

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of
INDIANA MICHIGAN POWER COMPANY
for a certificate of necessity pursuant to
MCL 460.6s and related accounting
authorizations.

Case No. U-21377
(e-file paperless)

**THE MICHIGAN PUBLIC SERVICE COMMISSION STAFF'S
INITIAL BRIEF**

**MICHIGAN PUBLIC SERVICE
COMMISSION STAFF**

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I. Introduction

On March 27, 2023, Indiana Michigan Power Company (I&M or the Company) filed an application in this case pursuant to Public Act 3 of 1939, as amended by Public Act 341 of 2016 (Act 341), MCL 460.6s, and the Michigan Public Service Commission's (the MPSC's or the Commission's) May 11, 2017, Order in Case No. U-15896. I&M requested the Commission issue a certificate of necessity (CON) for the construction of the Lake Trout solar generation facility (Lake Trout), a 245 megawatt (MW) solar generation project to be located in Blackford County, Indiana. Staff finds that the Lake Trout solar project is reasonable and requests the Commission issue a CON for the Lake Trout solar generation facility.

II. Regulatory Framework and Standard of Review

Section 6s(1) of Act 341, MCL 460.6s(1), allows an electric utility that proposes to purchase an existing electric generation facility to submit an application to the Commission seeking a CON for the purchase. Section 6s(3) of Act 341 provides that an electric utility may request the Commission make a number of findings in a CON proceeding. In this case, I&M requests the Commission:

1. issue a CON that the size, fuel type, and other design characteristics of the proposed electric generation facility represent the most reasonable and prudent means of meeting I&M's power need, consistent with MCL 460.6s(3)(b); and
2. issue a CON that the estimated purchase or capital costs of, and the financing plan for, the proposed electric generation facility will be recoverable in rates from I&M customers, consistent with MCL 460.6s(3)(d). [2 TR 33.]

Under Section 6s(4)(a-e) of Act 341, the Commission shall grant a utility's request for a CON if it determines the following:

(a) That the electric utility has demonstrated a need for the power that would be supplied by the existing or proposed electric generation facility or pursuant to the proposed power purchase agreement through its approved integrated resource plan under section 6t or subsection (11).

(b) The information supplied indicates that the existing or proposed electric generation facility will comply with all applicable state and federal environmental standards, laws, and rules.

(c) The estimated cost of power from the existing or proposed electric generation facility or the price of power specified in the proposed power purchase agreement is reasonable. The commission shall find that the cost is reasonable if, in the construction or investment in a new or existing facility, to the extent it is commercially practicable, the estimated costs are the result of competitively bid engineering, procurement, and construction contracts, or in a power purchase agreement, the cost is the result of a competitive solicitation. Up to 150 days after an electric utility makes its initial filing, it may file to update its cost estimates if they have materially changed. No other aspect of the initial filing may be modified unless the application is withdrawn and refiled. A utility's filing updating its cost estimates does not extend the period for the commission to issue an order granting or denying a certificate of necessity. An affiliate of an electric utility that serves customers in this state and at least 1 other state may participate in the competitive bidding to provide engineering, procurement, and construction services to that electric utility for a project covered by this section.

(d) The existing or proposed electric generation facility or proposed power purchase agreement represents the most reasonable and prudent means of meeting the power need relative to other resource options for meeting power demand, including energy efficiency programs, electric transmission efficiencies, and any alternative proposals submitted under this section by existing suppliers of electric generation capacity under subsection (13) or other intervenors.

(e) To the extent practicable, the construction or investment in a new or existing facility in this state is completed using a workforce composed of residents of this state as determined by the commission.

This subdivision does not apply to a facility that is located in a county that lies on the border with another state. [MCL 460.6s(4)(a-e).]

An applicant must demonstrate by a preponderance of the evidence that the above provisions of MCL 460.6s(4) have been satisfied. “[I]n matters before the Commission where statutory law is silent regarding the correct quantum of proof needed to review a utility’s costs, the Commission assesses those costs using the preponderance of the evidence standard adopted in civil cases.” *In re Detroit Edison Co on Remand*, MPSC Case No. U-15768, 10/17/2013 Order, p 16 (citing *Residential Ratepayer Consortium v Public Service Comm*, 198 Mich App 144, 149 (1993)).

