

February 2, 2024

Ms. Lisa Felice
Executive Secretary
Michigan Public Service Commission
7109 West Saginaw Highway
Post Office Box 30221
Lansing, MI 48909

RE: Case No. U-21049 – In the matter of the application of CONSUMERS ENERGY COMPANY for reconciliation of its power supply cost recovery plan (Case No. U-21048) for the 12 months ending December 31, 2022.

Dear Ms. Felice:

Enclosed for electronic filing in the above-captioned case, please find **Consumers Energy Company's Response to Cadillac Renewable Energy, LLC's Motion to Amend Schedule to Allow for Rebuttal Testimony and Affidavit of Raymond T. Scaife.**

This is a paperless filing and is therefore being filed only in PDF. Also included is a Proof of Service showing service upon the parties.

Sincerely,

Spencer A. Sattler
Phone: 517-474-6638
Email: spencer.sattler@cmsenergy.com

cc: Parties Per Attachment 1 to Proof of Service

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of)
CONSUMERS ENERGY COMPANY)
for reconciliation of its power supply cost)
recovery plan (Case No. U-21048) for the)
12 months ended December 31, 2022.)
_____)

Case No. U-21049

**CONSUMERS ENERGY COMPANY’S RESPONSE TO CADILLAC RENEWABLE
ENERGY, LLC’S MOTION TO AMEND SCHEDULE
TO ALLOW FOR REBUTTAL TESTIMONY**

Cadillac Renewable Energy, LLC (“Cadillac”) has moved to amend the schedule to require Consumers Energy Company (“Consumers Energy” or “the Company”) to rebut Cadillac’s testimony before the day currently set for rebuttal. By having the Company file rebuttal testimony early, Cadillac would be able to file surrebuttal to the Company when the other parties are filing rebuttal. Cadillac disputes the characterization of its proposed testimony as “surrebuttal,” but surrebuttal is simply rebuttal to rebuttal, which is what Cadillac is proposing. There is no precedent for the relief Cadillac is requesting, and it would be unfair to the other parties who must file rebuttal when rebuttal is due.

Alternatively, Cadillac requests leave to file surrebuttal testimony to the Company after the Company files rebuttal. The Company is willing to stipulate to this relief *if* the Company is likewise allowed to file sur-surrebuttal testimony if needed. This is common in cases when surrebuttal is requested. If this is the outcome, the Company would also ask that surrebuttal and sur-surrebuttal testimony be accommodated within the current schedule.

I. Background

On March 31, 2023, the Company filed an application with the Michigan Public Service Commission (“MPSC” or the “Commission”), together with supporting testimony and exhibits, seeking to reconcile its 2022 power supply costs with its 2022 power supply revenues. The \$12.2 million that the Company pays to purchase power from Cadillac under their power purchase agreement (“PPA”) is included in the costs being reconciled, see Exhibit A-23 (JLR-1), line 54, and is ultimately recovered from Consumers Energy’s customers. Compare Exhibit A-23 (JLR-1), line 74, column (h), with Exhibit A-26 (RTS-1) Revised, lines 1 and 15, column (h), with Exhibit A-4 (LEF-1) Revised, line 19, column(n). In addition to these PPA costs, Public Act 286 of 2008 (“Act 286”) allows Cadillac to recover certain excess costs, some capped and some not, that exceed amounts that Cadillac is paid under contract. See MCL 460.6a(9)–(11). There are approximately \$12 million in excess costs included in the costs being reconciled. See Company witness Jenny L. Rickard’s Direct Testimony, page 4, adopted in Company witness Raymond T. Scaife’s Revised Direct Testimony; Exhibit A-23 (JLR-1), line 73. All costs that Consumers Energy is required to pay Cadillac are recovered from the Company’s customers. See MCL 460a(11).

