison. One of the issues involved a provision in the consent decree requiring that prisoners arriving at the prison receive psychological screening and that "[t]he recommendations resulting from the screening shall be implemented...."⁴² The appellate court cited approvingly the District Court's decision that merely formulating a treatment plan does not constitute "implementation". According to the court, "implementation" means that the plan must actually be carried out:

...the court found it insufficient to simply diagnose a serious condition and formulate a program plan; "implementation" means that the "program plan" must actually be carried out.This

⁴¹ *Id.* at *2 (quoting WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY (1988)).

⁴² *Hadix, supra*, at *7.

finding is consonant with the generally accepted meaning of "implementation."⁴³

The Michigan Supreme Court also had occasion to interpret the word, "implement" in the recent case of *Brightwell v Fifth Third Bank of Michigan*, 487 Mich 151, 161 n28; 790 NW2d 591 (2010). In *Brightwell*, the Court considered the meaning of that word in the context of determining the proper venue for hearing a civil rights claim. The Court determined that a violation of the Civil Rights Act occurs when a discriminatory employment decision is made and implemented.⁴⁴ In reaching its decision, the Court quoted the definition of "implement" in the RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2001):

"Implement" is defined in part as "to fulfill; carry out [or] put into effect according to a definite plan or procedure".⁴⁵

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.

Yet another case with a similar holding is *US v State of Michigan*, 940 F2d 143, 157 (6th Cir 1991), where, in the context of a construing a consent decree requiring Michigan to "design and implement a professionally based classification," the court ruled that "Michigan shall meaningfully implement the security classification plan filed on June 3, 1988 by actually placing individual inmates in accordance with their classification profiles ...".

See also, *Netflix, Inc v Blockbuster, Inc*, 477 F Supp 2d 1063, 1077 (ND Cal 2007) ("'Implemented' is generally understood to mean 'carried out' or 'accomplished'"); *Laidlaw Waste Systems, Inc v Consolidated Rail Corp*, 85 Ohio St 3d 413, 417; 709 NW2d 124 (1999)

⁴³ *Id.*

⁴⁴ *Brightwell, supra*, at p 168.

⁴⁵ *Brightwell, supra*, at p 161 n28.

(Utilizing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY to define "implement" as "to carry out ... accomplish, fulfill ... to give practical effect to ..."); *Commonwealth v Wright*, 256 Va 236, 241; 504 SE2d 862 (1998) (Construing the verb "implement" to mean "to carry out," as set forth in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY); *Utilities Management Consultants Inc v International Paper Co*, 1998 WL 252117, *3 n3 (ED Pa 1998) ("Implement" means "to give practical effect to and ensure of actual fulfillment by concrete measures"); *Mullins v NC Criminal Justice Education & Training Standards Comm'n*, 125 NC App 339, 347; 481 SE2d 297 (1997) (Interpreting the word "implement," as used in a North Carolina statute, to mean "to carry out ... to give practical effect to and ensure of actual fulfillment by concrete measures"); *Puget Sound Energy, Inc v US*, 47 Fed Cl 506, 509 (2000) (Construing the word "implementation" to mean "the act of carrying out, fulfilling, accomplishing-to give practical effect to and ensure actual fulfillment by concrete measures," as set forth in WEBSTER'S THIRD INTERNATIONAL DICTIONARY); *State v Fugate*, 332 Or 195, 207-208; 26 P3d 802 (2001) (Determining the word "implement," as used in the title of a senate bill, to mean "to carry out: accomplish, fulfill"); *City of Burbank, California v US*, 273 F3d 1370, 1381 (Fed Cir 2001) (citing VII THE OXFORD ENGLISH DICTIONARY 722 (2d ed. 1989) as a basis for holding that "'Implement' means '[t]o complete, perform, carry into effect (a contract, agreement, etc.); to fulfill (an engagement or promise).'); *Reed v Rhodes*, 472 FSupp 603, 607-608 (ND Ohio 1979) (Distinguishing implementation activities from planning activities in the context of orders for stay. "Implementation activities are those ultimate steps which immediately carry out or accomplish the overall remedy").