Preponderance of the evidence means “such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.” *People v Pugh*, 48 Mich App 242, 245 (1973). The Michigan Supreme Court has provided an explanation of how this standard is to be applied by administrative agencies:

The comparative degree of proof by which a case must be established is the same in an administrative as in a judicial proceeding – that is, a preponderance of the evidence. It is not satisfied by proof creating an equipoise, but it does not require proof beyond a reasonable doubt. No essential issue may be left to surmise, guess, or conjecture, for an administrative body cannot base an award or decision upon conjecture or speculation, although a determination may properly be based on circumstantial evidence. [*Dillon v Lapeer State Home & Training Sch*, 364 Mich 1, 8; 110 NW2d 588 (1961) (quotation marks and citation omitted).]

The Commission has found that once a utility has satisfied its initial burden of proof, another party “may challenge that evidence and present

evidence of unreasonableness.” *In re Detroit Edison Co’s Application to Increase Rates*, MPSC Case No. U-15768, 1/11/2010 Opinion and Order, p 38. At which point, the other party “has the burden to demonstrate its position is correct.” *Id.*

III. Procedural History

On February 28, 2022, in Case No. U-21189, I&M filed its multistate IRP in Michigan under MCL 460.6t. On November 14, 2022, I&M filed a settlement agreement in its IRP case. The Company, the Association of Businesses Advocating Tariff Equity (ABATE), and the Staff signed the settlement agreement. Energy Michigan filed a statement of non-objection. On November 28, 2022, objections were filed by several intervening parties. On February 2, 2023, the Commission issued an order in Case No. U-21189 (February 2 Order) approving the IRP settlement agreement. I&M filed a separate proceeding in Case No. U-21189 to seek additional solar resources pursuant to the settlement agreement approved its integrated resource plan (IRP) case under Section 6t of Act 341, MCL 460.6t.

The settlement agreement provided that I&M would submit CON applications for Commission approval for all projects 225 MW or larger. MPSC Case No. U-21189, 2/2/2023 Order, Exhibit A, p 6. The settlement agreement also allowed for reasonable and prudent costs for resources approved in such CON proceedings to be recoverable in rates, in accordance with MCL 460.6s for cost recovery of resources larger than 225 MW, for which construction commences within three years of the date of the February 2 order, and that result from a

competitive solicitation that complies with the Commission's Competitive Procurement Guidelines. *Id.*

As previously noted, on March 27, 2023, I&M filed an application in this case with supporting testimony and exhibits for a certificate of necessity for the Lake Trout solar generating facility. At a prehearing on April 27, 2023, Administrative Law Judge Katherine E. Talbot (ALJ) granted a petition to intervene to Wabash Valley Power Association, Inc. d/b/a Wabash Valley Power Alliance. Intervention was granted to the Attorney General of right. On July 6, 2023, the Company filed direct testimony. Staff and the Attorney General filed direct testimony on July 13 and 14, 2023, respectively. On August 8, 2023, Staff and the Company filed rebuttal testimony.

IV. Discussion

The Staff recommends the Commission approve the Lake Trout solar PSA, requested certificates of necessity, and find that the project is reasonable for future cost recovery. Sections 6s(b) and 6s(e) of Act 341 appear to be satisfied. As stated in the testimony of Company witness Beth E. Lozier, the developer is responsible for all permitting for the facility at issue and will comply with State and Federal environmental standards, laws, and rules. (2 TR 211.) As noted by the Company in the direct testimony of Company witness David A. Lucas, the workforce requirements of Section 6s(4)(e) of Act 341 are not applicable as I&M itself is not engaging in the construction of the solar generation facility and costs are reflective of the purchase of the project upon completion. (2 TR 33-34.) Compliance with

these sections has not been raised as an issue by any intervening party to the case.

