September 20, 2023

Ms. Lisa Felice
Michigan Public Service Commission
7109 W. Saginaw Hwy.
P. O. Box 30221
Lansing, MI 48909

Via E-Filing

RE: MPSC Case Nº. U-21261

Dear Ms. Felice:

The following is attached for paperless electronic filing:

PUBLIC Sierra Club's Reply Brief; and

Proof of Service.

Sincerely,

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xc: Parties to Case No. U-21261

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of **INDIANA MICHIGAN POWER COMPANY** for approval to implement a power supply cost recovery plan for the twelve months ending December 31, 2023.	U-21261

PUBLIC

SIERRA CLUB'S REPLY BRIEF

September 20, 2023

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I. REPLY TO INDIANA MICHIGAN POWER COMPANY (I&M)

A. The OVEC analysis I&M submitted in its IRP case does not demonstrate that the OVEC costs are reasonable or comply with the Code of Conduct.

I&M asserts that an analysis it performed as part of its IRP case, U-21189, "demonstrates the long-term reasonableness and prudence of the Company's OVEC purchases."[1] That assertion is wrong for several reasons. First, I&M did not enter the IRP analysis into evidence in this case; I&M witness Jason Stegall only described the results in his direct testimony.[2] The Administrative Procedures Act requires that evidence be entered into the record and prohibits an agency from considering evidence that is not.[3] The rules of evidence also require that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence."[4]

Second, the analysis Mr. Stegall refers to is a *revised* analysis submitted in rebuttal in U-21189.[5] The original analysis I&M submitted in direct testimony in U-21189 was full of errors that I&M admitted to.[6] The Commission never vetted the revised analysis or found it reliable because I&M settled the IRP case with a small number of parties in a contested settlement.[7] The only term in the settlement that referenced OVEC said: "Nothing in the approval of this IRP shall be construed as express or implied approval of the OVEC ICPA or any of its amendments."[8]

Third, as already explained in Sierra Club's initial brief, the IRP analysis assumed that customers will be responsible for all outstanding debt after the ICPA's termination, which is

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[1] I&M Initial Brief, p. 22.
[2] Stegall Direct, 2 TR 121-22.
[3] MCL 24.276; see also MCL 24.285 ("Findings of fact shall be based exclusively on the evidence and on matters officially noticed.")
[4] MRE 703. For application in MPSC cases, see Case No. U-16582, December 20, 2011, Order, pp 15-16 and Case No. U-17302, December 19, 2013, Order, p 3.
[5] Stegall Direct, 2 TR 122.
[6] See Glick Direct, 2 TR 200-201; see also, Case No. U-21189, Sierra Club witness Tyler Comings Public Direct, 3 Tr 951-60 and Confidential Direct, 3 Tr 980-990; and I&M witness Peter Berini Rebuttal, 2 Tr 445-51.
[7] Case No. U-21189, February 2, 2023, Order.
[8] *Id*., Exhibit A, Settlement Agreement, p. 4, paragraph 1.d.

unreasonable since the Commission has never approved the ICPA.[9] Fourth, as also explained in Sierra Club's initial brief, the IRP analysis assumed that OVEC would install upgrades to comply with federal Effluent Limitation Guidelines (ELG) and Coal Combustion Residuals (CCR) rules to keep the units online through the end of the ICPA in 2040; but never compared these compliance costs with a scenario where the requirements were avoided by retiring the units before compliance was required.[10]

Fifth, the IRP analysis does not address additional environmental rules that have been either made final, such as EPA's Good Neighbor Plan;[11] or proposed this year, such as an updated ELG rule[12] and new greenhouse gas (GHG) performance standards.[13] Each of these rules could impose new costs on the OVEC plants, and none are considered in the IRP analysis.

B. I&M's attempt to justify the OVEC costs based only on the net of energy costs and revenues in historic years has been rejected by the Commission in prior cases.