F. All Of These Many Court Decisions Are Not Only Consistent With The Dictionary Definition Of The Word, "Implement", But Are Also Consistent With Common Sense.

The wealth of judicial precedent cited above is not only consistent with the dictionary definition of the word, "implement", but these court decisions are also consistent with the common and accepted usage of the term, "implemented". For example, President Obama signed the Affordable Care Act, a/k/a "Obamacare", into law in 2010.⁴⁶ By its terms, the Act provided for numerous changes to be implemented over many years, with the last change to be implemented in 2018. Indeed, if one goes online and searches for "Affordable Care Implementation", one will find "implementation timelines" detailing which provisions in the Act are scheduled to be implemented in which year.⁴⁷

For another example, assume hypothetically that a rule is adopted to change the date for filing tax returns from April 15th to February 15th, beginning in calendar year 2017. If a taxpayer calls a tax advisor today and asks whether the new rule has been implemented yet, it is simply not reasonable to expect the tax advisor to respond, "Yes, the new rule has been implemented" merely because the rule was promulgated. Common sense dictates that the correct answer is, "No, the new rule will not be implemented until 2017".

Not surprisingly, the commonly accepted meaning of "implemented" is also reflected in the Michigan Court Rules. For example, both MCR 2.404(D) and MCR 2.410(F) direct the chief judge to supervise the "implementation" of those rules. Also, MCR 3.218(2)(1)

⁴⁶ Patient Protection and Affordable Care Act, Public Law 111-148, March 23, 2010, 124 STAT.119, Act 42 USC 18001.

⁴⁷ *E.g.*, <http://kff.org/interactive/implementation-timeline/>

provides that a friend of the court office must provide other agencies with access to certain records as necessary "to implement the state's plan" under a specific federal statute.

Similarly, Michigan Court of Appeals IOP 7.203(G) states: "As authorized by MCR 7.203(G) and Administrative Order 2004-5, commencing January 1, **2005**, the Court of Appeals implemented an expedited track for summary disposition appeals." Both the court rule and the Administrative Order referenced in the IOP were adopted on Oct 5, 2004, but the court's IOP states that the expedited track was not "implemented" until Jan 1, 2005.

All of these examples make it clear that, under the common and accepted definition of "implemented", any written plan requiring the future implementation of a change is not considered to be implemented until the plan is actually carried out.

G. The MDEQ Rules Of Relevance To This Appeal Constitute A "State Implementation Plan" Under Federal Law, Thus Underscoring The Fact That The Rules Constitute A Plan For Future Implementation Of New Requirements.

It is instructive to point out that the MDEQ rules in question are formally known as a "State Implementation Plan".⁴⁸

The fact that the MDEQ rules are known as a "State Implementation Plan" underscores the fact that there is a recognized distinction between a plan and the implementation of that plan. Consistent with the common and accepted usage of the English language, the MDEQ rules, when promulgated, constituted a plan for future implementation of new requirements.

⁴⁸ 74 Fed Reg 41638 (August 18, 2009) (emphasis added).

H. The Federal Register Expressly States That The First Phase Of The New Nox Regulations Were To Be "Implemented" In 2009.

The EPA's official description of the Clean Air Interstate Rule ("CAIR"), as published in the FEDERAL REGISTER, states:

"The CAIR requires that the emission reductions be *implemented* in two phases. The first phase of CAIR NO_x reductions *starts in 2009* (covering 2009-2014) and the first phase of CAIR SO₂ reduction starts in 2010 (covering 2010-2014); the second phase of CAIR reductions for both NO_x and SO₂ starts in 2015, covering 2015 and thereafter." 70 Fed Reg 49721 (August 24, 2005). (Emphasis added).