The remaining issues in this case are addressed below.

A. Indiana Michigan Power Company has demonstrated a need for the power that would be supplied by the electric generation facility through its integrated resource plan.

Section 6s(4)(a) of Act 341 states that the Commission shall grant the request for a CON if it determines the following:

That the electric utility has demonstrated a need for the power that would be supplied by the existing or proposed electric generation facility or pursuant to the proposed power purchase agreement through its approved integrated resource plan under section 6t or subsection (11). [MCL 460.6s(4)(a).]

In approving the Company's IRP settlement agreement, the Commission found that the Company demonstrated that the power supplied through the purchase of the Lake Trout facility is needed. Specifically, the Commission found that "I&M will have a 750 MW capacity need which follows naturally from the retirement of the Rockport plant and the resulting 2,600 MW capacity deficiency in 2028." MPSC Case No. U-21189, 2/2/2023 Order, p 96; see also, p 100. As the Company stated in testimony, "[t]he approved IRP clearly identifies a need for additional supply-side capacity starting in 2025 to replace the Rockport capacity. The approved IRP includes 1,300 MW (ICAP) of renewable capacity additions by 2026. Therefore, the Lake Trout Solar Project is consistent with the identified need for more renewable capacity additions in this timeframe." (2 TR 35.)

The Lake Trout solar generation facility is the result of a competitively bid purchase sale agreement (PSA) between the Company and the developer EDF Renewables Development, Inc. (EDF Renewables). Lake Trout will produce 245 MW of solar generation and is expected to be operational in April 2026 at which time the Company will obtain ownership of the facility. (2 TR 29.) The Lake Trout Solar Project resulted from the Company's 2022 all-source request for proposals (RFP) to fulfill the identified need in the Company's approved IRP settlement agreement.

Staff recommends the Commission find that I&M has demonstrated a need for the power that would be supplied by the electric generation facility through its integrated resource plan.

B. The Staff recommends the Commission find the estimated cost of power from the proposed electric generation facility is reasonable.

Under Section 6s(4)(c) of Act 341, the Commission must grant a utility's request for a CON if it determines "[t]he estimated cost of power from the existing or proposed electric generation facility or the price of power specified in the proposed power purchase agreement is reasonable." MCL 460.6s(4)(c). The Commission shall find that the cost associated with an investment in an existing facility is reasonable if the cost is the result of a competitive solicitation. *Id.*

1. **The Lake Trout contract is reasonable because it was secured through the Commission’s competitive procurement process consistent with the Competitive Procurement Guidelines.**

The Company provided details about its competitive solicitation process in the testimony of Company witnesses Timothy B. Gaul and D. Dean Koujak. (2 TR 65-101, 2 TR 127-138.) Staff reviewed the bid and contract for Lake Trout on April 20, 2023, as well as other RFP materials. (2 TR 277.) Staff found that the RFP selection process was in accord with the Competitive Procurement Guidelines for Rate-Regulated Electric Utilities, adopted by the Commission in its September 9, 2021, Order in Case No. U-20852. (2 TR 268.) Charles River Associates (CRA), the Company’s Independent Monitor, concluded in its report that “[t]he evaluation process was reasonable and demonstrated an effort on the part of I&M to ensure a competitive solicitation.” (2 TR 274 (quoting Company Exhibit IM-9, p 5); see also 2 TR 137-138.)

The Attorney General took issue with the negotiation process used for the Lake Trout solar generation facility. The Attorney General asserts that the final contracts negotiated by I&M “must be considered as resulting from bilateral negotiations” as opposed to a competitive solicitation. (2 TR 290.) As an alternative, the Attorney General asserts that “I&M had the option of asking all of the viable projects for revised offers, so as to obtain competitive prices.” *Id.* The Attorney General asserts that “[a]ll of the prices initially offered for projects dropped from the shortlist were less than the prices agreed in final contracts for the shortlisted projects.” (2 TR 290.) The Attorney General concludes that “I&M has

not demonstrated that its project selection as a result of its IRP is reasonable.” (2 TR 291.)

