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May 9, 2024

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

Re: **MPSC Case No. U-21172**

Dear Ms. Felice:

Attached for electronic filing in the above-referenced matter, please find the Petition for Rehearing of The Michigan Energy Innovation Business Council, Institute for Energy Innovation and Advanced Energy United. Thank you for your assistance in this matter.

Very truly yours,

Justin K. Ooms

Digitally signed by Justin K. Ooms
Date: 2024.05.09 12:00:04 -04'00'

Justin K. Ooms

JKO/srd
Enclosure
c. All parties of record.

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

*****

In the matter, on the Commission's own motion regarding the regulatory reviews, revisions, determination and/or approvals necessary for **DTE ELECTRIC COMPANY** to comply with Section 61 of 2016 PA 342.	))))))	**Case No. U-21172**

PETITION FOR REHEARING
OF THE
MICHIGAN ENERGY INNOVATION BUSINESS COUNCIL,
INSTITUTE FOR ENERGY INNOVATION AND ADVANCED ENERGY UNITED

I. INTRODUCTION

On April 25, 2024, the Michigan Public Service Commission ("MPSC" or "Commission") issued an order in this proceeding (the "April 25 Order")[1] resolving all issues in this case except for those issues addressed in the pending contested partial settlement filed on March 13, 2024 and updated on March 14, 2024. One of the issues resolved by the Commission involved the question of DTE's obligation to purchase renewable energy credits ("RECs") from distributed generation ("DG") customers, originating from the Commission's November 18, 2022 Order in Case No. U-20836 (the "U-20836 Order").[2]

Because they believe the Commission erred in two key respects in its resolution of this issue in the April 24 Order, the Michigan Energy Innovation Business Council, the Institute for

[1] See Filing No. U-21172-0128.
[2] *In the matter of the application of DTE ELECTRIC COMPANY for authority to increase its rates, amend its rate schedules and rules governing the distribution and supply of electric energy, and for miscellaneous accounting authority*, order of the Public Service Commission, entered November 18, 2022 (Case No. U-20836), at 435–446.

Energy Innovation and Advanced Energy United (collectively, "MEIU"), by their attorneys, Potomac Law Group, PLLC, hereby file this Petition for Rehearing (this "Petition") of the April 25 Order.

II. LEGAL STANDARD

Under Rule 437(1) of the Commission's Rules of Practice and Procedure, R 792.10437(1):

> A petition for rehearing after a decision or order of the commission shall be filed with the Commission within 30 days after service of the decision or order of the commission unless otherwise specified by statute. A petition for rehearing based on a claim of error shall specify all findings of fact or conclusions of law claimed to be erroneous with a brief statement of the basis of the error. . . .

The Commission recently restated the standards applicable to its review of a petition for rehearing in Case No. U-21099, where it explained:

> The Commission has repeatedly found that "[a]n application for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing."[3]

III. ARGUMENT

The April 25 Order makes one finding and engages in some discussion with respect to DG REC purchases that MEIU believe to be erroneous and/or that are likely to result in unintended consequences. Specifically, the Commission finds that "DTE Electric complied with the Commission's previous directive to file in this case a mechanism to purchase RECs from DG customers."[4] When this finding is compared to the Commission's order in Case No. U-20836 from which its directive derives, however, the two are impossible to square, and MEIU believe that the Commission's finding here is in error. It may also result in utilities' flouting the requirements of

[3] *In the matter, on the Commission's own motion, to open a docket for load serving entities in Michigan to file their capacity demonstrations as required by MCL 460.6w*, order of the Public Service Commission, entered February 23, 2023 (Case No. U-21099), at 14 (citing January 31, 2017 order in Case No. U-17691, p. 8).
[4] April 25 Order at 26.

future Commission orders that they find unsavory, a consequence which the Commission almost certainly does not intend. Furthermore, the discussion surrounding the interaction between the purchase of DG RECs and Public Act 235 of 2023 ("PA 235") appears to rest on erroneous assumptions about how RECs are related to energy generated by renewable energy systems. In doing so, it also risks setting the outreach session it orders DTE to conduct on the wrong path.

MEIU therefore respectfully request that the Commission grant their Petition and reconsider the portions of the April 25 Order addressed herein.

