STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of **INDIANA MICHIGAN POWER COMPANY** for reconciliation of its power supply cost recovery plan for the 12 months ended December 31, 2020.	)))))	Case No. U-20530

At the February 2, 2023 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Daniel C. Scripps, Chair
Hon. Tremaine L. Phillips, Commissioner
Hon. Katherine L. Peretick, Commissioner

ORDER

History of Proceedings

On March 31, 2021, Indiana Michigan Power Company (I&M) filed an application pursuant to Section 6j of Public Act 304 of 1982 (Act 304), MCL 460.6j, with supporting testimony and exhibits, requesting approval to reconcile revenues collected pursuant to its power supply cost recovery (PSCR) plan for the 12-month period ended December 31, 2020. I&M's application stated that the company recorded a PSCR underrecovery of $5,386,708 for calendar year 2020.

A prehearing conference was held on May 11, 2021, before Administrative Law Judge (ALJ) Dennis W. Mack (ALJ Mack), at which the Michigan Department of Attorney General (Attorney General) was granted intervention. I&M and the Commission Staff (Staff) also participated in the proceeding.

On May 24, 2021, ALJ Mack issued a protective order[1] to prevent the unintended disclosure of confidential material. On June 24, 2021, ALJ Mack granted intervention through a petition for leave to intervene out of time to the Citizens Utility Board of Michigan (CUB).

On October 11, 2021, Administrative Law Judge Jonathan F. Thoits (ALJ) was assigned to be the presiding officer in the case. On October 26, 2021, the ALJ presided over an evidentiary hearing. Following cross-examination, the testimony of eight I&M witnesses, the testimony of one Attorney General witness, the testimony of one CUB witness, and the testimony of two Staff witnesses were entered into the record.

On November 30, 2021, I&M, the Attorney General, and the Staff filed initial briefs. On December 2, 2021, CUB filed an initial brief. On December 14, 2021, CUB filed an amended initial brief. On December 21, 2021, I&M, CUB, and the Attorney General filed reply briefs. On April 18, 2022, the ALJ issued his Proposal for Decision (PFD). On the same date, the ALJ filed a redacted PFD containing confidential information subject to the protective order. Exceptions to the PFD were filed by I&M on May 9, 2022. Replies to exceptions were filed by CUB and the Attorney General on May 23, 2022.

The record in this case consists of 452 pages of transcript and 46 exhibits.

<u>The 2020 Power Supply Cost Recovery Reconciliation</u>

Starting on page 4 of the PFD, the ALJ set forth I&M's proposed reconciliation of its 2020 PSCR plan as follows:

> I&M recorded an under-recovery of $5,359,218 in PSCR costs in 2020, which with interest of $27,490 results in a total under-recovery of $5,386,708. [I&M witness] Mr. Walcutt provided the methodology I&M utilized to calculate its PSCR revenues and expenses, and the interest thereon, to arrive at the total under-recovery

[1] The Commission finds that information redacted and/or filed under seal pursuant to the protective order is not material to the ultimate determinations made in this order.

> that is proposed to be rolled into the 2021 PSCR Plan costs. As it pertains to 2020 PSCR revenues, the evidence I&M entered concerning the methodology it used to calculate the amount, along with the $86,987,637 it actually collected, is unrefuted. Rather, the issues in this case relate to certain components of the $89,293,968 in 2020 PSCR expenses I&M claims.

PFD, pp. 4-5 (footnotes omitted).

On pages 8-24 of the PFD, the ALJ succinctly outlined the positions of the parties, which will not be repeated in this order. The ALJ next identified and addressed four substantive issues regarding the utility's (1) inter-company power agreement (ICPA), (2) unit power agreement (UPA), (3) Code of Conduct implications, and (4) the Rockport Unit process for committing its generation resources and reporting the data and information used in making its commitment decisions. The Commission will address these four substantive issues.

Discussion

Inter-Company Power Agreement

The Attorney General argued that the projected and actual costs of all power supply resources demonstrate I&M paid more than $26.5 million in excessive costs under the ICPA with the Ohio Valley Electric Corporation (OVEC). Attorney General's initial brief, pp. 16-17. OVEC is a joint venture owned by 12 utilities with I&M's parent company, American Electric Power Company (AEP), the largest shareholder with an ownership interest of 43.47%. Under the ICPA, OVEC supplies energy and capacity to electric utilities located in Michigan, Ohio, Indiana, and Kentucky from two coal-fired plants located in Ohio and Indiana. 2 Tr 307-308. OVEC, in turn, bills the utilities a variable, demand, and transmission charge. 2 Tr 308.