The Staff reviewed all bids and [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] (2 TR 277.) Staff witness Karsten D. Szajner provided non-price issues with solar projects excluded from the short list in Exhibit S-2.3. [REDACTED]

[REDACTED] (Confidential Exhibit S-2.3.) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (*Id.*)
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (*Id.*) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Confidential

Exhibit S-2.3.)

Adopting the Attorney General's position that bids should be updated as a part of the competitive solicitation process, regardless of flaws in the initial bids, would make the bidding process untenable. There is often a significant elapse of time from the bid submittal to the final contract negotiations. If bidders were not able to alter their bids to account for changing market conditions, the bidder would need to submit bids to cover all possible changes in market conditions. If adverse market conditions did not materialize, the bidder would then reap a windfall profit at the expense of the Company and ultimately the Company's ratepayers.

The Attorney General's resubmittal proposal would result in an unnecessary delay to the procurement process. The possibility that a resubmittal of bids could produce lower prices or even a different result is entirely speculative. There is no way of knowing if the [REDACTED]

[REDACTED] (2 TR 276.)

The projects selected included Lake Trout and the four projects now approved by the Commission in Case No. U-21189.¹ Despite similar criticisms by the Attorney General in that case that the competitive bidding process was flawed, the Commission found that all of the projects were reasonable. The Lake Trout solar generation facility as well as the four projects approved in Case No. U-21189 resulted from the same competitive solicitation process.

The Staff has reviewed the Company's competitive procurement contract selection process and finds it to be reasonable. The Staff recommends the Commission find the Lake Trout contract is reasonable because it was secured through the competitive procurement process consistent with the Competitive Procurement Guidelines.

2. The costs associated with the Lake Trout solar generation facility are the result of a competitive solicitation.

The Attorney General asserts that “[b]ecause the final contracts in I&M’s process were priced substantially higher than at the time the short list was developed and the degree of change in the prices varies considerably between projects, the resulting prices cannot reasonably be considered as resulting from competitive solicitation.” (2 TR 290.) The Attorney General further asserts that “I&M has not demonstrated that its proposed contract for the purchase of the Lake Trout Solar Project is reasonable, because its pricing was not determined through a

¹ MPSC Case No. U-21189, 8/30/2023 Order, p 50, 52.

competitive solicitation and because it appears that a less costly power purchase agreement was available.” (2 TR 292.) The Staff disagrees.

As stated in the testimony of Company witness Koujak, “it is standard industry practice to conduct post-solicitation contract negotiations to produce a final-form, execution-ready agreement.” (2 TR 136.) The Company provided a comparison of the levelized cost of energy (LCOE) of the proposed portfolio of solar resources as compared to the LCOE of the solar alternatives assumed in the IRP in Figure MAB-3. As stated by the Company, when considering the solar projects including the Lake Trout project and proposed portfolio of solar resources, the LCOE is comparable to the \$80/MWh LCOE of the blended solar assumptions approved in the IRP. (2 TR 57.)

Staff testified that in its IRP, the Company assumed there would be two tiers of solar resources available: Tier 1, which has a lower LCOE, and Tier 2, which has a higher LCOE. The Company assumed that there would be 250 MW of Tier 1 solar capacity and 250 MW of Tier 2 solar capacity available at the time of the RFP. (2 TR 240; 2 TR 57.) In the IRP, the Company assumed that Tier 1 solar would have an [REDACTED] and Tier 2 solar would have an [REDACTED] (2 TR

241.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (2 TR 243.) The

result of the RFP [REDACTED]

[REDACTED] *Id.* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (2 TR 243.)

The Company targeted any renewable resource in this RFP. I&M's preferred plan called for 400 MW of Wind in 2026. All wind resources that responded to I&M's RFP either withdrew their bids or were selected by an I&M sister company. (2 TR 242-243.) Thus, the Company accepted more solar to fill the capacity need created by the Rockport retirement. (2 TR 243.)

