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STATE OF MICHIGAN
IN THE SUPREME COURT

VECTREN INFRASTRUCTURE SERVICES CORP,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF TREASURY,

Defendant-Appellant.
_____/

Supreme Court No. 163742

Court of Appeals No. 345462

Court of Claims No. 17-000107-MT

REPLY BRIEF OF APPELLANT MICHIGAN DEPARTMENT OF TREASURY

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INTRODUCTION

Vectren's answer to Treasury's application to this Court could have been an exhibit attached to the application if it were sequentially possible. That is because the answer only further demonstrates the problems and confusion caused by the Court of Appeals' decisions that must be resolved by this Court.

To begin, the answer foreshadows (and promotes) confusion as to the process of determining an alternative apportionment method—in effect attempting to forge a new process that amounts to no more than negotiation for more friendly tax treatment. Vectren joins other taxpayers in exploring such notions as "good faith collaboration" and "working together" when the Michigan Business Tax Act (like its successor, the Corporate Income Tax Act) says nothing about collaboration or good faith. Instead, it gives Treasury the exclusive authority to approve any alternate apportionment method. Vectren's preferred approach will cause (and has already caused) confusion/opportunism among taxpayers seeking to pay less in taxes.

Then, Vectren compounds the confusion by claiming that it provided evidence of distortion in "1,200 pages of documentation." Yet Vectren has never pointed to a single page of these documents to support its claims, instead opting for its attorney's self-serving letter, upon which the Court of Appeals exclusively relied for the purported distortion. That is because the documents do not support its claims.

In short, this case matters because the Court of Appeals' decisions will cause confusion and allow taxpayers to achieve better tax outcomes via negotiation, instead of the statute, and based on attorney-prepared letters instead of evidence. For these reasons and those in Treasury's application, this case warrants review.

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ARGUMENT

I. Vectren's answer to Treasury's application further supports the significance by illustrating the confusion caused by the Court of Appeals' decisions.

In its answer, Vectren only further demonstrates the confusion that the Court of Appeals' decisions will cause (and are already causing). Vectren does not dispute that the decision is an order remanding for "the parties to determine an alternate method of apportionment." (Ex A, p 9 (Op).[1]) Vectren also does not dispute efforts that other taxpayers are already making (and will make) to weaponize the decision so as to achieve better tax outcomes through negotiation. (Ex G, p 13 (Pet'r's Exceptions, *US Steel Corp v Mich Dep't of Treasury*, MTT Docket No. 18-001253-TT) ("Petitioner respectfully requests additional guidance or instruction to the parties illustrating what constitutes 'good faith' and an acceptable resolution for purposes of approving an alternative apportionment methodology . . . .").)

To the contrary, Vectren exacerbates the confusion, using language similar to the *US Steel* petitioner about the parties "work[ing] together" and "engag[ing] in good faith efforts" and "collaboration." (Pl's Br in Opp'n, pp 26–27 n 11, pp 26–28.) "[T]here is no reason, statutory or otherwise, that would prohibit the Department and the taxpayer to engage in good-faith efforts to review the multiple alternative methods previously proffered by MLI." (*Id.* at 27–28.) Further, "[s]uch good-faith

[1] Unless otherwise indicated, the exhibits referenced throughout this brief were attached to Treasury's application for leave to appeal filed with this Court on November 12, 2021.

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collaboration is the statutory basis for the use of alternative apportionment." (*Id.* at 28.)

This is all despite the language of the statute, which makes no mention of "good faith" or "collaboration" or "working together." The statute is clear and simple: Treasury has the exclusive authority to approve any alternative apportionment method. See MCL 208.1309. While a taxpayer may propose an alternative apportionment method, *a taxpayer cannot force Treasury into negotiation*—but this is precisely what Vectren and other taxpayers seek.[2] Negotiation is an end-run around the statutory scheme that relieves taxpayers of any burden to demonstrate their entitlement to alternative apportionment. In short: for all its denials that this case is remarkable, Vectren's own briefing (and the litigation being conducted by other taxpayers) belies its attempt to downplay the significance of the Court of Appeals' decisions.