The Attorney General argued that OVEC is an affiliate of I&M and, as such, the Commission's Code of Conduct caps I&M's recovery of its transactions with OVEC at the market price. Attorney General's initial brief, p. 18. The Attorney General argued that she presented evidence of long-term supply agreements that showed that OVEC costs are in excess of market prices and other comparable resources. *Id.* The Attorney General further argued that it was I&M's burden to prove that OVEC costs complied with the Code of Conduct market price cap and that I&M produced no comparisons of the prices paid for OVEC power to other benchmarks. *Id.*, pp. 18-19. The Attorney General argued that she did provide such comparisons as shown in Table 1 at 2 Tr 316:

> Michigan Public Power Agency's (MPPA's) cost for energy and capacity from Consumers Energy [Company]'s Campbell unit 3 coal-fired generator in 2020: $28.87 per megawatt-hour (MWh).
>
> MPPA's cost for energy and capacity from DTE [Energy Company]'s Belle River coal-fired power plant in 2020: $55.16 per MWh.
>
> Consumers Energy [Company]'s cost for energy and capacity from the Midland Cogeneration Venture gas-fired plant in 2020: $48.89 per MWh.
>
> Cost of New Entry (CONE) for a natural gas combined cycle plant: $50.32 per MWh.
>
> CONE for a natural gas combustion turbine: $48.03 per MWh.
>
> Cost of capacity in the PJM Interconnection, LLC (PJM) base residual auction: $29.38 per MWh.
>
> I&M's RFP [request for proposals] for new renewable resources, conducted for its upcoming IRP [integrated resource plan] case: $44 to [$]50 per MWh.
>
> Northern Indiana Public Service Commission's recent renewable request for proposal results: $37.10 per MWh for wind, $39.30 per MWh for solar, and $43.30 per MWh for solar plus battery storage.

Id., p. 20. The Attorney General argued that the provided benchmarks demonstrate that I&M customers are paying as much as $26 million per year in excess of the cost of these long-term supply comparisons. *Id.*

Additionally, the Attorney General argued that her witness Devi Glick, a Principal Associate at Synapse Energy Economics, Inc., demonstrated that I&M should have provided better oversight of the OVEC generation units and that it was inefficient to run them as must-run units in the PJM.[2] The Attorney General argued that, "[b]ecause of their must-run designation, the OVEC units stayed online for the majority of 2020, despite incurring significant net revenue losses." *Id*., p. 29. According to the Attorney General, OVEC operated these plants without regard for customer interest and the excessive costs passed on to I&M's Michigan customers should be disallowed.

The Staff also made similar comparisons, most notably, comparing the 2020 OVEC energy charges to the energy revenues OVEC received in 2020. Based on the comparison, the Staff argued that OVEC energy charges were $2,571,839 greater than energy revenues and that Michigan customers should not be responsible for their portion of OVEC ICPA costs that exceeded the market price provision of the Code of Conduct, amounting to a recommended $306,391 disallowance. The Staff also provided an alternative recommendation to disregard the disallowance due to extenuating circumstances related to COVID-19 that resulted in unique market factors during the PSCR year. Staff's initial brief, p. 12.

I&M argued that the ICPA is reasonable because it was entered into based upon available information at the time it was executed. I&M's initial brief, p. 19. I&M further provided that:

> I&M entered into the ICPA more than 50 years ago, with extensions in 2004 (extending the ICPA through 2026) and 2011 (extending the ICPA through 2040). (2 Tr. 308). Ms. Glick's testimony fails to acknowledge that electric utilities must enter into long-term agreements based on what they know at the time a decision is made, taking into account the needs of the Company and customers at that time. (2 Tr. 133). Witness Glick's attempt to compare ICPA pricing to the short[-]term market in 2020 fails to evaluate the ICPA based on market prices or alternatives that were available at the time of the 2004 or 2011 ICPA extensions.

Id., pp. 19-20 (footnote omitted).

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[2] CUB also supports the evidence presented by Ms. Glick and all associated disallowances. CUB's amended initial brief, pp. 1-2.

I&M also argued that the Attorney General misapplied the Code of Conduct to the ICPA as the ICPA was approved by the Federal Energy Regulatory Commission (FERC) as a multi-party wholesale agreement under which I&M agreed to purchase power from OVEC. I&M's reply brief, p. 6. Because the ICPA is a FERC-approved wholesale agreement, I&M argued that the terms, pricing, and conditions are subject to FERC jurisdiction and the Commission's Code of Conduct is not applicable. *Id*. I&M further argued that:

> If the Commission attempts to set the price of the ICPA through the Code of Conduct's pricing provision, such action would run afoul of both federal preemption and the Michigan Supreme Court's holding in *Union Carbide v Pub Serv Comm*, 431 Mich 135, 147-148; 428 NW2d 322 (1988), which prohibits the Commission from infringing on management decisions and contractual obligations arising from a utility's business judgment. The Commission's power to fix and regulate rates does not include the power to make management decisions or force a utility to adopt particular principles of economic management.