Thus, the federal agency that is ultimately responsible for approving the MDEQ regulations pertinent to the instant appeal used the word, "implemented" in exactly the same manner as is advocated by Appellant TES in this appeal. Consistent with the common usage of the word, "implemented", the EPA clearly stated that the new NO_x regulations were to be "implemented" in 2009 when the State Implementation Plans were actually carried out and put into effect.

I. In Other Cases, The MPSC, Itself, Has Used The Word, "Implemented" In A Manner Consistent With The Commonly Accepted Definition Of That Word.

As explained above, numerous courts have cited numerous dictionaries for the same conclusion that to "implement" something means "to fulfill; carry out [or] put into effect according to a definite plan or procedure." Moreover, the applicable precedent is consistent with common usage of the English language, as reflected in the name of the rules and in statements by the EPA. Indeed, the MPSC itself frequently issues orders in which it distinguishes between approval of a plan and implementation of that plan. For example, in MPSC Case No. U-15890, the MPSC issued an order dated June 3, 2010 in which it approved

an energy optimization plan submitted by Michigan Consolidated Gas Company.⁴⁹ The MPSC subsequently issued a separate order dated June 24, 2010 authorizing Mich Con to implement its plan.⁵⁰ In that case and other cases, the MPSC has used the term, "implement", in a manner that is consistent with the numerous dictionary definitions and court decisions cited above.

As applied to the statute at issue in the instant appeal, this well-established precedent makes it clear that the pertinent MDEQ regulations were not "implemented" until the planned actions envisioned in the regulations were actually carried out.

J. It Was Reversible Error For The MPSC To Decide That Rules Setting Forth A Plan To Impose Certain New Regulatory Requirements In 2009 Were "Implemented" When The MDEQ Promulgated Its Initial Proposal In 2007, Rather Than When The Plan Embodied In The Final Rules Was Actually Carried Out In 2009.

In the decision under review in the instant appeal, Appellee MPSC was required to comply with a statutory provision clearly stating that Appellant TES is entitled to recover its NOx allowance costs if those costs were "incurred due to changes in federal or state environmental laws or regulations *implemented* after October 6, 2008."⁵¹ Faced with that statutory provision, the MPSC held that "the change in state law took place before October 6, 2008, and therefore the petition for TES's 2009 NOx allowance costs must be denied."⁵²

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⁴⁹ <http://efile.mpsc.state.mi.us/efile/docs/15890/0093.pdf>

⁵⁰ <http://efile.mpsc.state.mi.us/efile/docs/15890/0096.pdf>

⁵¹ MCL §460.6a(8)

⁵² MPSC Order in Case No. U-15675-R, dated 6/16/11, at p.25 (emphasis added).

The MPSC states in its order that the rules were supposedly implemented on June 25, 2007.⁵³ That date is the date when the MDEQ first promulgated the original rules embodying that agency's initial proposal to the EPA. As detailed in the Statement of Facts to this Application, the 2007 date identified by the MPSC as the "implementation" date came *before* all of these dates:

1. April 13, 2009, the date when the MDEQ submitted to the EPA a new proposal for a revised State Implementation Plan.
2. May 28, 2009, the date when the MDEQ finally promulgated the revised rules addressing the deficiencies in the 2007 rules that had been disapproved by the EPA.
3. June 10, 2009, the date when the MDEQ submitted the revised 2009 rules to the EPA for approval.
4. August 18, 2009, the date when EPA approved Michigan's State Implementation Plan.
5. October 19, 2009, the effective date of the EPA's approval of Michigan's State Implementation Plan, containing new NOx allowance requirements.
6. November 30, 2009, the deadline for TES to actually take action under the new rules by acquiring NOx allowances, and the month when TES purchased its first NOx allowances.

Notably, all of the dates listed above occurred in 2009, and therefore came after the cut-off date of October 6, 2008 that is specified in MCL §460.6a(8). Nevertheless, the MPSC decided that the MDEQ's State Implementation Plan was "implemented" when the initial proposal was promulgated in 2007, rather than when the plan was actually carried out in 2009. Clearly, MPSC's decision flies in the face of the overwhelming weight of legal authority. Accordingly, it must be reversed.