A. The Commission Erred in Finding that DTE Complied with its Direction from Case No. U-20836.

The Commission found in the April 25 Order that "DTE Electric complied with the Commission's previous directive to file in this case a mechanism to purchase RECs from DG customers." The directive from the U-20836 Order required DTE to

> supplement its VGP application in Case No. U-21172 with a proposal for amendments to Riders 17 and 18 to accommodate the company's purchase of RECs from DG customers to be applied to the company's VGP program. Finding the Staff's exceptions on this issue well-taken, the Commission adds that any purchase of RECs *should be at the option of the DG customer*, which DTE Electric should reflect in its proposal.[5]

Earlier in the U-20836 Order, the Commission noted that, "[a]s to DTE Electric's purchase of RECs from DG customers, *the Commission agrees with the ALJ*, the Staff, and intervenors that it is beneficial to both DG customers and the VGP program."[6] The ALJ, in turn, had framed the DG REC purchases in the following terms:

> This PFD disagrees that *requiring the purchase of RECs from DG customers* is particularly ill-timed or otherwise inappropriate to address here, noting that changes to Rider 17 eligibility and structure have no impact on how the company

[5] U-20836 Order at 445 (emphasis added).
[6] *Id.* (emphasis added).

> acquires green energy, which could be purchased at a discount from DG customers under Rider 18.[7]

All of these references from Case No. U-20836 clearly demonstrate that what was in view in that case and in the Commission's directive in the U-20836 Order was ultimately a *mandatory* DG REC purchase obligation applicable to DTE, with DG *customers* retaining the option of whether to sell their RECs to the utility.

As MEIU noted in their Initial Brief in this case, DTE's "compliance" with this directive took the form of changes to its Rider 18 tariff that *retained the status quo* with respect to DTE's ability and obligation to purchase RECs from DG customers.[8] To emphasize this point, MEIU note here that DTE witness Cameron described the pre-existing Rider 18 in such a way in this case that clearly showed that, if the Commission's U-20836 Order were interpreted to require no more than making DG REC purchases possible, there was no need for that Order's directive:

> Rider 18 specifies that all RECs are owned by the customer. Therein, Rider 18 states that "*the Company may purchase Renewable Energy Credits from participating Distributed Generation Program customers who are willing to sell RECs generated* if the customer has a generation meter in place to accurately measure and verify generator output. REC certification costs are the responsibility of the customer." Per Rider 18, any agreement by DTE Electric to purchase RECs would be conducted through a separate agreement with the customer.[9]

It is supremely difficult to square (1) the U-20836 Order itself, especially when combined with its context; (2) DTE's proposal for DG REC purchases at the Company's continued discretion in this case; and (3) the April 25 Order's findings on this point. Without any further explanation provided by the Commission, attempting to reconcile these three forces MEIU to the conclusion that the Commission may have capitulated to utility opposition and tacitly backed down from its earlier position. The Commission's finding in the April 25 Order is simply inconsistent with the

[7] PFD in Case No. U-20836, Filing No. U-20836-0828, at 703.
[8] Initial Brief of MEIU, Case No. U-21172, Filing No. U-21172-0092 ("MEIU Initial Br"), at 18–20.
[9] 2 Tr 56 (emphasis added).

directive from the U-20836 Order and for that reason is erroneous. More than that, however, it rewards DTE for its gall in refusing to comply with the U-20836 Order by filing a largely non-responsive tariff revision maintaining the *status quo* and ensuring that DG customers would *not* have the discretion as to whether or not DTE would purchase their RECS. This encourages and risks emboldening DTE, as well as other utilities, to do the same or worse in the future.

The Commission's finding of compliance in the April 25 Order is, furthermore, not necessary for reaching the Order's ultimate conclusion with regard to DG RECs in this case, which is that the Commission wants DTE to examine additional questions raised by the passage of PA 235 in a stakeholder outreach process and report back on in its next VGP filing.[10] The Commission could have easily rejected DTE's purported compliance efforts "for the record" before noting the potentially changed circumstances created by the passage of PA 235 which the Commission found merit further examination.

MEIU therefore respectfully request that the Commission grant their Petition on this issue and find that DTE's purported compliance filing in this case with regard to its purchase of DG RECs failed to comply with the U-20836 Order's directive.

B. The Assumptions that Appear to Underlie the Commission's Discussion of the Effect of PA 235 on DG REC Purchases Are Erroneous.