Id., p. 7.

In further reply to the Attorney General, I&M argued that "[t]he Commission should acknowledge the totality of the circumstances, including the value of long-term generation commitments and the fact that OVEC has consistently made money in the energy markets." I&M's reply brief, p. 18. I&M further argued that, "[w]hen analyzing the costs of the ICPA, it is critical to understand what is being paid for under the ICPA and how to split those costs appropriately, which the Attorney General's witness continuously confuses." *Id*. I&M asserted that it is improper to compare the energy-only costs of these agreements to the PJM energy costs because it only shows profitability while failing to address the prudency of the company's decisions. *Id*.

I&M averred that a proper evaluation of the prudency of the company's decisions would need to take into account all information available at the time the decision was made. *Id.* For instance, I&M continued:

> Demand costs are those costs that provide I&M the right to energy delivered under the cost-based energy charges in both agreements. *Id*. This is particularly valuable at times when market prices for energy are high. *Id*. Demand costs are costs that will be incurred as a result of the agreement, and are independent of the energy delivered. *Id*. In addition, the demand costs allow I&M to take credit for a share of OVEC's capacity and AEP's capacity to meet its capacity requirements as a Fixed Resource Requirement ("FRR") entity in PJM.
>
> I&M's status as an FRR entity within PJM also means that I&M has sufficient capacity to serve the needs of its customers and, therefore, does not participate in PJM's Reliability Pricing Model ("RPM") capacity market. Under PJM's Rules, an FRR entity is allowed to carry lower reserve margins than entities that participate in the RPM market.

Id.

Additionally, I&M argued that there is a significant difference between the value of a short-term market purchase subject to inherent volatility over which the company has no control and the value of long-term resources that facilitate effective planning for a utility. *Id*., p. 19. Thus, I&M concluded:

> Comparing Company-owned or contracted-for FRR capacity with a market product is not a valid comparison and, if accepted, would undermine longer-term utility planning. Resources for FRR entities are contracted over the long-term, while RPM resources are shorter-term and only look about three years out given the PJM planning process. Long-term FRR resources provide more certainty for customers, and are more consistent with reasonable, long-term utility planning. A Company owned or contracted for long-lived asset that is dedicated to serve its customers clearly cannot be substituted by a short-term product that is fraught with uncertainty and risk that is beyond the Company's control.

Id. I&M also argued that the Attorney General's accuracy of comparators is unreliable because she only relied on bills rather than underlying contracts and did not provide a legitimate basis for the comparison. *Id.*, p. 21.

I&M agreed with the Staff that 2020 was not a typical year due to the effects of the COVID-19 pandemic and that attempting to compare the short-term market during the most unusual year in a generation is inappropriate. I&M's initial brief, p. 18. I&M, however, argued that the

Commission should reject the Staff's initial recommendation to disallow $306,391 because it is contrary to the Commission's previous determinations related to the value of long-term resources over the inherent volatility of short-term market purchases. *Id.*

The ALJ found I&M's costs it seeks to recover under the ICPA unreasonable under Act 304 and are in excess of the market price cap in Mich Admin Code, R 460.10108(4) (Rule 8(4)) of the Code of Conduct. The ALJ recommended that the Commission disallow portions of the costs incurred by Michigan customers under the contract. The ALJ did not agree with the PJM market costs or capacity cost comparison put forth by the Attorney General but recommended the disallowance be based on long-term cost comparisons. PFD, p. 61. Specifically, the ALJ stated that:

> [T]his PFD recommends that appropriate disallowances be ordered based upon the long-term cost comparisons offered by the Attorney General. This PFD notes that these various costs make up a reasonable and relatively narrow range, with the exception of the MPPA's cost from Consumers['] Campbell 3, which cost amount is rejected from consideration as an outlier. This PFD finds that each of these various categories of cost comparisons – prior power transactions, CONE, and RFPs – are supported by the record evidence in this case and are appropriate benchmarks for the Commission to consider in calculating any disallowance.

Id. Based on the long-term comparison offered by the Attorney General and the lack of meaningful comparisons offered by I&M, the ALJ ultimately recommended that the Commission disallow:

> $1.347 million of the ICPA, costs calculated as the difference between the ICPA total cost of $65.46 per MWh and the average ($52.02 per MWh) of the MPPA-DTE Belle River transaction cost ($55.16 per MWh) and the Consumers-MCV transaction cost ($48.49), multiplied by the 721,476 MWh of electricity billed in 2020, reduced for the Michigan share (13.9%) of the costs.