I&M next argues that "the ICPA has provided a benefit to customers over the past 5 years" when considering only the net of energy costs versus energy revenues and excluding all demand charges – the latter of which make up the bulk of the OVEC costs.[14] This argument is wrong for

[9] See Sierra Club Initial Brief, p. 20 and Glick Direct, 2 TR 201.
[10] Sierra Club Initial Brief, p. 21, discussing Glick Direct, 2 TR 201-202.
[11] Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg 36654, June 5, 2023.
[12] Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 88 Fed. Reg. 18824, March 29, 2023 (eliminating allowance for bottom ash handling systems that allow for the purge of ash wastewaters).
[13] New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 88 FR 33240, May 23, 2023 (requiring coal units that operate beyond 2030 to reduce GHG emissions by reducing operation, installing carbon capture and sequestration, or by other means).
[14] I&M Initial Brief, p. 23; see also, p. 29. For the relative sizes of energy and demand charges, see Glick Confidential Direct, 2 TR 263, Figure 2, and compare the gray and orange bars.

two reasons. First, as noted in Sierra Club's initial brief, I&M seeks to recover all OVEC costs – including demand charges – from customers through the PSCR.[15]

Second, the same argument has been rejected in prior PSCR cases. See Case No. U-20530 (PFD rejected Staff's proposed OVEC disallowance based only on net energy revenues in favor of disallowance based on comparing total OVEC costs to benchmarks); Case No. U-20804 (Commission issued Section 7 warning based on other long-term analyses of OVEC economics which included energy and demand charges and also found that "the Rockport sale capacity value and net CONE may be appropriate proxies for calculating market price and I&M's resulting PSCR factor.")[16] Thus, based on both logic and Commission precedent, in a PSCR proceeding I&M must show the reasonableness of *all* OVEC costs, not just a subset of them.

C. The fact that OVEC was economic in a single outlier year – 2022 – does not make the OVEC costs reasonable or compliant with the Code of Conduct for the PSCR plan year or five-year forecast.

I&M next asserts that its OVEC power purchases in 2022 were economic based on comparing all costs to all revenues.[17] While that is true, Sierra Club witness Devi Glick explained in her direct testimony that 2022 was a "highly anomalous" year due to the spike in energy prices caused by the spike in natural gas prices resulting from the war in Ukraine.[18] Further, it was one year out of six for which witness Glick presented historic data, and 2022 is not under review in this PSCR plan case for 2023. Last, under the Code of Conduct, there is no exception to the requirement that a utility cannot make payments at above market price to an affiliate, where such payments may have been at market price in some other year. That is why the costs are reviewed

[15] Sierra Club Initial Brief, p. 22, citing Glick Direct, 2 TR 187.
[16] Case No. U-20530, April 18, 2022, PFD, pp. 31-32 and 61-62; adopted in Commission Order dated February 2, 2023.
[17] I&M Initial Brief, p. 25.
[18] Glick Direct, 2 Tr 189-91.

each year in the reconciliation.

D. I&M's argument that the cost of individual resources should not be considered in PSCR plan cases is contrary to the statute and counter to prior Commission decisions in I&M's PSCR plan cases.

I&M next argues that "PSCR Plan cases are not the proper venue to evaluate the economics of individual resources."[19] Rather, the company asserts, "[w]hen determining the reasonableness of I&M's 2023 PSCR Plan factor, the Commission should disregard witness Glick's focus on specific resources and focus on the overall reasonableness of I&M's power supply costs."[20]

I&M's position is contrary to the statute and prior Commission decisions. Section 3 of the PSCR statute states the plan "shall describe all major contracts and power supply arrangements entered into by the utility" as well as "the utility's evaluation of the reasonableness and prudence of its decisions to provide power supply in the manner described in the plan…"[21] Then Section 5 provides that "[i]n its final order in a power supply and cost review, the commission shall evaluate the reasonableness and prudence of the decisions underlying the power supply cost recovery plan filed by an electric utility under subsection (3), and shall approve, disapprove, or amend the power supply cost recovery plan accordingly."[22] Section 6 also says that the approved PSCR factor "shall not reflect items the commission could reasonably anticipate would be disallowed under subsection (13)," which governs the PSCR reconciliation.[23]

There would be no reason for the utility describe its power supply arrangements or justify its decisions to supply power in the ways described in the plan if the Commission's authority in the plan case was limited to reviewing the overall PSCR costs. Further, the directive to evaluate

[19] I&M Initial Brief, p. 26.
[20] *Id*. at 27.
[21] MCL 460.6j(3).
[22] MCL 460.6j(5).
[23] MCL 460.6j(6).

the reasonableness and prudence of the decisions underlying the plan is clearly a directive to review individual decisions about specific supply resources. Likewise, the authority to amend the plan can only be interpreted as amending it with respect to specific costs or decisions. If any doubt remained, the directive that the plan shall not reflect items that would likely be disallowed in the reconciliation is plainly a directive to review individual resources, decisions, and costs.