The Commission's discussion of the issues raised by the passage of PA 235 includes the following statements:

> As shown in the emphasized language of the above-quoted statute, the outflow from DG customers is excluded in the denominator of the RPS equation under either option available to electric providers. *Therefore, Act 235 has already accounted for the renewable attributes associated with the outflow from DG generation in its exclusion from the denominator of the RPS equation*. In other words, the electric provider is permitted to exclude the outflow from DG generation from its RPS requirement *because DG outflow is already covered by renewable energy, and the electric provider is not required to procure or generate additional renewable*

[10] See April 25 Order at 28.

> *energy to cover that outflow*. Section 28 under Act 295 of 2008, as amended by Act 342, did not include this exclusion for DG outflow (or VGP customers) from the RPS calculation.
>
> [. . .]
>
> [T]he Commission is now concerned that requiring the purchase of RECs by the electric provider results in a double counting of the REC associated with the DG outflow *because the renewable attribute has already been taken into account in the utility's RPS calculation*. [11]

These statements, particularly those italicized, rest on assumptions that are not at all clear from the text of PA 235 and which do not square with the way that renewable energy is accounted for.

While it is undoubtedly clear that PA 235 does exclude DG outflow from an electric provider's RPS calculation, the *reasons* for this are *nowhere expressed in the statute*. It is simply nowhere established that DG outflow is excluded from utility sales "because the renewable attribute has already been taken into account" or "because Act 235 has already accounted for the renewable attributes associated with the outflow from DG generation in its exclusion from the denominator of the RPS calculation."

In simple terms, what makes any particular energy "renewable" is the associated RECs.[12] Without them, energy, even if generated by a renewable energy system, becomes simply "energy." This is reflected in the fact that RECs can be "unbundled" from the underlying energy.[13] It is, furthermore, the well-understood and long-recognized premise on which many private renewable energy commitments and the RPS itself have historically been built upon, since it is impossible, on an interconnected regional grid powered by many generation types—not all renewable—to ensure that renewable energy travels along to the grid *only* to those who have purchased it, or that *only* renewable energy is provided to those who have pledged to run on "100% renewable energy."

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[11] April 25 Order at 27 (emphasis added).
[12] See, *e.g.*, MCL 460.1011(c) (defining "renewable energy credit" as "represent[ing] renewable energy").
[13] See, e.g., MCL 460.1028(5)(c).

Thus, it is also possible for the owner of a DG system to sell their RECs to a third party and thereby forfeit the right to claim to power their home or business with renewable energy because the renewable attributes of the energy (*i.e.*, the RECs) were sold to someone else. The fact that, from the standpoint of physics, a DG customer's home or business may have been directly powered by a behind-the-meter solar array is legally irrelevant once the RECs have been sold.

Neither DTE nor any other major utility in Michigan obtains title to DG owners' RECs simply by purchasing their outflow under a DG program tariff, as each tariff specifically provides that DG RECs are owned by the customer.[14] Mr. Cameron confirmed as much in his supplemental direct testimony, cited above: "Rider 18 specifies that all RECs are owned by the customer."[15] PA 235 nowhere states anything to the contrary. Thus, it simply cannot be the case that the RPS calculation gives DTE credit for DG outflow *for the reason that* "the renewable attribute has already been taken into account." The Legislature may have had reasons for giving electric providers such credit for DG outflow, but since the Legislature is presumed to have known that there is no transfer of RECs from DG customer to electric provider simply by virtue of the purchase of capacity and energy under a DG tariff (Rider 18 in DTE's case),[16] the reason cannot be that the energy purchased by the electric provider as DG outflow is *legally* renewable. Because the DG customer retains ownership of the renewable attributes of that generation and can freely sell those attributes to a third party (who can in turn claim those attributes), the energy sold as outflow is, legally speaking, no more renewable than that generated by the Company's Belle River coal facility.

[14] See DTE Electric Rate Book, Sheet D-116.03; Consumers Energy Company Electric Rate Book, Sheet C-64.80; Indiana Michigan Power Company Electric Rate Book, Sheet D-110.00.
[15] 2 Tr 56.
[16] See *O'Connell v. Director of Elections*, 316 Mich App 91, 99 (2016) ("[A] general rule of statutory construction is that the Legislature is presumed to know of and legislate in harmony with existing laws.").