PFD, p. 62.

The ALJ also reviewed the Attorney General's assertion that OVEC operated uneconomically for most of the plan year and that I&M took no meaningful steps to limit those losses. PFD, p. 41. The ALJ determined that the Attorney General's requested disallowance was far too excessive because it did not allocate for the Michigan portion (13.9%) of the alleged losses and, more importantly, that it appears that under the ICPA that I&M has no authority to exercise authority or to independently override the decisions of the OVEC Operating Committee.

I&M takes exception to the ALJ's recommended disallowance and argues that the ALJ supplanted the reasonable and prudent standard required under Act 304 and conflated that standard with the "no higher than market" Code of Conduct pricing standard.[3] I&M's exceptions, p. 1. I&M further argues that the ALJ did not identify any unreasonable actions taken by the utility in managing its PSCR costs in 2020 but relied solely on market proxies. *Id.*, p. 4. I&M contends that no party argued, and that the ALJ did not find, that the decisions of the utility to enter into the ICPA initially, or to extend the contract through various iterations, to be imprudent. *Id.*, p. 38. I&M argues that the Commission should reject any application of the Code of Conduct to a contract that was entered into prior to the date of the latest adoption of the Code that for the first time included a definition for "affiliate." *Id.*, pp. 19-20.

In her replies to exceptions, the Attorney General argues that the ALJ carefully weighed the evidence and arguments provided by all the parties and did not find in favor of any one party on all issues. Attorney General's replies to exceptions, p. 4. The Attorney General further argues that the Commission placed I&M on notice in previous proceedings that the Commission would scrutinize the ICPA and other contract costs moving forward. *Id.*, p. 3. The Attorney General contends that I&M not only disregarded the directives of the Commission to provide cost

[3] I&M's exceptions on all issues generally relate to the ALJ's application of the pricing standard in the Commission's Code of Conduct and its related definition of "affiliate" that was not adopted until 2018. Application of the Code of Conduct will be discussed in more detail later in this order.

comparisons to its long-term contracts but now submits arguments in its exceptions that were never raised before the ALJ, lack merit, and should be rejected. *Id.*, pp. 3-4.

CUB's replies to exceptions closely mirrored those presented by the Attorney General but with CUB further arguing that the ALJ's recommended disallowances are an appropriate response to I&M's rising residential rates due to excessive costs and provide meaningful relief to ratepayers. CUB's replies to exceptions, p. 4.

As an initial matter, in its May 13, 2021 order in Case No. U-20529 (May 13 order), the Commission found that "I&M's interest of 7.85% exceeds the ownership requirement set forth to establish that I&M and OVEC are affiliates under the Code of Conduct." May 13 order, p. 17. The Commission further found that the ICPA is an affiliate contract under the Code of Conduct's pricing provision of Rule 8(4), which reads:

> "If an affiliate or other entity within the corporate structure provides services or products to a utility, and the cost of the service or product is not governed by section 10ee(8) of 2016 PA 341, MCL 460.10ee(8), compensation is at the lower of market price or 10% over fully allocated embedded cost."

Id. The Commission specifically found that I&M would be required to demonstrate that the amended ICPA, an affiliate contract, is in compliance with the pricing provisions of Rule 8(4). *Id.*

The Commission also noted that, because the ICPA contractual rates may vary from year to year, under Act 304, each PSCR case involves a new plan with appropriate PSCR factors in which the Commission determines the reasonableness and prudence of the PSCR plan. *Id.*, p. 13. The Commission also stated that:

> [W]hile the Commission finds that the ALJ properly stated that long-term agreements, such as the ICPA, must be evaluated under the reasonable utility management test, asking whether the costs in question "are those a reasonable utility manager would have incurred, in good faith, under the same circumstances and at the relevant point in time," the Commission also has the duty under statute to continuously evaluate the reasonableness of the PSCR plan and factors, including

> the cost arising under the ICPA and its amendments. . . . This is particularly true for cases involving affiliate transactions that implicate the Code of Conduct[.]

Id., pp. 13-14 (internal citation omitted). Additionally, in its December 9, 2020 order in Case No. U-20203 (December 9 order), the Commission recognized the value of long-term contracts, but also that decisions to enter into the contract did not "absolve a utility from monitoring and responding to market conditions and system needs and making good faith efforts to manage existing contracts." December 9 order, p. 26. The Commission further provided that proper management "may entail meaningful attempts to renegotiate contract provisions to ensure continued value for ratepayers as market conditions change." *Id*.