In addition, the Commission's Section 7 warnings to I&M in Case No. U-20804 and Case No. U-21052 specifically referenced the OVEC costs and I&M's decisions concerning the ICPA.[24] I&M's argument in this case is directly contrary to these decisions.

E. I&M's comparison of OVEC costs to its recent solar contracts is inapt for several reasons.

I&M next argues that the Commission should use recent solar contracts it executed after its 2022 RFP as benchmarks for OVEC costs.[25] Company witness Stegall testified that these contracts include a purchase and sale agreement (PSA) for the Lake Trout solar project that is under review in Case No. U-21377.[26] The Lake Trout PSA has a very high levelized cost of energy (LCOE) of $[[ ]] per MWh.[27] The solar contracts also include three that I&M submitted in Case No. U-21189: Mayapple, another PSA with a very high LCOE of $[[ ]] per MWh; and two PPAs with LCOEs of $[[ ]] per MWh (Sculpin) and $[[ ]] per MWh (Elkhart).[28] The Commission recently approved these three contracts in U-21189.[29] However, the Commission declined to approve the large amounts of contingency costs included in the Mayapple LCOE; and

[24] Case No. U-20804, November 18, 2021, Order, p 26, paragraph C; Case No. U-21052, June 22, 2023, Order, p 19.
[25] I&M Initial Brief, p. 32.
[26] Stegall Confidential Rebuttal, 2 Tr 241.
[27] *Id*.
[28] *Id*. at 124-25.
[29] Case No. U-21189, Order, August 30, 2023.

therefore the full price of the Mayapple PSA cited by witness Stegall has not been approved.[30] Lake Trout likewise has not been approved and remains pending in U-21377, where the very large amounts of contingency costs for that PSA are also under review.

I&M's comparison of OVEC costs in 2021 to the LCOEs of these unbuilt solar contracts executed in 2023 should be rejected, for several reasons. First, I&M testified throughout U-21189 and U-21377 that it negotiated the contract prices [ ] from the RFP bids because of extraordinary solar market conditions in 2023.[31] The 2022 RFP solar bids ranged from $[[ ]] to $[[ ]].[32] The Commission Order in U-21189 recounted I&M's testimony about a raft of market pressures driving up solar prices in 2023, including trade disruptions, war, federal investigations, the Inflation Reduction Act, interconnection queue reforms, and high inflation and interest rates.[33] The Commission Order further noted I&M's testimony that "additional market pressures such as the cost in raw materials, equipment costs, interest rates, and labor…impacted bid pricing and the contract negotiation process."[34] The Commission also noted Staff's testimony that prices for solar are inflated in 2023 due to "a high level of uncertainty regarding pricing of components, component shortages, and a labor shortage, all exacerbated by increased demand with the passage of the Inflation Reduction Act (IRA) in 2022."[35] In this PSCR proceeding, I&M is seeking to exploit extraordinary and likely temporary market conditions and its own failure to control costs resulting from those conditions to set new and unprecedently-high benchmarks for OVEC costs.

Second, none of these solar projects are built yet. They have commercial operation dates starting in the mid-2020s. Therefore, they do not reflect costs for power during the 2023 PSCR

[30] Case No. U-21189, Order, August 30, 2023.
[31] Ex SC-31C, discovery response 3-07.
[32] Ex AG-37, discovery response AG 3-53, p. 4, Proposal ##'s 4-14.
[33] Case No. U-21189, Order, August 30, 2023, p. 13.
[34] *Id*.
[35] Case No. U-21189, Order, August 30, 2023, p. 19, quoting Staff witness Heidemann, 11 Tr 1795.

plan year. The OVEC costs have risen substantially over the past six years,[36] and if that trend continues, then even these high solar project prices could be lower than OVEC's all-in costs.

Finally, as noted above, in U-21189, the Commission declined to preapprove the large amounts of contingency costs for the Mayapple PSA.[37] The Commission may someday approve some of those costs if I&M actually incurs them, but whether and how much is unknown. Until then, the actual LCOE for Mayapple is unknown and so it cannot be used as a comparison for OVEC. Further, based on the Order in U-21189, there is reason to think the Commission in Case No. U-21377 is likely to disapprove the large contingency costs included in the Lake Trout PSA, which would bring the LCOE of that project down as well.