⁵³ *Id.*

IV. THE MPSC ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE MDEQ'S 2007 RULES WERE IN EFFECT DURING THE TIME PERIOD WHEN APPELLANT TES PURCHASED ITS NOX ALLOWANCES.

This section of the Application presents an alternative and independently sufficient basis for deciding the instant appeal. Specifically, as explained in more detail below, the Commission erred when it concluded that the relevant change in law supposedly "took place" in 2007⁵⁴. In fact, the change in law that caused Appellant TES to incur the NOx allowance costs at issue "took place" in 2009, which was after the statutory cut-off date of October 6, 2008 specified in MCL §460.6a(8). For reasons detailed below, the MDEQ's 2007 rules were effectively contingent on EPA approval. Because the 2007 rules were disapproved by the EPA in 2008, they were not in effect when Appellant TES purchased its NOx allowances in 2009.⁵⁵

As noted above, the MDEQ's 2007 rules were promulgated because of a federal mandate. Specifically, the United States Environmental Protection Agency ("EPA") promulgated the Clean Air Interstate Rule ("CAIR") requiring states to change their existing "State Implementation Plans" ("SIPs") to include control measures to reduce emissions of NOx.⁵⁶ Because the EPA's rules were very detailed, the MDEQ's 2007 rules, in large part, incorporated by reference the federal CAIR regulations.⁵⁷ In fact, the MDEQ's 2007 NOx allowance rules contain at least 32 separate references to the Code of Federal Regulations

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⁵⁴ MPSC Order in U-15675-R, dated June 16, 2011, at p. 25.

⁵⁵ This fact not only constitutes a compelling independent ground for reversal, but it also provides further support for the argument that the rules were not implemented until 2009. It would be patently illogical to conclude that any rules could be "implemented" at a time when they were not even in effect.

⁵⁶ 70 Fed Reg 25162 (May 12, 2005).

⁵⁷ 2007 MR 12 – July 15, 2007.

("C.F.R").⁵⁸ For example, the very first rule (R 336.1802a), is captioned "Adoption by reference", and lists various parts of the federal CAIR rules that are being adopted by reference.⁵⁹

Of particular relevance to the instant appeal is MDEQ rule R 336.1803(3), which provides in pertinent part, as follows:

"Definitions under the clean air interstate rule NOx ozone season and annual trading programs in 40 CFR §97.102 and §97.302 are applicable to R 336.1821 to R 336.1834."⁶⁰

The state rules that are referenced in the above-quoted rule (*i.e.*, R 336.1821 to R 336.1834) were the rules that, if enforceable, would have required Appellant TES to procure NOx allowances in 2009. For example, R 336.1822(2) provides as follows:

"CAIR NOx allowances for the 2009 ozone season control period shall be the same allowances as were allocated under the NOx budget trading program. For newly-affected EGUs [e.g., T.E.S] which were not subject to the federal NOx budget program, these units are eligible to apply for allowances from the CAIR NOx ozone season new source set-aside pool for the 2009 season, pursuant to R 336.1823."⁶¹

As noted in MDEQ rule R 336.1803(3), *supra*, the MDEQ required that the words used in R 336.1822(2) and the other relevant state rules must be read in accordance with the definitions contained in the two federal rules that were incorporated by reference in R 336.1803(3), *supra*. Specifically, the MDEQ incorporated by reference 40 CFR §97.102 and

⁵⁸ *Id.*

⁵⁹ *Id.* at pp 2-3. Similarly, R 336.1821, also follows the same pattern of adopting by reference various provisions in the CFR. *Id.* at p. 7.

⁶⁰ *Id.* at p. 4.