Based on the previous decisions of the Commission and the evidence presented in this proceeding, the Commission agrees that the ALJ's recommended disallowance of $1.347 million is appropriate. The Commission agrees that cost comparison of prior power transaction costs are the fairest benchmarks for calculating the disallowance. As it pertains to I&M's arguments regarding the Attorney General's comparisons, the Commission notes that it would be difficult to produce comparisons that are 100% identical to the OVEC units. However, as the Attorney General demonstrated, comparisons can be made and the failure of I&M to provide the Commission with meaningful benchmarks when repeatedly directed to do so is not well taken. Specifically, as highlighted in the PFD,

> I&M provided no information through direct or rebuttal testimony or through discovery responses comparing the ICPA OVEC costs to other long-term supply resources. I&M filed no testimony – in direct or rebuttal – comparing the OVEC costs to other long-term supply arrangements. When asked in discovery to produce any comparisons of the prices paid for OVEC power to other benchmarks, I&M had none. When asked for any valuations of the energy and capacity from OVEC, I&M had none of those, either. When asked for prices of unsolicited offers of energy or capacity or the cost of recent capacity purchases, I&M had none of those either. When asked if I&M knew of any PPA or generating resource that was as expensive as OVEC in 2020 (other than the AEG contract), I&M objected and refused to answer.

PFD, pp. 39-40 (citing Attorney General's initial brief, pp. 18-19.) The Commission further notes that, as highlighted in the PFD, "I&M does not challenge the accuracy of the compiled costs or the calculations of the proposed disallowance amounts made by the Attorney General or Staff." PFD, p. 32. On this basis, given the record evidence in support of the disallowance, the fact that I&M did not dispute the accuracy of the costs presented, and that I&M stubbornly refused to provide any other meaningful basis for comparison despite the Commission's explicit statements in the May 13 order that such comparisons would be required to support recovery, the Commission adopts the ALJ's recommended disallowance of $1.347 million.

The Commission further notes that the ICPA has never been approved by the Commission, and therefore each time associated costs are submitted, they must be reviewed for reasonableness and prudence. Any associated FERC approval of the ICPA, a previously determined affiliate transaction, does not absolve the utility from complying with the pricing provisions of the Code of Conduct. Indeed, as noted by the ALJ, the Commission "is not determining the reasonableness of a FERC-approved rate;" rather, the Commission here is evaluating "the reasonableness and prudence of I&M's decision to purchase from OVEC, an affiliate, as opposed to another source at a lower rate or market price." PFD, p. 47 (quoting May 13 order, p. 21).

I&M also cautions that rejecting full recovery for the uneconomic costs associated with the ICPA would "run afoul of … the Michigan Supreme Court's holding in *Union Carbide v Pub Serv Comm*, 431 Mich 135, 147-148; 428 NW2d 322 (1988), which prohibits the Commission from infringing on management decisions and contractual obligations arising from a utility's business judgment." I&M's reply brief, p. 7. The Commission finds this argument wholly without merit. The very purpose of the Commission's Code of Conduct is to protect customers from exactly this type of arrangement, namely where a utility contracts with an affiliate for above-market-cost power to the detriment of its customers. I&M, of course, remains free to continue to make whatever business decisions it wishes in terms of continuing to participate in the ICPA. What it cannot do is continue to recover the costs of any unreasonable and imprudent decisions from its customers.

Unit Power Agreement

According to the Attorney General, the UPA was executed in 1982 with amendments executed in 1989 and in 2018. Attorney General's initial brief, p. 34. The Attorney General further provided that its witness testified that the Rockport Generating Station is a two-unit coal-fired power station operated by I&M. Unit 1 is operated by I&M and is 50% owned by I&M and 50% owned by AEP Generation (AEG), while Unit 2 is owned by non-affiliated parties and is leased back to I&M and AEG at a 50% share each. 2 Tr 327.[4] AEG sells 70% of its share of each Rockport unit back to I&M under the UPA with AEG and in return I&M pays AEG an energy charge and a demand charge and I&M is responsible for the costs associated with the 50% share of Rockport 1 that it owns and the 50% share of Rockport 2 that it leases, with the associated fuel costs passed on directly to customers. 2 Tr 328.

The Attorney General argued that the cost of the power I&M receives from the UPA shows that I&M customers are paying a premium for Rockport's energy and capacity services over the equivalent value of the energy and capacity in the PJM market. This works out to a total $115.1 million premium for Rockport services allocated to I&M based on the UPA, approximately $16.1 million of which will be passed onto Michigan customers. Attorney General's initial brief, pp 35-

[4] The Commission notes that subsequent to the 2020 year at issue in this case, Unit 2 was sold to AEG and I&M.