F. The 2011 benchmark study does not support I&M's 2023 OVEC costs as reasonable and other studies referenced by the Commission in prior cases show that OVEC is uneconomic.

I&M next argues that the benchmark study OVEC submitted with its application to FERC to amend and extend the ICPA in 2011 is not relevant to this case, and even if it was relevant, the study supports the decision to amend and extend the ICPA back then.[38] Sierra Club agrees that the 2011 benchmark study is not relevant to this case because I&M never sought approval of the ICPA from the Commission and because the Commission has directed I&M to evaluate the economics of the contract on a regular basis and show that it "is still just and reasonable for customers."[39]

Sierra Club witness Glick only addressed the 2011 benchmark study preemptively, in case I&M argued that the study supports continued approval of the OVEC costs today. She explained that the 7-page study was, at most, a screening-level review and not a "robust forward-looking

[36] See Glick Confidential Direct, 2 TR 266, Table 2 ("$/MWh cost").
[37] Case No. U-21189, Order, August 30, 2023, pp. 54-55.
[38] I&M Initial Brief, pp. 34-35.
[39] Direct Testimony of Staff witness Raushawn Bodiford, 2 Tr 164-65; Case No. U-20529, May 13, 2021, Order, pp. 13-14.

analysis."[40] She also explained that AEP, which performed the benchmark study for OVEC, failed to disclose assumptions critical to evaluating the study, and the study was completed after I&M signed the amended ICPA and so it could not have informed I&M's decision.[41]

Further, I&M ignores economic analyses by AEP and by others since the 2011 benchmark study that show that OVEC is uneconomic for the sponsoring companies. Sierra Club discussed these other studies in its initial brief;[42] and the Commission relied on them when it issued a Section 7 warning in Case No. U-20804.[43]

G. I&M's legal arguments for why the Code of Conduct should not apply to OVEC costs lack merit and have been rejected in prior cases.

1. Applying the Code of Conduct's market price rule to affiliate purchases in the PSCR does not conflict with the PSCR statute.

I&M argues that applying the market price rule to PSCR costs incurred with its affiliates exceeds the powers granted to the Commission "by materially altering Act 304's framework for evaluating power supply costs under the reasonableness and prudence standard."[44] The PFD in U-21052 rejected this same argument.[45] The ALJ found I&M's argument "unavailing because the Code of Conduct was itself implemented by the Commission pursuant to a legislative mandate; thus, the Code's heightened scrutiny for affiliate transactions is aligned with legislative intent."[46] The ALJ further explained: "This PFD does not perceive any conflict between the Code of Conduct and Act 304 regarding the PSCR process; instead, the Code of Conduct simply provides additional,

[40] Glick Direct, 2 TR 270.
[41] *Id*.
[42] Sierra Club Initial Brief, pp. 16-18.
[43] Case No. U-20804, Order dated November 18, 2021, pp. 19-20.
[44] I&M Initial Brief, pp. 38-39.
[45] Case No. U-21052, March 29, 2023, PFD, pp. 25-27.
[46] *Id*. at 25.

stricter rules for a specific subset of transactions, i.e. affiliate transactions."[47] The Commission in U-21052 found this issue "to be well-settled" and adopted the PFD's analysis, finding it "well-reasoned and aligned with the Commission's previous decisions on this issue."[48]

Additionally, in two recent cases, the Michigan Court of Appeals has held that the electric utility statutes should be read *in pari materia*. In *In re Consumers Energy Co,* the Court found that the statute authorizing a long-term industrial load retention rate (LTILRR) based on the cost of the Zeeland gas plant should be harmonized with the statute authorizing a securitization charge for the undepreciated book balance of the Karn coal plant, and held that Hemlock Semiconductor was required to pay both.[49] Similarly, in *In re Cloverland Electric Cooperative,* this Court held that Act 167, which authorizes member-regulated electric cooperatives to set their own rates, and MCL 460.6w, which requires the Commission to set a special "State Reliability Mechanism" charge for electric providers, should be read *in pari materia* and both given effect.[50] These two decisions use similar reasoning to the PFD in U-21052: that the market price rule applies a stricter standard to the subset of PSCR costs incurred via affiliate transactions.