⁶¹ R 336.1822(2). Note that Appellant TES is a "newly affected EGU", as that term is defined in the 2007 version of § 336.18 (3)(j). Rule R 336.1823 provides that a total of 1,385 tons of "CAIR NOx ozone season allowances" will be available in a set-aside pool for new EGUs, newly-affected EGUs and new non-EGUs.

§97.302. The first of those federal rules is 40 CFR §97.102. That rule contains numerous definitions, including the following one:

"CAIR NO_x allowance means a limited authorization issued by a permitting authority or the Administrator under subpart EE of this part or §97.188, or under **provisions of a State implementation plan that are approved under §51.123(o)(1) or (2) or (p) of this chapter**, to emit one ton of nitrogen oxides during a control period of the specified calendar year for which the authorization is allocated or of any calendar year thereafter under the CAIR NO_x Program. An authorization to emit nitrogen oxides that is not issued under subpart EE of this part, §97.188, or **provisions of a State implementation plan that are approved under §51.123(o)(1) or (2) or (p) of this chapter** shall not be a CAIR NO_x allowance."⁶²

The above-quoted definition makes it expressly clear that an allowance issued by the MDEQ does not constitute a "CAIR NO_x allowance" unless it is issued pursuant to a State Implementation Plan that has been approved by the EPA.

Similarly, the other federal definitional section incorporated by reference in R 336.1803(3), *supra*, also makes it clear that an allowance issued by the MDEQ does not constitute a "CAIR NO_x ozone season allowance" unless it is issued pursuant to a State Implementation Plan that has been approved by the EPA:

"CAIR NO_x Ozone Season allowance means a limited authorization **issued by a permitting authority or the Administrator under subpart EEEE of this part, §97.388, or provisions of a State implementation plan that are approved under §51.123(aa)(1) or (2) (and (bb)(1)), (bb)(2), (dd), or (ee) of this chapter**, to emit one ton of nitrogen oxides during a control period of the specified calendar year for which the authorization is allocated or of any calendar year thereafter under the CAIR NO_x Ozone Season Trading Program or a limited authorization issued by a permitting authority for a control period during 2003 through 2008 under the NO_x Budget Trading Program in accordance with

⁶² 40 CFR 97.102 (emphasis added). The rule cited therein, 40 CFR §51.123, is entitled, "Findings and requirements for submission of State implementation plan revisions relating to emissions of oxides of nitrogen pursuant to the Clean Air Interstate Rule."

§51.121(p) of this chapter to emit one ton of nitrogen oxides during a control period, provided that the provision in §51.121(b)(2)(ii)(E) of this chapter shall not be used in applying this definition and the limited authorization shall not have been used to meet the allowance-holding requirement under the NO_x Budget Trading Program. **An authorization to emit nitrogen oxides that is not issued under subpart EEEE of this part, §97.388, or provisions of a State implementation plan that are approved under §51.123(aa)(1) or (2) (and (bb)(1)), (bb)(2), (dd), or (ee) of this chapter or under the NO_x Budget Trading Program as described in the prior sentence shall not be a CAIR NO_x Ozone Season allowance.**⁶³

Thus, wherever the MDEQ's 2007 rules made reference to CAIR NO_x allowances or CAIR NO_x Ozone Season allowances, those terms referred exclusively to allowances issued pursuant to rules that were approved by the EPA. Under the definitions adopted by the MDEQ, there could be no "CAIR NO_x allowances" or "CAIR NO_x Ozone Season allowances" under the 2007 rules absent EPA approval of those rules. Consequently, the MDEQ's 2007 rules were effectively contingent on EPA approval. Absent such approval, the 2007 rules were non-functional with no force and effect.

It is thus appropriate to examine the question of whether the MDEQ's 2007 rules were approved and in effect at the time when Appellant TES incurred the environmental costs at issue in the instant case. As explained below, the 2007 rules were not, in fact, in effect in 2009 when Appellant TES incurred its NO_x allowance costs. The public record clearly shows that the MDEQ submitted its 2007 rules to the EPA on July 16, 2007.⁶⁴ Initially, on December 20, 2007, the 2007 rules were conditionally approved by the EPA subject to the condition that the MDEQ was required to correct certain deficiencies in the Revised SIP and

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⁶³ 40 CFR §97.302 (emphasis added).