Staff finds that the resource type, timing, and operations and maintenance costs of these solar projects are consistent with what was presented in the IRP when taken as a portfolio. (2 TR 245.) It is common occurrence [REDACTED]

[REDACTED] (2 TR 276.) As the Commission stated in its August 30, 2023, order in Case No. U-21189, "[t]he finalized price as compared to the initial bid does not discount the extensive competitive procurement process utilized in the selection of the projects." MPSC Case No. U-21189, 8/30/2023 order, p 53. The record in this case, which reflects almost verbatim the record in Case No. U-21189, demonstrates that the negotiations are a common part of the competitive solicitation process.

The Staff finds that the contract price is within a reasonable cost range as compared to the modeled solar in the IRP when considering tiered pricing modeled in the IRP and the amount of resources contracted under this RFP. Staff recommends the Commission find that costs associated with the Lake Trout solar generation facility are reasonable as they are the result of a competitive solicitation.

C. Indiana Michigan Power Company has demonstrated that the selected renewable resources are the most reasonable and prudent means of meeting the power need relative to other resource options for meeting power demand through its integrated resource plan.

Section 6s(4)(d) of Act 341 states that the Commission shall grant the request for a CON if it determines “[th]e existing or proposed electric generation facility or power purchase agreement represents the most reasonable and prudent means of meeting the power need relative to other resource options for meeting power demand” MCL 460.6s(4)(d). I&M made this demonstration.

The settlement agreement in Case No. U-21189 states that “[t]he parties agree that the Company’s IRP, including its Preferred Portfolio, is the most reasonable and prudent means to meet its needs for energy and capacity” with the modifications made in the settlement agreement. MPSC Case No. U-21189, 2/2/2023, Exhibit A, p 3. The Staff maintains that Lake Trout solar generation facility fills the need identified by the Company in its IRP, as outlined above, and is the most reasonable and prudent means of filling that need based on the resource options presented in this case.

D. Staff recommends the Commission review contingency and contingency-like costs for reasonableness and prudence to be recovered in rates at the time the costs are incurred.

In the August 30, 2023 order in Case No. U-21189, the Commission declined to preapprove any contingency or contingency-like expenses associated with the Mayapple Solar Project PSA.² In Case No. U-18419, DTE Electric Company’s CON case for a natural gas combined cycle generating facility, the Commission approved \$17.8 million in contingency costs, eliminating excess contingency as argued by the Staff, “but only actually incurred amounts were allowed to be recovered in rates, and only after these amounts were spent and the Company provided enough information for Staff to conduct a review of reasonableness and prudence.” (2 TR 254.)

Consistent with the Commission’s decisions in the above cases, Staff recommends the Commission review contingency and contingency-like costs for reasonableness and prudence to be recovered in rates at the time the costs are incurred. As noted in the testimony of Staff witness Zachary C. Heidemann, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (2 TR 252-253.) Further, Staff stated that [REDACTED]

[REDACTED]

[REDACTED] (*Id.*) The Staff maintains its position that evidence relating to the explanation of what lead to the costs being necessary “should be provided in the

² MPSC Case No. U-21189, 8/30/2023 order, p 54.

annual CON update that is to be filed in this docket, as well as in future rate cases, in which I&M is proposing to recover these costs and include them in rates.” (2 TR 257.) As noted in the Commission’s order in Case No. U-21189, this conclusion “does not preclude I&M from seeking approval of any such expenses in the future once the costs have been incurred and the company can provide evidence that expenses were incurred, as well as an explanation of what led to the costs being necessary”³

Staff reviewed the contingency at issue in this case to determine if the contract costs were reasonable as proposed. Staff recommends the Commission review contingency and contingency-like costs for reasonableness and prudence to be recovered in rates at the time the costs are incurred, and a prudence review has been conducted.

³ MPSC Case No. U-21189, 8/30/2023 order, p 55.

V. Conclusion

For the reasons stated in Staff's direct testimony, Staff respectfully requests the ALJ, and the Commission approve a certificate of necessity for the Lake Trout Solar Project presented in Indiana Michigan Power Company's application consistent with the positions presented in this brief.

Respectfully submitted,

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