2. Applying the Code of Conduct's market price rule to affiliate purchases in the PSCR is not arbitrary and capricious.

Next, I&M argues that applying the Code of Conduct to the OVEC costs is "arbitrary and capricious" because it "attempts to replace the [PSCR] statutory scheme" with market price standards.[51] I&M made the same argument in Case No. U-21052 and the PFD in that case rejected it. The PFD found that the rule was rationally related to the purpose of the Code of Conduct's

[47] *Id*. at 25-26.
[48] Case No. U-21052, June 22, 2023, Order, p. 21.
[49] *In re Consumers Energy,* 339 Mich App 346, 361 (2021).
[50] *In re Implementing Section 6w of 2016 PA 341 for Cloverland Electric Cooperative,* 329 Mich App 163, 178-81 (2019).
[51] I&M Initial Brief, pp. 40-41.

authorizing statute and therefore not arbitrary or capricious.[52] The Commission in U-21052 adopted this portion of the PFD's analysis as well and rejected I&M's position.[53]

3. The Code of Conduct aligns with MCL 460.10ee's lawful legislative mandate to regulate inter-affiliate transactions like the ICPA.

I&M next argues that applying the market price rule to the OVEC costs would violate the nondelegation doctrine.[54] The nondelegation doctrine challenges the constitutionality of a statute for granting legislative power to an administrative agency due to a lack of standards in the statute.[55] It is unclear whether I&M challenges the Code's authorizing statute or the market price rule – but nondelegation is properly raised as a challenge to a statute. Be that as it may, as with the previous legal arguments, the PFD in U-21052 considered and rejected I&M's nondelegation argument. The ALJ found that the Code of Conduct and Act 304 are to be interpreted in harmony and therefore the Code does not supplant the PSCR standard; (2) the Code's authorizing statute did set a sufficient standard which the market price cap reasonably applies; and (3) the Legislature's ratification of the Code of Conduct essentially affirmed the Code.[56] The Commission in U-21052 adopted this portion of the PFD as well.[57]

4. Applying the Code of Conduct to projected OVEC costs for 2023 is not impermissible retroactive application of statutes and rules.

Next, I&M argues that the Code of Conduct cannot be applied to projected OVEC costs for 2023 because the Code "cannot retroactively apply to those contracts."[58] The PFD in U-21052

[52] Case No. U-21052, March 29, 2023, PFD, p. 26.
[53] Case No. U-21052, June 22, 2023, Order, p. 21.
[54] I&M Initial Brief, pp. 38-39.
[55] See for example, *North Michigan Land & Oil Corp v Public Service Commission*, 211 Mich App 424, 444–45 (1995).
[56] Case No. U-21052, March 29, 2023, PFD, pp. 27-28.
[57] Case No. U-21052, June 22, 2023, Order, p. 21.
[58] I&M Initial Brief, pp. 46-49.

also rejected this argument, noting that the Commission has held decisions in a PSCR plan case "are applied prospectively to inform reconciliations and not retroactively to PSCR factors set in earlier plan years, and as such it is appropriate to apply the Code of Conduct to the case at hand."[59] The Commission adopted this part of the PFD's analysis in its Order in U-21052 as well.

Further, the Code of Conduct and the market price rule precede the current ICPA, not the other way around. The ICPA in effect today is the "Amended and Restated Inter-Company Power Agreement Dated as of September 10, 2010." The authorizing statute for the original Code of Conduct was enacted in 2000, and the Commission first promulgated the market price cap rule in substantially identical form in 2001.[60] Because the operative provisions of the market price rule precede the current ICPA, it cannot possibly be retroactive. While I&M claims that the *original* ICPA was executed in 1952, that version of the agreement is not in evidence. I&M cannot demonstrate that the Code of Conduct's market price rule upsets I&M's original contractual expectations under on a 1952 agreement whose terms are unknown.

Third, the primary case I&M relies on – *LaFontaine Saline, Inc v Chrysler Group, LLC*[61] – is distinguishable. In *LaFontaine,* an automobile dealer entered into an agreement with Chrysler in 2007, when the Motor Vehicle Dealer Act (MVDA) defined the dealer's "relevant market area" as a six-mile radius. When a 2010 amendment of the MVDA expanded the relevant market area to nine miles, the Michigan Supreme Court held that the new market area did not apply retroactively to the agreement between LaFontaine and Chrysler.[62]

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[59] Case No. U-21052, PFD, p. 28, quoting Case No. U-20804, November 18, 2021, Order, p. 17.