As permitted by Act 286, Cadillac filed testimony, together with other biomass plants, seeking to recover its excess costs. In addition, Cadillac claimed that the Company owes it \$600,417 in hold harmless payments under the parties’ Reduced Dispatch Agreement. Among other things, this Reduced Dispatch Agreement allows for market purchases, when market prices merit them, that may reduce power purchased from Cadillac’s plant. The agreement also provides for hold harmless payments to Cadillac, in certain circumstances, when the Company opts to exercise its option under the agreement to purchase power from the market. Cadillac witness Chase D. Shepherd filed testimony describing the excess costs Cadillac is seeking to recover under

Act 286 and challenged how the Company calculated its hold harmless payments. See Shepherd's Direct Testimony, pages 16-18.

In discovery, Company witness Scaife was asked whether he agreed that the Company miscalculated its hold harmless payments. He responded that the Company did not agree, explained how the Company interprets the Reduced Dispatch Agreement, and said that the Company would further address the issue in rebuttal testimony. Mr. Scaife also noted that "[t]he payment in question is associated with contract interpretation rather than BMP cost recovery available under MCL460.6a(9)-(11) that the MPSC addresses in PSCR reconciliation cases."

II. Argument

The Company opposes Cadillac's motion for three reasons. First, Cadillac has already had the opportunity to respond to the Company's testimony and, indeed, concedes that Cadillac witness Shepherd already responded. See Cadillac's Motion, ¶ 13. This opportunity for Cadillac to be heard, together with adequate notice and an impartial decision-maker, satisfies due process. Second, the Company is not prepared to file its rebuttal testimony on February 16, 2024 when Staff and Intervenor testimony is due. Third, the Company will agree to Cadillac's alternative request to file surrebuttal testimony after the Company files rebuttal testimony *if* the Company is likewise given the chance to file sur-surrebuttal testimony. If this is the outcome, it would moot Cadillac's primary request for relief.

A. Cadillac has already responded to the Company's direct testimony and will have the opportunity to respond to other parties through rebuttal, as due process requires.

Cadillac witness Shepherd has already responded to Consumers Energy's application and testimony, including Cadillac's argument that the Company's hold harmless payments to Cadillac were too low. The Company plans to rebut Mr. Shepherd's claims about the hold harmless

payments on the date scheduled for rebuttal, and while Cadillac naturally would like the Company to file early so that it can respond in rebuttal, there is no reason to make the Company file early. If the parties had intended for the Company to file a second round of direct testimony when Staff and Intervenors file testimony, they would have made this clear when proposing the schedule, but they did not. See 1 TR 7-8. Moreover, the Commission's Rules of Practice and Procedure provide a process that allows a party to respond to another party's rebuttal evidence, and the process is not to make the other party file early. Rather, under the rule, "Some surrebuttal evidence may be permitted at the discretion of the presiding officer or the commission." Mich Admin Code, R 792.10427(3).

If the Company files rebuttal testimony and Cadillac responds to this testimony, it will be surrebuttal testimony. Cadillac argues that this "mischaracterizes the nature of the testimony in these PSCR proceedings." Cadillac's Motion, ¶ 23. According to Cadillac, Consumers Energy's testimony responding to Cadillac will be "its direct testimony regarding that claim in the same manner as the Staff and Intervenor testimony will be their direct testimony." *Id.* This is not true. Unlike Staff and Intervenors, the Company has already filed direct testimony. Parties sometimes complain that rebuttal is not proper and that it should have been filed with a party's direct case, but this is the first time that the Company is aware of a party arguing that testimony to be filed as rebuttal is, in fact, direct testimony. Regardless of how the Company's responsive testimony is labeled, Cadillac has not explained why it should be treated differently from Staff and Intervenors and afforded a second chance to respond to the Company on the date set for rebuttal.