36. The Attorney General added that the cost of the Rockport power from the UPA exceeds all of the long-term benchmarks set forth in Table 1. *Id.*

The ALJ agreed with the Attorney General that the costs I&M seeks to recover for its Rockport power purchase expenditures in 2020 under the UPA are unreasonable and in excess of the market cap of Rule 8(4). PFD, p. 44. The ALJ provided that:

> I&M is required to pay an energy charge and a demand charge for the Rockport power it buys from AEG [AEP Generation Company]. Ms. Glick calculates that I&M received a total energy and capacity value of $40.79/ MWh. The Attorney General asserts that the actual cost of the AEG power was $122.24 per MWh. Ms. Glick asserts that, as a result, I&M customers are paying a total of $115.1 million premium for Rockport's energy and capacity in the PJM market, with approximately $16.1 million to be passed on to Michigan customers. She adds that the costs of the long-term supply options in Ms. Glick's Table 1 can be compared to the $122.24 per MWh AEG cost in the same way these long-term options were compared to the OVEC cost. The Attorney General argues that, based on such a comparison, it is obvious that the AEG costs far exceed any other long-term supply benchmark available.

PFD, p. 44 (footnotes omitted). The ALJ agreed with the Attorney General and recommended a disallowance of $7.1 million, which represents Michigan's share of excessive costs calculated as the difference between the UPA total cost of $122.24 per MWh and the average of the comparison costs of the long-term supply options in Ms. Glick's Table 1, multiplied by the 721,476 MWh of electricity billed in 2020. PFD, p. 62.

I&M excepts to the PFD and argues that the ALJ erred in determining that the UPA was subject to the Code of Conduct pricing provisions because the UPA is a financing mechanism, not an affiliate transaction for goods or services. I&M's exceptions, p. 7. I&M avers that the UPA provided the credit support that was necessary to allow I&M to complete the Rockport plant construction and for which I&M retains all the essential benefits of ownership, including capacity assigned to AEG. *Id.* I&M further argues that it would be illogical to disallow UPA costs simply because they compare unfavorably to current market prices when the underlying costs have already been reviewed and approved by the Commission. *Id.*

I&M also argues in exceptions that the ALJ erred in not evaluating conditions caused by the COVID-19 pandemic into Rockport's cost profile. *Id.*, p. 8. I&M argues that the substantial reduction in generation, as was the case in 2020 when many businesses were closed, increases Rockport's costs on a dollar-per-MWh basis because the plant's costs are heavily weighted to fixed costs. I&M further argues that the ALJ's recommended disallowance should be rejected because the use of short-term comparisons to long-term contracts is inappropriate. *Id.*

The Attorney General asserts that the purpose of the UPA is irrelevant in determining whether the contract is subject to the Code of Conduct. Attorney General's replies to exceptions, p. 20. The Attorney General argues that the UPA requires AEG to provide its share of power and energy from the Rockport plant to I&M and that I&M compensates its affiliate, AEG, for this power and energy. *Id.*, p. 19. The Attorney General contends that this energy and power are products and possibly services and are therefore subject to Rule 8(4) pricing provisions. *Id.*, p. 21.

The Staff did not address this issue in briefing or in exceptions, while CUB merely provided its general support of the Attorney General's evidence and arguments.

The Commission agrees that the UPA is subject to the pricing provisions of the Code of Conduct. I&M and AEG are wholly owned subsidiaries of AEP, and the agreement provides for I&M to compensate AEG for power and energy. The Commission agrees with the Attorney General that the transactions for power and energy equate to affiliate transactions for products and possibly services and are thus subject to Rule 8(4).

The Commission, however, agrees with I&M that the ALJ's recommended disallowance should be rejected. First, the Commission notes that unlike the ICPA, the underlying costs related to the UPA have been reviewed and at least partially approved in a previous PSCR proceeding settlement agreement. *See*, March 14, 1991 order in Case No. U-9656, Exhibit A. Additionally, the Commission finds that the unique circumstances created by COVID-19 during 2020 do not allow for a proper evaluation of the UPA during the PSCR period in question as the reduction in production and the weighting of costs to fixed costs skews the comparison; as such, the Commission finds that the comparisons suggested by the Attorney General do not properly evaluate the capacity and demand charges associated with these fixed costs. Finally, the Commission finds that based on the evidence, I&M's energy costs associated with the UPA were not unreasonable.