⁶⁴ 2007 MR 12 – July 15, 2007.

then submit a corrected plan to the EPA within one year⁶⁵. The MDEQ, however did not make the revisions required by the EPA before the deadline.⁶⁶ Therefore, the EPA's conditional approval of the MDEQ's incomplete proposal was automatically converted into a disapproval.⁶⁷

Later, on May 28, 2009, the MDEQ finally promulgated new, revised rules addressing the deficiencies in the 2007 rules that had been disapproved by the EPA.⁶⁸ Then, on June 10, 2009, the MDEQ submitted those 2009 revised rules to the EPA for approval.⁶⁹ On August 18, 2009, the EPA announced that it would approve Michigan's 2009 Revised State Implementation Plan effective as of October 19, 2009.⁷⁰

Because the MDEQ's 2007 rules were, by their terms, effectively conditioned on EPA approval, and because those 2007 rules were disapproved by the EPA on December 20, 2008, logic dictates that the 2007 rules were not in effect during the time when Appellant TES incurred the NOx allowance costs that are the subject of the instant case.⁷¹ At the time in

⁶⁵ 72 Fed Reg 72256-722631 (December 20, 2007).

⁶⁶ The apparent reason why the MDEQ did not make the required revisions by the deadline was that the United States Court of Appeals for the District of Columbia issued an opinion dated July 11, 2008, vacating CAIR and its associated FIP based on "more than several fatal flaws in the rule". *North Carolina v EPA*, 531 F3d 896, on rehearing in part, 550 F3d 1176 (DC Cir 2008).

⁶⁷ 74 Fed Reg 41637-41641 (August 18, 2009).

⁶⁸ *Id.*

⁶⁹ *Id.* Among other things, the allowance allocations specified in the 2007 rules were changed in the 2009 rules. With regard to the allowance allocations for the CAIR NOx ozone season trading program, compare Rule 822 in the 2007 rules (2007 MR 12 – July 15, 2007 at pp 8-11) with R 336.1822 in the 2009 rules. With regard to the allowance allocations for the CAIR NOx annual trading program compare Rule 830 in the 2007 rules (2007 MR 12 – July 15, 2007 at pp 16-18) with R 336.1830 in the 2009 rules.

⁷⁰ *Id.* at p. 41638-41640. The new rules refer to electric generating units ("EGUs") located outside the "fine grid zone" as being "*newly-affected* EGUs". Mich Admin Code R 336.1803(3)(o) (emphasis added). Appellant TES is located outside the fine grid zone and, therefore, was a "newly-affected EGU" as of October 19, 2009.

⁷¹ It is undisputed that Appellant TES incurred the costs at issue during 2009.

2009 when Appellant TES incurred its NOx allowance costs, the MDEQ's 2007 rules were an unenforceable nullity.

The pertinent statutory provision, quoted below, stipulates that the relevant changes in law are those changes which caused Appellant TES to incur its environmental costs:

"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. [*i.e.*, October 6, 2008]...."
MCL §460.6a(8) (emphasis added).

This governing statutory provision makes it clear that the key question is whether Appellant TES incurred its 2009 NOx allowance costs "due to" the MDEQ's 2007 rules. Clearly, Appellant TES could not have incurred those 2009 costs "due to" the MDEQ's 2007 rules because those 2007 rules had been disapproved by the EPA and were not in effect at the time when Appellant TES purchased its 2009 NOx allowances.⁷²

In his well-reasoned Dissenting Opinion in this case, Judge Whitbeck recognizes this important fact.⁷³ Because the MDEQ rule adopted the federal definition of NOx allowances, there were no NOx allowances that could be issued unless and until the MDEQ's implementation plan was approved by the EPA. As Judge Whitbeck correctly noted, until the EPA finally approved the MDEQ's Implementation Plan in 2009, "there were no limited NOx allowances under a state implementation plan because no such plan existed."⁷⁴

Because the 2007 rules were not the rules due to which Appellant TES incurred its

⁷² Moreover, the record contains the un rebutted testimony of the TES witness confirming that TES incurred these costs due to the 2009 rules. (Tr, pp.178-180).