To the extent, therefore, that the Commission believes that the credit PA 235 gives electric providers for DG outflow requires that DG outflow be renewable energy, it must require DTE to own the renewable attributes associated with that outflow and therefore require DTE to *purchase* those RECs under its DG tariff or an alternative arrangement, as DTE's existing Rider 18 provides for compensation *only* for the energy and capacity provided by DG systems.[17] The alternative would deprive DG customers of their RECs without just compensation, which would represent an unlawful taking in violation of Article X, Section 2 of the Michigan Constitution and the Fifth Amendment to the U.S. Constitution.

Alternatively, the Commission could recognize that PA 235 does not explicitly explain the rationale for excluding DG outflow from an electric provider's load under the RPS calculation and does not require DTE to obtain the renewable attributes of DG outflow, leaving those attributes to be retired or sold by DG customers at their discretion. In such a case, those RECs would remain available for DTE to purchase, in accordance with the Commission's directive from the U-20836 Order, without any legal risk of double-counting.

Either way, the key point and the key issue on which the Commission's April 25 Order erred is that, as things currently stand, it is *legally impossible* for PA 235's *rationale* for excluding DG outflow from electric providers' sales for RPS calculation purposes to have been that "the renewable attribute has already been taken into account" or that "Act 235 has already accounted for the renewable attributes associated with the outflow from DG generation in its exclusion from the denominator of the RPS calculation."

Because of the legal error underlying the April 25 Order's conclusion on this issue and absent a correction, the outreach that the Commission ordered DTE to engage in will be burdened

[17] See DTE Electric Rate Book, Sheets D-112.00 through D-116.03.

by the same erroneous legal interpretation. In other words, any proposals for purchasing RECs from DG customers will be needlessly encumbered by the incorrect conclusion that PA 235 essentially summarily divests DG system owners of the RECs associated with their outflow without just compensation.

Thus, in order to both correct the record on this legal issue and to avoid setting the stakeholder outreach that the Commission ordered DTE to conduct on the wrong path at the outset, MEIU respectfully ask the Commission to grant their Petition with respect to this issue as well and issue a correction and clarification of the April 25 Order to ensure that the treatment of DG RECs under PA 235 is framed appropriately.

IV. CONCLUSION AND RELIEF REQUESTED

As explained above, certain findings and discussions in the Commission's April 25 Order contain errors and may likely result in unintended consequences. Accordingly, MEIU hereby request that the Commission grant their Petition for Rehearing and amend the April 25 Order to (1) state that though the Commission believes PA 235 has raised new questions regarding DG REC purchases, DTE did not in fact comply with the Commission's directive in its U-20836 Order and that DTE's required "new proposal for purchasing RECs from DG customers"[18] should provide for purchases of RECs at the *customer's* discretion, as the Commission had originally required of DTE for this proceeding; and (2) clarify that it is legally impossible for PA 235's rationale for excluding DG outflow from electric providers' sales for RPS calculation purposes to have been that "the renewable attribute has already been taken into account" or that "Act 235 has already accounted for the renewable attributes associated with the outflow from DG generation in its exclusion from the denominator of the RPS calculation."

[18] April 25 Order at 28.

Respectfully submitted,

Potomac Law Group, PLLC
Attorneys for the Michigan Energy Innovation Business Council, the Institute for Energy Innovation and Advanced Energy United

May 9, 2024

By: Justin K. Ooms
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4878-8516-3451, v. 4

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

*****

In the matter, on the Commission's own motion, regarding the regulatory reviews, revisions, determination and/or approvals necessary for regulated electric providers to comply with Section 61 of 2016 PA 342	))))))	**Case No. U-21172**

PROOF OF SERVICE

STATE OF SOUTH CAROLINA)
) ss.
COUNTY OF BERKELEY)

Summer R. Dukes, the undersigned, being first duly sworn, deposes and says that she is a Paralegal at Potomac Law Group PLLC and that on the 9th day of May, 2024 she served a copy of the Petition for Rehearing of The Michigan Energy Innovation Business Council, Institute for Energy Innovation and Advanced Energy United, via email, upon those individuals listed on the attached Service List.

Summer Dukes

Digitally signed by Summer Dukes
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Summer R. Dukes

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