Code of Conduct

The ALJ rejected I&M's repeated arguments regarding the Code of Conduct and its non-applicability to the contracts at issue in this proceeding. First, the ALJ dismissed I&M's assertion that the Code of Conduct does not apply to FERC-approved contracts. The ALJ noted that the Commission's May 13 order squarely addressed this issue and provided that:

> "Through the application of the Code of Conduct discussed above, the Commission is not determining the reasonableness of a FERC-approved rate. Rather, the Commission will evaluate the reasonableness and prudence of I&M's decision to purchase from OVEC, an affiliate, as opposed to another source at a lower rate or market price."

PFD, p. 47 (quoting May 13 order, p. 21).

Second, the ALJ was not persuaded that the Code of Conduct conflicts with Act 304. I&M argued that the Commission cannot use the Code of Conduct to create a new statutory standard that restricts the ability of a utility under Act 304 to pass through to its customers all reasonable and prudent PSCR costs. I&M's reply brief, p. 8. The ALJ determined that the Code of Conduct was legislatively mandated and, as such, must be read in harmony with Act 304. In rejecting

I&M's argument, the ALJ further provided that "this PFD does not see an inherent conflict between Act 304 and the Code of Conduct when the Code of Conduct provides for stricter rules applicable to special situations (affiliate transactions)." PFD, p. 49.

Finally, I&M argued that the Code of Conduct does not apply to OVEC because it is not an affiliate subject to I&M's ownership and control. I&M's reply brief, p. 10. The ALJ rejected I&M's argument stating that the Commission's previous determinations that I&M and OVEC are affiliates is correct. However, the ALJ disagreed with the Commission's previous conclusions that I&M and OVEC are affiliates because I&M is a 7.85% sponsoring company to the ICPA with OVEC. PFD, pp. 51-52 (citing May 13 order, pp. 16-17). Additionally, the ALJ disagreed with the November 18, 2021 order in Case No. U-20804, in which the Commission concluded that I&M possesses the power to cause the direction of the management or policies of OVEC. PFD, p. 52. The ALJ determined that under Mich Admin Code, R 460.10102(1)(a) (Rule 2(1)(a)):

> there are three separate circumstances in which an entity is an affiliate: 1) when an entity "controls" another entity, 2) when an entity "is controlled by" another entity, or 3) when an entity "is under common control with" another entity. Rule 2(1) further provides that for each of the affiliate circumstances there are two separate ways that control can be shown: A) when an entity has the power to direct the management or policies of another entity through either an ownership, beneficial, contractual, or equitable interest, or 2) when an entity has ownership of at least 7% of another entity.

PFD, pp. 51-52. The ALJ disregarded the Commission's previous determinations that I&M's 7.85% interest exceeds the ownership requirement for affiliate designation set forth in Rule 2(1) but determined that I&M and OVEC are affiliates because they are under common control:

> Here, the evidence indicates that I&M is under common control with OVEC as each is controlled by AEP. Specifically, AEP controls I&M, as I&M is a wholly owned subsidiary of AEP. Similarly, AEP controls OVEC, as AEP owns a 43.47% equity interest in OVEC, which equity interest exceeds the 7% ownership interest threshold. As such, I&M and OVEC are affiliates under Rule 2(1) and the ICPA constitutes an affiliate transaction to which the Code of Conduct applies.

PFD, p. 54 (footnotes omitted).

I&M argues in exceptions that the Code of Conduct should not apply to the ICPA or the UPA and that the ALJ's recommendations based on his application of the Code of Conduct violate various legislative and constitutional protections. I&M urges the Commission to properly apply Act 304 and recognize that the Code of Conduct pricing provisions cannot lawfully be applied to pre-existing, FERC-approved contracts. I&M's exceptions, p. 39.

In replies to exceptions, the Attorney General argues that:

> [a]n electric utility that files a PSCR plan and reconciles PSCR costs must meet the standards of Act 304. If the utility seeks to recover among its PSCR costs any costs incurred to procure products or services from an affiliate, then the cost of those products or services must also meet the Code of Conduct. The fact that a utility must meet the standards of Act 304 for all of its PSCR costs, and must also meet the Code of Conduct for any of its PSCR costs incurred with affiliates, does not mean that the Code of Conduct conflicts with the PSCR statute.

Attorney General's replies to exceptions, p. 29. The Attorney General further argues that the Commission promulgated the Code of Conduct pursuant to a lawful legislative mandate and that "I&M's efforts to avoid the additional scrutiny of the Commission's lawfully-promulgated Code of Conduct are unsupported and fail to challenge the PFD's application of the Code of Conduct to I&M." *Id.*, p. 36.