[60] Case No. U-12134, Order dated December 4, 2000, p. 6. The Commission revised the Code on October 29, 2001. (U-12314-0223 (Oct. 29, 2001, Order on Rehearing). In *Detroit Edison Co v Pub Serv Comm'n*, 261 Mich App 1 (2004); *Detroit Edison Co v Pub Serv Comm'n*, 472 Mich 897 (2005), the Court of Appeals upheld the Code and the Supreme Court found that the Legislature ratified the Code in 2004. *Detroit Edison*, 472 Mich at 897.

[61] *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 39; 852 NW2d 78 (2014).

[62] *Id*. at 42.

Regulated utilities know that their costs and decisions will be scrutinized in PSCR cases. They also know that courts have called for special scrutiny of transactions between utilities and affiliates for nearly a century. The U.S. Supreme Court recognized in 1932 that "[t]here is an absence of arms' length bargaining between the two corporate entities involved, and of all the elements which ordinarily go to fix market value;"[63] and in 1937 that "any relationship between the buyer and seller which tends to prevent arm's length dealing may have an important bearing on the reasonableness of the selling price."[64] Unlike the change in a dealer's market area, a statute or rule that codifies longstanding case law on affiliate transactions does not "impose a new substantive duty…that did not previously exist."[65] I&M never had a settled expectation that it could charge its customers more than market price for power from its affiliate.

5. Applying the Code of Conduct to projected OVEC costs for 2023 does not violate the Contract Clause.

Next, I&M claims that applying the Code of Conduct would violate the Contract Clause by "prospectively impairing I&M's rights with regard to the ICPA."[66] The PFD in U-21052 addressed this issue too. After reciting the three-prong test for the Contract Clause, the PFD first found that any disallowance "does not impair – let alone substantially impair – the ICPA because I&M's rights and obligations under the ICPA remain the same; the only change would be the amount of money related to the ICPA that I&M can recover through the PSCR process."[67] Second, the PFD found that "even if there were a substantial impairment, the Code of Conduct serves a legitimate public purpose because it prevents preferential treatment among utilities and their

[63] *Western Distributing Co v Public Service Comm*, 285 US 119, 124; 52 S Ct 283, 284; 76 L Ed 655 (1932).
[64] *Natural Gas Pipeline Co of America v Slattery*, 302 US 300, 307; 58 S Ct 199 (1937).
[65] *Kia Motors America, Inc v Glassman Oldsmobile Saab Hyundai, Inc*, 706 F3d 733, 740 (CA 6, 2013), quoted in I&M's Initial Brief, p. 49.
[66] I&M Initial Brief, pp. 49-52.
[67] Case No. U-21052, PFD, p. 29.

affiliates."[68] Third, the PFD found that "the Code of Conduct's price cap is reasonably related to the proffered public purpose because it effectively prevents a utility from collecting excessive amounts under an affiliate contract."[69] Again, the Commission adopted the PFD's analysis.[70]

6. Applying the Code of Conduct to projected OVEC costs is not a taking.

Next, I&M argues that a disallowance of OVEC costs would be an unconstitutional taking of its property under the Takings Clause.[71] The PFD in U-21052 addressed this argument too, and found that in takings cases involving utility regulation, "[t]he guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory."[72] The PFD found that I&M did not argue that "any potential disallowance under the Code of Conduct would render the overall PSCR plan or factors so low as to be confiscatory, and the utility thereby fails to provide an argument that addresses the pertinent analysis."[73] The Commission Order adopted the PFD's analysis.[74]

7. The Commission has repeatedly rejected I&M's argument that the Code of Conduct does not to apply to the ICPA because it is a federally regulated wholesale service.

I&M again argues based on a passing comment in a 2018 Commission order regarding a different issue that "[t]he Commission has established that wholesale purchase power agreements, such as the ICPA, do not give rise to an affiliate transaction subject to the Commission's Code of

[68] *Id*.
[69] *Id*.
[70] Case No. U-21052, June 22, 2023, Order, p. 21.
[71] I&M Initial Brief, pp. 52-55.
[72] Case No. U-21052, PFD, pp. 29-30, quoting *Duquesne Light Co Light Co v Barasch*, 488 US 299, 307; 109 S Ct 609; 102 L Ed 2d 646 (1989).
[73] *Id*.
[74] Case No. U-21052, June 22, 2023, Order, p. 21.