Finally, while Vectren makes the conclusory statement that Treasury has not shown how entities will be treated disparately, (Pl's Br in Opp'n, p 24), Treasury plainly argued that any entity with *purported* (not proven) out-of-state business activity will have an opportunity to negotiate with Treasury for better tax treatment that Michigan-based entities will not have. This will result in a disparate tax burden—both legally (Michigan-based entities must still prove their

[2] While Vectren cites *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 56 (2015) as somehow "notably" indicative of "work[ing] together," (Pl's Br in Opp'n, p 27 n 11), the end result was not precedential but instead the function of alternative dispute resolution employed by the Court of Claims as a matter of judicial economy.

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tax exemption claims) and factually (these same entities will pay comparatively more in taxes).

For these reasons, this case warrants review by this Court.

II. Vectren did not produce evidence of distortion. The Court of Appeals' decisions allow taxpayers to achieve more favorable tax treatment without proving their claims, and prevents Treasury from administering taxation and apportionment based on facts and evidence.

In response to Treasury's argument that Vectren did not produce evidence of distortion, Vectren repeats the same argument concerning the number of pages it produced, including purported depreciation schedules that purportedly show where its assets are located. (Pl's Br in Opp'n, pp 25–26.) The problem with this argument (which is long on generality, short on specifics) is that the documents it produced do not show any distortion. Vectren's entreaty is, effectively: *Look at the number of pages, but don't look at any single one of them*.

That is because none of these documents support Vectren's assertion that the standard apportionment formula distorts MLI's Michigan business activity. According to KPMG's draft valuation report, MLI's assets at the time of the sale were valued as follows:

(1) Net Working Capital (e.g., current assets such as accounts receivable): $15,248,000;

(2) Fixed Assets: $34,396,000;

(3) Customer Relationship: $14,588,000;

(4) Backlog: $287,000;

(5) Trade Name: $4,241,000;

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(6) Assembled Workforce: $3,670,000; and

(7) Implied Goodwill (excluding Assembled Workforce): 16,622,000. [Pl's 12/07/2018 COA App Vol I, pp 62.]

It is Vectren's burden to prove that the business activity attributed to MLI in this state is out of all appropriate proportion to the actual business activity transacted in this state and leads to a grossly distorted result or would operate unconstitutionally. MCL 208.1309(3). But Vectren fails to provide supporting evidence to meet its burden of proof.[3]

For instance, Vectren failed to explain what portion of MLI's net working capital (e.g., accounts receivable, cash, etc.) is attributable to its activities in Michigan, especially given the fact that during the several months prior to its sale in March of 2011, MLI purportedly was working on the Enbridge contract during its off-season months. (Pl's Br in Opp'n, pp 4, 23–24.) The inference being that most, if not all, of the net working capital is attributable to MLI servicing the Enbridge contract in Michigan.

Vectren also failed to explain what portion of the value of MLI's intangible assets (i.e., customer relations, backlog, trade name, assembled workforce, and implied goodwill), based on future projected earnings at the time of the sale, are attributable to its activities in Michigan. Mr. Hirsch, a business valuation expert from KPMG, acknowledged the value of MLI's identifiable intangible assets were

[3] Mr. Bradley A. Hirsch, a business valuation expert for KPMG, testified that it was his opinion that MLI's assets could have been valued on a state-by-state basis, but were not. (Pl's 12/07/2018 COA App Vol I, pp 167, 173.)

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based on future projected earnings. (Pl's 12/07/2018 COA App Vol I, pp 176–177.) Thus, the question is what portion of the value of those identifiable assets, based on future projected earnings at the time, are attributed to MLI's business activities in Michigan. Mr. Hirsch also testified that he believed that it was possible to value those identifiable intangible assets on a state-by-state basis. (*Id.* at 173.)

Vectren also failed to provide supporting evidence to establish what portion of MLI's fixed assets are attributable to MLI's business activities in Michigan. The depreciation schedules do not show use, location, or "sales" of assets (in Michigan or in other states)—instead they show the depreciation amounts for various items, both in a limited period of time and cumulatively:

Minnesota Limited, Inc.
Depreciation Expense Report
As of December 31, 2010

Book = Tax
FYE Month = December

Sys No	Ext	In Svc Date	Acquired Value	P T	Depr Meth	Est Life	Salv/168 Allow Sec 179	Depreciable Basis	Prior Thru	Prior Accum Depreciation	Depreciation This Run	Current YTD Depreciation	Current Accum Depreciation	Key Code
001774	000	03/27/07	3,342.02	P	MF200	05 00	0.00	3,342.02	11/30/10	2,378.64	32.11	385.34	2,763.98	
001775	000	03/22/07	13,277.92	P	MF200	05 00	0.00	13,277.92	11/30/10	9,453.88	127.47	1,529.62	10,983.50	
001776	000	03/22/07	13,277.93	P	MF200	05 00	0.00	13,277.93	11/30/10	9,453.89	127.47	1,529.62	10,983.51	
001777	000	04/09/07	2,661.00	P	MF200	05 00	0.00	2,661.00	11/30/10	1,907.41	25.12	301.44	2,208.85	
001778	000	04/12/07	20,900.00	P	MF200	05 00	0.00	20,900.00	11/30/10	14,880.80	200.64	2,407.68	17,288.48	
001779	000	04/12/07	20,900.00	P	MF200	05 00	0.00	20,900.00	11/30/10	14,880.80	200.64	2,407.68	17,288.48	
001780	000	04/12/07	20,900.00	P	MF200	05 00	0.00	20,900.00	11/30/10	14,880.80	200.64	2,407.68	17,288.48	
001781	000	04/12/07	20,900.00	P	MF200	05 00	0.00	20,900.00	11/30/10	14,880.80	200.64	2,407.68	17,288.48	
001782	000	04/12/07	20,900.00	P	MF200	05 00	0.00	20,900.00	11/30/10	14,880.80	200.64	2,407.68	17,288.48	
001783	000	04/12/07	20,900.00	P	MF200	05 00	0.00	20,900.00	11/30/10	14,880.80	200.64	2,407.68	17,288.48	
001784	000	04/05/07	12,700.00	P	MF200	05 00	0.00	12,700.00	11/30/10	9,042.40	121.92	1,463.04	10,505.44	
001785	000	04/05/07	12,700.00	P	MF200	05 00	0.00	12,700.00	11/30/10	9,042.40	121.92	1,463.04	10,505.44	
001786	000	04/05/07	12,700.00	P	MF200	05 00	0.00	12,700.00	11/30/10	9,042.40	121.92	1,463.04	10,505.44	
001787	000	04/05/07	12,700.00	P	MF200	05 00	0.00	12,700.00	11/30/10	9,042.40	121.92	1,463.04	10,505.44	

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Further, the disposal schedules Vectren references say nothing about MLI's use of the assets or business activity in Michigan as opposed to other states:

Minnesota Limited, Inc.
Disposal Report
01/01/2010 to 12/31/2010

Description	Cl	In Svc Date	Disposal Date	D M	Acquired Value	Current Accum Depreciation	Net Proceeds
D7N HYSTER WINCH	2	04/24/87	11/01/10	A	$ 2,102.00	$ 2,102.00	$ 0.00
D4D HYSTER WINCH	2	04/24/87	11/01/10	A	1,174.65	1,174.65	0.00
318 CAT GENERATOR	2	05/15/87	11/01/10	A	2,000.00	2,000.00	0.00
TRIPLEX T/A PUMP	2	05/27/87	11/01/10	A	3,500.00	3,500.00	0.00
HYSTER D7D WINCH	2	05/27/87	11/01/10	A	600.00	600.00	0.00
FILL-TEST PUMP	2	06/04/87	11/01/10	A	7,733.00	7,733.00	0.00
SIDE BOOM ATTACHM	2	06/04/87	11/01/10	A	954.00	954.00	0.00
ROSCOE BROWN AUG	2	06/04/87	11/01/10	A	7,155.11	7,155.11	0.00
WACKER RAMMER	2	07/27/87	11/01/10	A	2,008.70	2,008.70	0.00
AZTEC VIBRATOR	2	07/27/87	11/01/10	A	639.00	639.00	0.00
1000B HOLE HOG	2	08/14/87	11/01/10	A	5,409.71	5,409.71	0.00
FISHER M SCOPE	2	09/11/87	11/01/10	A	550.00	550.00	0.00
125KVA ELEC POWER	2	09/04/87	11/01/10	A	2,800.00	2,800.00	0.00
30" AUTO RELEASE T	2	11/12/87	11/01/10	A	1,417.75	1,417.75	0.00
187A ILLUMINATOR	2	11/13/87	11/01/10	A	821.50	821.50	0.00
RUPP SANDPIPER PU	2	11/09/87	11/01/10	A	1,065.30	1,065.30	0.00
232 MAG BASE DRILL	2	11/23/87	11/01/10	A	500.00	500.00	0.00
CAT 583 SIDEBOOM	2	11/18/87	11/01/10	A	18,929.80	18,929.80	0.00
D-8 CAT	2	01/11/88	11/01/10	A	7,000.00	7,000.00	0.00
PIPE CUTTING MACH	2	02/18/88	11/01/10	A	2,085.85	2,085.85	0.00
2CC-BR PIG	2	02/09/88	11/01/10	A	3,023.00	3,023.00	0.00
BALDERSON P.A.T. D	2	03/07/88	11/01/10	A	2,407.50	2,407.50	0.00
MIDWESTERN SIDEB	2	03/07/88	11/01/10	A	1,819.00	1,819.00	0.00
1980 TRAILER TANDE	3	06/21/88	11/01/10	A	1,500.00	1,500.00	0.00
1976 SCHOOL BUS	3	06/30/88	11/01/10	A	2,000.00	2,000.00	0.00
1972 LOAD KING 353	3	06/27/88	05/05/10	S	14,840.00	14,840.00	5,520.00
1980 SCHOOL BUS	3	07/13/88	11/01/10	A	2,250.00	2,250.00	0.00
1967 WELDING RIG	3	07/13/88	11/01/10	A	4,200.00	4,200.00	0.00
KNAPHEIDE BODY	3	03/30/89	11/01/10	A	3,498.00	3,498.00	0.00
1966 FRUEHAUF TAN	3	03/30/89	09/01/10	S	3,760.00	3,760.00	500.00
84" SWEEPSTER BRO	2	06/13/88	11/01/10	A	1,696.00	1,696.00	0.00