The Commission agrees with the Attorney General and the ALJ that the Code of Conduct pricing provisions apply to both the ICPA and UPA. The Commission further agrees with the Attorney General that Act 304 and the Code of Conduct must be read in harmony, and the fact that I&M must meet the standards of Act 304 for all of its PSCR costs, and must meet Code of Conduct requirements for costs incurred with affiliates, does not mean that the Code of Conduct conflicts with PSCR statutes.

Additionally, the application of the Code of Conduct's pricing provisions to I&M's PSCR costs has been well-settled in prior proceedings as discussed in this order. In its May 13 order the Commission determined that the Code of Conduct applies to Act 304 proceedings and further provided that:

> I&M's 7.85% ownership interest is not disputed by the company; rather, I&M contends that it lacks the authority to direct management policies of OVEC as required under the language of Rule 2. *See*, I&M's replies to exceptions, pp. 25-26. However, I&M's interpretation of Rule 2(1)(a) discounts the "or" preceding the phrase "the ownership of at least 7% of an entity either directly or indirectly" whereby "control" is established through a direct or indirect ownership interest. As such, the Commission finds that, under the plain language of Rule 2(1)(a), I&M's interest of 7.85% exceeds the ownership requirement set forth to establish that I&M and OVEC are affiliates under the Code of Conduct.

May 13 order, pp. 16-17. The Commission notes that the May 13 order was not appealed and continues to find that the evaluation of the facts and conclusions of law rendered in that order are correct and are applied consistently to the determinations made in this order.

<u>Rockport Unit Commitment</u>

The Attorney General argued that I&M imprudently self-committed the Rockport units in 2020 and identified six distinct time periods when the unit was designated with a must-run status despite I&M's six-day forecasts projecting that net revenue losses would result.

I&M argued that there are many factors that are considered in designating a unit as must-run. Specifically, to the review period in question, I&M argued that it offered its units as must-run to address an oversupply of coal while managing its delivery obligations under its current contracts. I&M argued that it avoided $19.7 million in liquidated damages that it could have incurred under its contractual obligations if it had not self-committed the units.

The ALJ provided that the record evidence did not support the Attorney General's recommended disallowance. PFD, p. 59. The ALJ further provided that:

> it is important to note that the potential for liquidated damages derives from the terms of the various fuel supply contracts and the failure to take or accept deliveries thereunder, and not from the status of I&M's fuel inventory supply capacity. As such, without knowing the specific fuel supply contract provisions of each of I&M's eight supply contracts with its three different suppliers, including the dates and amounts of fuel delivered, and when and the amounts of any liquidated damages may have been incurred and owed, as well as the limits of the emergency storage capacity, it is possible that the amount of coal burned is directly related to the avoided liquidated damages.

Id., p. 60 (footnote omitted).

The Commission agrees with the ALJ and adopts the recommendation within the PFD. The Commission further notes that the Attorney General did not file exceptions to the PFD and, therefore, has waived any objection to the PFD, including any potential objection(s) on the issue. *See*, Mich Admin Code, R 792.10435(2).

THEREFORE, IT IS ORDERED that:

A. Indiana Michigan Power Company's 2020 power supply cost recovery reconciliation application for the 12-month period ended December 31, 2020, is approved, as described in this order.

B. Indiana Michigan Power Company is authorized to roll the power supply cost underrecovery, consisting of principal and interest of $4,034,386, into its beginning balance for its 2021 power supply cost recovery reconciliation.

C. Indiana Michigan Power Company shall continue to document, and make available to the Commission Staff upon request, the basis for the company's decision to designate a generating unit as must-run when the company's forecast demonstrates that the decision to do so will result in excess costs, that is, the marginal costs to operate the generating unit will exceed the revenue attributed to supplying that power to the PJM Interconnection, L.L.C. market.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notification should be sent to the Executive Secretary at mpscedockets@michigan.gov and to the Michigan Department of Attorney General - Public Service Division at pungp1@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General – Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

Daniel C. Scripps, Chair

Tremaine L. Phillips, Commissioner

Katherine L. Peretick, Commissioner

By its action of February 2, 2023.

Lisa Felice

Lisa Felice, Executive Secretary

P R O O F   O F   S E R V I C E

STATE OF MICHIGAN)

Case No. U-20530

County of Ingham)

Brianna Brown being duly sworn, deposes and says that on February 2, 2023 A.D. she electronically notified the attached list of this **Commission Order via e-mail transmission**, to the persons as shown on the attached service list (Listserv Distribution List).

Brianna Brown

Subscribed and sworn to before me
this 2nd day of February 2023.

Angela P. Sanderson
Notary Public, Shiawassee County, Michigan
As acting in Eaton County
My Commission Expires: May 21, 2024

Service List for Case: **U-20530**

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