⁷³ See Appendix B.

⁷⁴ Id. at p. 5.

environmental costs, the relevant rules are the MDEQ's revised 2009 rules. Those 2009 rules, as noted above, were promulgated after the statutory cut-off date of October 6, 2008. The 2009 rules were also submitted to the EPA after that date, approved by the EPA after that date, and implemented by the MDEQ after that date. Thus, the costs that were incurred due to those 2009 rules clearly qualify for cost recovery under MCL §460.6a(8).

In summary, the MDEQ's 2007 NOx allowance rules were disapproved by the EPA in 2008 and, therefore, by their terms, had no force and effect at the time when Appellant TES incurred its NOx allowance costs in 2009. The MDEQ's NOx allowance rules, as revised in 2009, became legally effective as of October 19, 2009, when they were approved by the EPA. Then, in November of 2009, the rules were actually implemented, thereby requiring Appellant TES to incur costs pursuant to those rules. Thus, both the effective date and the implementation date of the rules that required TES to incur its NOx allowance costs came after the statutory cut-off date of October 6, 2008 in MCL §460.6a(8). Accordingly, Appellant TES is entitled to recover its 2009 NOx allowance costs in the instant case.

The MPSC erred as a matter of law in concluding that the MDEQ's 2007 rules were in effect during the time period when Appellant TES incurred those costs. As explained previously, the MPSC also erred in concluding that the relevant rules were "implemented" in 2007. For both of these reasons, the order under review in the instant appeal must be reversed.

V. **THE COURT OF APPEALS, IN ITS SPLIT DECISION, MADE SEVERAL FACTUAL AND LEGAL ERRORS.**

In its 2-1 decision, the Court of Appeals affirmed the MPSC's erroneous decision. In doing so, the Court of Appeals made several factual and legal errors, as follows:

A. The Court stated that, "The NOx emission rules that were applicable to TES Filer did not change after October 6, 2008" ⁷⁵ In fact, as explained above, it is a matter of public record that the MDEQ's 2007 rules were revised after that date, approved after that date, and became effective after that date.

B. The Court stated that, "At issue in this case is not the meaning of the term "implemented"" ⁷⁶ The error in this statement is obvious from the fact that, on the very next page of its split decision, the Court devotes its attention to defining the term, "implemented."

C. The Court stated, "At issue in this case is . . . on what date TES Filer was affected by the NOx emission rules." ⁷⁷ Then, on the next page of its split decision, the Court contradicts itself by stating that, "We do not believe that any particular person or entity needs to feel the effect of a law or rule for it to be "implemented." ⁷⁸

D. The Court stated, "MCL 460.6a(8) compares the effective date of the statute and the date of any changes in state or federal environmental rules." ⁷⁹ This assertion is patently false. The statute (*i.e.*, MCL 460.6a(8)) clearly and unequivocally compares the effective date of the statute with the date when any changes are implemented. The Court, in its split decision, repeats the same fundamental error that was committed by the MPSC. By failing to carefully read the governing statute, the Court has changed its meaning so that TES's rights hinge on when the relevant rule was changed instead of when the rule change was actually implemented.

⁷⁵ See Appendix A, at p. 7

⁷⁶ Id.

⁷⁷ Id. at p. 7.

⁷⁸ Id. at p. 8.

⁷⁹ Id. at p. 7.