There are no locations for the assets above, no indication of where they were used—indeed, no information at all that has anything to do with showing distortion of MLI's business activity in Michigan. The same is true for the rest of Vectren's "1,200 pages of documentation"—none of the schedules Vectren provides support its claims concerning MLI's business activity in Michigan as opposed to other states.

It is telling that despite all these documents, Vectren's only support for its claims concerning distortion and business activity in Michigan *in its appellate briefing* (and the only "evidence" the Court of Appeals relied on) was a footnote referring to an attorney-prepared letter to Treasury (dated June 24, 2016) and its own pleading. (06/04/2020 Appl for Leave to Appeal, Ex C, p 32 nn 21–22 (Pl's 12/07/2018 COA Br); Pl's 12/07/2018 COA App Vol VII, pp 93–129 (Am Compl).)

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Now in its response to Treasury's application to this Court, Vectren again sees fit to cite to *the same letter drafted by its own attorney*, i.e., the same attorney who has briefed this matter at all levels, including before this Court. (Pl's Br in Opp'n, p 27.) But Vectren still has yet to address why it believes that a letter written by its attorney constitutes evidence, and still has yet to otherwise show any evidence of distortion of MLI's Michigan business activity.

Vectren also has yet to address how the actual business activity MLI reported in Michigan can be distortive of its business activity in Michigan. How can reality be a distortion of reality? The Court of Appeals noted that the business activity was significant. But when does a certain percentage make actual business activity distortive if the activity is actually reflective of that activity? At what point does a percentage become distortive? Neither Vectren nor the Court of Appeals have answers.

The implications of the Court of Appeals' decisions, which offer the Court's imprimatur to taxpayers merely offering self-serving statements about distortion without evidence, allows taxpayers (particularly those with purported out-of-state business activity) to achieve better tax outcomes. The decision creates separation of powers problems (which Vectren does not address in its brief in opposition) and leaves Treasury at the mercy of mere representations and characterizations without any ability to examine the facts/evidence supporting why a taxpayer should get alternative (special) treatment. Vectren's answer to Treasury's application only brings these problems into greater relief.

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For these reasons, the Court of Appeals' decisions warrant this Court's review.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals erroneously concluded that Vectren is entitled to alternative apportionment based on attorney representations instead of evidence and remanded the matter to the Court of Claims for "the parties" to determine a proper method. If allowed to stand, the Court of Appeals' opinion will impact the state's jurisprudence and public fisc, will favor companies with past non-Michigan business activities, and will disrupt the balance between particular taxpayers seeking special treatment and taxpayers generally.

Accordingly, Treasury respectfully requests that this Court grant its application for leave to appeal.

Respectfully submitted,

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