Conduct."[75] This Commission has expressly rejected this argument twice: in Case No. U-20529[76] and again in Case No. U-20224.[77] The PFD in Case No. U-21052 also rejected it, and the Commission adopted the PFD's analysis.[78]

8. The Commission has repeatedly rejected I&M's argument that a disallowance of OVEC costs would set the price of a federally regulated wholesale contract.

A disallowance because of a Code of Conduct violation does not set a wholesale price or otherwise intrude on the authority of the FERC. The Commission has already decided this issue three times. First, as the Commission has previously found, FERC stated expressly that it did not approve any rate associated with the ICPA.[79] Second, as the Commission has previously held, while FERC has exclusive jurisdiction over wholesale power rates, the Commission has exclusive jurisdiction over retail rates in Michigan.[80]

H. I&M's argument that Commission oversight is unnecessary for its Rockport energy market commitment decisions is unavailing.

I&M argues that the Commission need not address must-run commitment decisions for Rockport because a disallowance based on a commitment decision is best left to a PSCR reconciliation proceeding and I&M has volunteered to document its energy market comment decisions.[81] Contrary to these protestations, the Commission should instruct I&M of its obligation

[75] I&M Initial Brief, pp. 56-59.
[76] Case No. U-20529, Order dated May 13, 2021, p. 16.
[77] Case No. U-20224, Order dated June 23, 2021, p. 11.
[78] Case No. U-21052, PFD, pp. 30-31 and Order, p. 21.
[79] Case No. U-20529, Order dated May 13, 2021. p. 20, citing December 13, 2004 FERC letter in Docket Nos. ER04-1026-000 and ER04-1026-001; May 23, 2011 FERC letter in Docket Nos. ER11-3181-000, ER11-3440-000, and ER11-3441-000. See also Case No. U-20224, Order dated June 23, 2021, p. 13; Case No. U-20804, Order dated November 18, 2021, pp. 18-19.
[80] Case No. U-20529, Order dated May 13, 2021, p. 21, Case No. U-20224, Order dated June 23, 2021, Case No. U-20804, Order dated Nov. 18, 2021, pp. 18-19.
[81] I&M Initial Brief, p. 36.

to document each of its "must run" commitment decision for Rockport, and should warn I&M that any costs associated with an imprudent commitment decision will be excluded from PSCR recovery in reconciliation.[82] Simply put, Michigan customers should not have to pay for the cost of Rockport power when cheaper energy is available on the market; and adequate documentation of these daily decisions is necessary for appropriate oversight.

II. REPLY TO STAFF: Staff's position does not preclude a Section 7 warning.

Staff and Sierra Club agree that I&M and OVEC are affiliates; that the Code of Conduct's market price rule applies to the OVEC purchases; and that I&M is required to demonstrate compliance in the PSCR reconciliations.[83] Sierra Club only responds to Staff's statement that "I&M has provided sufficient information for Staff to determine that the Company's costs and forecasting procedures are reasonable and prudent for establishing a billing factor for the 2023 PSCR plan year."[84] Sierra Club notes that Staff's position in this regard did not preclude a Section 7 warning in Case Nos. U-20804 or U-21052 and it does not preclude such a warning here. Staff does not appear to take a position on the question of a Section 7 warning in its brief. The Commission should issue such a warning, for all of the reasons stated in Sierra Club's initial brief and this reply brief.

Respectfully Submitted,

Date: September 20, 2023

By: 

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[82] *See* Sierra Club Initial Brief, p. 26.
[83] Staff Initial Brief, pp. 5-8.
[84] *Id*. at 7-8.

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of **INDIANA MICHIGAN POWER COMPANY** for approval to implement a power supply cost recovery plan for the twelve months ending December 31, 2023.	U-21261

PROOF OF SERVICE

On the date below, an electronic copy of **PUBLIC Sierra Club's Reply Brief** was served on the following:

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The statements above are true to the best of my knowledge, information and belief.

OLSON, BZDOK & HOWARD, P.C.
Counsel for Sierra Club

Date: September 20, 2023 By: Digitally signed by Jill Smigielski Date: 2023.09.20 12:24:57 -04'00' Adobe Acrobat version: 2023.006.20320

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