E. The Court stated, "We cannot find any definition of "implemented" in any relevant statutes. . . ." Notably, the Court in its split decision, failed to distinguish or even mention any of the twenty-four (24) court decision and fifteen (15) dictionary definitions cited in TES's brief. Instead, the Court simply made up its own unique definition of this term. If the Court was looking for a definition of "implemented", it did not have to look any further than the Michigan Supreme Court's decision in *Brightwell v. Fifth Third Bank of Michigan*, 487 Mich 151, 161 790 NW2d 591 (2010). There, in the context of addressing the proper venue for hearing a civil rights claim, the Court held that the allegedly discriminatory firing was not "implemented" when the employer made the decision to fire the employee. Instead, the employer's plan to fire the employee was "implemented" when it was actually carried out.

In *Brightwell*, both the majority and the dissenting opinion agreed that the allegedly discriminatory firing was not "implemented" when the employer adopted the plan to fire the plaintiff. Rather, the plan to fire the employee was implemented when the employee was actually fired.⁸⁰

Similarly, the Court of Appeals in the instant case could have examined the decision in *US v. Hammer, supra*, where a plan to implement a death sentence was not deemed to be "implemented" when the sentence was imposed, but only when the punishment was actually inflicted. Alternatively, the Court of Appeals could have examined the published decisions in *Gaalla v. Citizens Medical Center, supra*; *Hadix v. Johnson, supra*; or *US v State of Michigan, supra*, where the Courts again recognized the critical distinction between a plan to

⁸⁰ The majority held that the plan to fire the plaintiff was implemented when the employee was no longer entitled to enter the work place in Wayne County, while the dissent would have held that the plan to fire the plaintiff was implemented when the employer actually communicated the decision to the employee by a phone call from Oakland County.

implement an action, as opposed to the actual implementation of that plan.

F. The Court stated, "We do not, however, perceive any reason why promulgation and implementation cannot occur contemporaneously" While contemporaneous promulgation and implementation may be a theoretical possibility in the context of some other set of facts, it certainly cannot occur here where the MDEQ's 2007 rules were effectively contingent on subsequent EPA approval and were thus an ineffective nullity until 2009 when the rules were amended, approved and implemented. Moreover, in addition to the fact that the unapproved 2007 rules were not in effect when TES incurred its costs, it must be remembered that these rules, by their very terms, constituted nothing more than an "implementation plan"; *i.e.*, a plan to implement new changes in 2009.

G. The Court's split decision is not only clearly erroneous, but it will also cause material injustice to TES and any other biomass merchant plants who are denied their lawful right to recover their environmental costs over the years. The same issue raised in this appeal has already resulted in three more pending appeals from the MPSC's decisions in Consumers Energy's 2010, 2011, and 2012 PSCR Reconciliation Cases⁸¹, and it has arisen again in the 2013 case, which is still pending at the MPSC.⁸² For this reason, and because the same issue is likely to continue to recur in future PSCR cases, it is a matter of major significance that should be resolved by this Court.

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⁸¹ MPSC Case No. U-16045-R (Court of Appeals Docket No. 314361); MPSC Case No. U-16432-R (Court of Appeals Docket No. 316868) and MPSC Case No. U-16890-R (Court of Appeals Docket No. 321877).

⁸² MPSC Case No. U-17095-R.

CONCLUSION AND RELIEF SOUGHT

For all of the reasons set forth above, Appellant TES respectfully requests that this Honorable Court grant its Application for Leave to Appeal and issue an order (1) reversing that portion of the MPSC's order dated June 16, 2011, which denied Appellant's request for recovery of its 2009 NOx allowance costs; (2) remanding this case to the MPSC with directions to approve full recovery of Appellant's 2009 NOx allowance costs, plus interest; and (3) granting all costs, fees, and other such relief as the Court deems just and reasonable under the circumstances. Alternatively, Appellant TES respectfully requests that this Court enter an Order granting appropriate peremptory relief in lieu of granting leave to appeal. The Court of Appeals split decision in this case is ripe for peremptory reversal based on the well-reasoned analysis set forth in the dissenting opinion of the Honorable William C. Whitbeck.

Respectfully submitted,

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