"Proper rebuttal evidence is 'that given by one party to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.'" MPSC Case No. U-20322, September 26, 2019 Order, page 39 (citation omitted). When

responding to Cadillac, the Company intends to contradict and disprove Cadillac's testimony concerning the Company's hold harmless payments. Cadillac's testimony on the subject was itself a response to the Company's hold harmless calculation in its direct case, which "did not include the NOx allowance costs and additional fuel costs that it would have paid Cadillac if Consumers had purchased power from Cadillac." Shepherd's Direct Testimony, page 17. In this way, Cadillac's testimony was like any Staff and Intervenor direct testimony taking issue with a Company position. And just like the Company's response to Staff's and Intervening parties' direct testimony is the Company's rebuttal testimony, its response to Cadillac's direct testimony is rebuttal testimony as well.

If the Company's response to Cadillac's testimony is rebuttal testimony, then Cadillac's response, if permitted, would be surrebuttal. "Surrebuttal" is defined as "[t]he response to the opposing party's rebuttal in a trial or other proceeding; a rebuttal to a rebuttal." *Black's Law Dictionary* (2nd Pocket Edition). Therefore, Cadillac's testimony responding to the Company's rebuttal testimony is, by definition, surrebuttal testimony. Describing it as surrebuttal is not a mischaracterization as Cadillac suggests. And, as discussed below, there is precedent for surrebuttal and sur-surrebuttal testimony; there is no precedent for requiring a utility to file rebuttal early so that one intervening party can respond to the Company a second time on the date set for rebuttal.

Due process does not require that Cadillac be given an opportunity to respond to the Company's rebuttal testimony as it suggests. "Procedural due process requires notice, an opportunity to be heard, and an impartial decision-maker." *UPPCo v Vill of L'Anse*, 334 Mich App 581, 596 (2020). This is presumably why, under the Commission's rules, parties have the right and obligation to introduce evidence they intend to rely on, Mich Admin Code,

R 792.10427(2), as well as “the right of cross-examination” and “right to submit rebuttal evidence.” Mich Admin Code, R 792.10427(3). There is, however, no due process right to surrebuttal testimony, which is presumably why surrebuttal is discretionary under the rules. *Id.* (“Some surrebuttal evidence *may* be permitted”) (emphasis added).

By giving Cadillac the opportunity to file direct testimony responding to the Company and rebuttal responding to other parties, it has an opportunity to be heard as due process requires. If the Company files rebuttal testimony, as it intends to do, Cadillac’s response to the Company’s rebuttal, if permitted, will be surrebuttal testimony. The Company should not be required to file its rebuttal testimony early so that Cadillac can file surrebuttal testimony on the date set for rebuttal.

B. The Company is not prepared to file its rebuttal testimony when Staff and Intervenor testimony is due.

In response to discovery, Company witness Scaife responded that the Company did not agree with Cadillac, explained how the Company interprets the Reduced Dispatch Agreement in question, and said that the Company would further address the issue in rebuttal testimony. While Mr. Scaife has a general idea of what he intends to say in rebuttal testimony, as described in his discovery response, he will be responding to nine pages of Mr. Shepherd’s testimony and may have more to say on the matter than was included in the discovery response. Other parties may also raise issues relating to the Company’s payments to Cadillac or the other biomass merchant plants that the Company may need to address, and to be coherent, these issues should be addressed together in a single rebuttal filing.

An affidavit from Mr. Scaife is attached explaining that he has not yet drafted rebuttal testimony, he has not begun the rigorous internal review process that the Company has for all its

testimony, and he is not prepared to file rebuttal testimony when Staff and Intervenors file testimony.

C. **The Company will stipulate to Cadillac filing surrebuttal testimony if the Company is likewise given the opportunity to file sur-surrebuttal testimony if needed.**

Cadillac has the benefit of knowing, generally, at least one argument the Company intends to make in rebuttal testimony. The Company does not know what Cadillac's surrebuttal testimony will say. Although the Company will agree to Cadillac's alternative request for relief to file surrebuttal testimony, to safeguard the Company's interests, this stipulation is subject to its ability to file sur-surrebuttal if necessary. This is common in cases when surrebuttal is requested. See, e.g., Case No. U-21090, Consumers Energy's Sur-surrebuttal Testimony, December 7, 2021; Case No. U-20963, Consumers Energy's Sur-surrebuttal Testimony, July 23, 2021; Case No. U-20642, DTE Gas's Sur-surrebuttal Testimony, May 13, 2020. The Company should also be allowed to preserve its rights to file motions to strike Cadillac's surrebuttal testimony if objectionable on other grounds.

If surrebuttal and sur-surrebuttal testimony are permitted, this will moot Cadillac's request to have the Company file its rebuttal testimony early so that Cadillac can respond to that testimony on the date currently scheduled for rebuttal.

III. Conclusion

For the reasons described above, the Company respectfully requests that the Administrative Law Judge (“ALJ”) reject Cadillac’s motion or, in the alternative, grant the alternative relief requested, with the caveat that sur-surrebuttal will also be permitted if needed. If this is the ALJ’s decision (to allow for surrebuttal and sur-surrebuttal testimony), the Company requests tight turnaround times so that the other dates in the schedule (except, possibly, for motions to strike and responses) do not need to be delayed again.

Respectfully submitted,

CONSUMERS ENERGY COMPANY



Dated: February 2, 2024

Spencer A. Sattler (P70524)
Bret A. Totoraitis (P72654)
Attorneys for Consumers Energy Company
One Energy Plaza
Jackson, Michigan 49201
(517) 474-6638

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of)
CONSUMERS ENERGY COMPANY)
for reconciliation of its power supply cost)
recovery plan (Case No. U-21048) for the)
12 months ended December 31, 2022.)
_____)

Case No. U-21049

AFFIDAVIT OF RAYMOND T. SCAIFE

Raymond T. Scaife, being first duly sworn, says the following:

1. I am Consumers Energy Company’s Manager of Midcontinent Independent System Operator, Inc. (“MISO”) Settlements in the Electric Grid Integration Contracts & Settlements section of the Company’s Electric Supply Department.
2. I am one of the witnesses who sponsored direct testimony and revised direct testimony in Case No. U-21049.
3. I also responded to discovery relating to Consumers Energy’s holding harmless payments to Cadillac Renewable Energy, LLP, which is at issue in the above response.
4. I plan to rebut Cadillac witness Chase D. Shepherd’s testimony in Case No. U-21049, but I have not yet begun drafting my rebuttal testimony.
5. Once drafted, my testimony will go through a rigorous internal review process that typically takes a week or longer.

6. In short, I am not currently prepared to file my rebuttal testimony on February 16, 2024 when Staff and Intervenors are scheduled to file direct testimony.



Raymond T. Scaife

Subscribed and sworn to before me this 2nd day of February 2024.



Crystal L. Chacon, Notary Public
State of Michigan, County of Ingham
My Commission Expires: 05/25/24
Acting in the County of Eaton

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_____)

Case No. U-21049

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS
COUNTY OF JACKSON)

Crystal L. Chacon, being first duly sworn, deposes and says that she is employed in the Legal Department of Consumers Energy Company; that on February 2, 2024, she served an electronic copy of **Consumers Energy Company’s Response to Cadillac Renewable Energy, LLC’s Motion to Amend Schedule to Allow for Rebuttal Testimony and Affidavit of Raymond T. Scaife** upon the persons listed in Attachment 1 hereto, at the e-mail addresses listed therein.

Crystal L. Chacon

Crystal L. Chacon

Subscribed and sworn to before me this 2nd day of February 2024.

Melissa K. Harris

Melissa K. Harris, Notary Public
State of Michigan, County of Jackson
My Commission Expires: 06/11/2027
Acting in the County of Jackson

ATTACHMENT 1 TO CASE NO. U-21049

Party	Mailing Address	Email Address
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