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 approval to implement a power supply cost recovery plan for the 12 months ending December 31, 2024.	)))))	Case No. U-21427

At the October 10, 2024 meeting of the Michigan Public Service Commission in Escanaba, Michigan.

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

ORDER

History of Proceedings

On September 29, 2023, Indiana Michigan Power Company (I&M) filed an application pursuant to Section 6j of Public Act 304 of 1982 (Act 304), MCL 460.6j, and the June 9, 2023 order in Case Nos. U-21421 *et al*. (June 9 order)[1] requesting approval of the company's PSCR plan and monthly PSCR factors for the 12-month period ending December 31, 2024. In its application, I&M sought approval of a PSCR factor of 11.44 mills per kilowatt-hour (kWh). I&M also included with its application its five-year forecast of projected power supply requirements

[1] The June 9 order assigned docket numbers and filing deadlines for I&M and other electric providers to file their respective power supply, gas, and steam supply cost recovery (PSCR) plans and reconciliations among other filings. June 9 order, pp. 1-2.

with the sources and costs of the same. Furthermore, I&M requests approval to continue its roll-in methodology that was approved in the December 21, 2006 order in Case No. U-15004 (I&M's 2007 PSCR plan case).

A prehearing conference was held on November 16, 2023 before Administrative Law Judge James M. Varchetti (ALJ), at which the ALJ recognized the intervention by the Michigan Department of Attorney General (Attorney General) and granted intervention to the Sierra Club and the Citizens Utility Board of Michigan (collectively participating as the Sierra Club). I&M and the Commission Staff (Staff) also participated in the proceeding.

The ALJ issued a protective order for use in this matter on December 15, 2023, and a revised protective order on January 11, 2024.

On March 4, 2024, the Staff and the Sierra Club filed testimony. I&M filed rebuttal testimony on April 12, 2024, and I&M filed revised direct and rebuttal testimony on May 14, 2024.

An evidentiary hearing was held on May 9, 2024, at which I&M witness Jason Stegall was cross-examined and testimony and exhibits were bound into the record. Initial briefs were filed by I&M, the Staff, and the Sierra Club on June 7, 2024, and reply briefs[2] were filed by I&M and the Sierra Club on June 28, 2024. On August 2, 2024, the ALJ issued a Proposal for Decision (PFD) in this matter. I&M filed exceptions to the PFD on August 23, 2024. Replies to exceptions were filed by the Staff and the Sierra Club on September 6, 2024. The record in this matter consists of

[2] I&M and the Sierra Club filed confidential reply briefs as well as public, redacted reply briefs that are available for public viewing in the docket.

274 pages of transcript[3] and 66 exhibits, some of which were filed confidentially, entered into evidence.

Proposal for Decision

After a recitation of the statutory requirements pertaining to PSCR plan proceedings on pages 3-5 of the PFD, the ALJ turned to I&M's 2024 PSCR plan and five-year forecast noting that many components therein were undisputed by the parties. Specifically, the ALJ listed the undisputed components as follows:

> actual and forecasted seasonal peak internal demands, energy requirements, and load factors through 2028; annual and average rates of growth in demand and energy for the historical and forecast periods; annual energy requirements for the residential, commercial, and industrial classes, other internal requirements, and the total internal energy requirements for I&M; month-by-month projections for 2024 and for the five-year forecast period 2024-2028 of I&M's energy sales into the PJM [Interconnection, L.L.C. (PJM)] market; I&M's expected capacity resources for the 2024 summer peak and I&M's committed capacity/energy purchase agreements; a projected PJM view of summer peak demands, capabilities, and margins for I&M for the 2024/25 PJM planning year through the 2028/29 planning year as well as I&M's capacity position within PJM; the relevant environmental requirements affecting I&M; a summary of the major contracts for the supply and disposal of nuclear fuel; forecasts of delivered coal costs; forecasts of power supply costs and net energy requirements; transmission expenses; and PSCR factor calculations.

PFD, pp. 5-6 (footnote omitted). The ALJ explained that I&M provided extensive support for these aspects of its PSCR plan and forecast and recommended that the Commission accept these projections used to develop the proposed PSCR factor. *Id*., p. 6.

[3] A confidential version of Volume 2 of the transcript is included in this docket. *See*, Case No. U-21427, filing #U-21427-0048. References to the transcript in this order refer to the public, redacted version of the transcript.

Finding the parties to be in agreement on the above-listed aspects of the company's PSCR plan and having no exceptions filed on these issues, the Commission adopts the ALJ's recommendations for these issues.

The ALJ explained that the following issues were contested by the parties:

> (1) the projected costs for purchased power from 2024 through 2028 under an Inter-Company Power Agreement (ICPA) with the Ohio Valley Electric Corporation (OVEC); (2) whether the Commission's Code of Conduct applies to the ICPA, and (3) I&M's commitment decisions regarding its Rockport facility.

Id. (footnotes omitted). These issues are described and addressed below.

Discussion

1. The Inter-Company Power Agreement with the Ohio Valley Electric Corporation

I&M recited a history and overview of the ICPA with OVEC and described the terms of the contract. Specifically, I&M stated that it purchases 7.85% of OVEC's capacity and energy at cost and uses that capacity to meets its PJM capacity requirements. 2 Tr 121-123. Recalling the Commission's directive in the May 13, 2021 order in Case No. U-20529 (May 13 order) to comprehensively review and take steps to minimize the costs of the ICPA, I&M explained that it had taken additional steps to manage the ICPA and in doing so had identified $9 million in future savings. I&M's initial brief, pp. 29-31. I&M further stated that three evaluations of the ICPA found it to be favorable to other alternatives and that evaluations of a 2022 and 2030 exit from the ICPA resulted in costs higher than the net present value of the costs of the company's generation portfolio. 2 Tr 125-126.

The Sierra Club challenged several aspects of the ICPA and argued that: (1) the ICPA is not reasonable and prudent because its cost is substantially higher than the value of its products and services; (2) based on I&M's forecasts of PJM market prices and other power purchase

benchmarks, the ICPA is likely to cost more than equivalent market products and services during the five-year forecast period (2024 to 2028); (3) I&M has not reasonably managed the ICPA; and (4) the Commission should issue a Section 7 warning pursuant to MCL 460.6j(7) for the ICPA.[4] Sierra Club's initial brief, pp. 6, 14-18. The Sierra Club further contended that reports and assessments by AES Services Corporation, Duke Energy Ohio, FirstEnergy Solutions, and Moody's Analytics show the ICPA to be uneconomical. *Id*., pp. 18-19 (citing 2 Tr 239; Exhibits SC-25, SC-27, and SC-28). The Sierra Club also provided benchmarks for cost comparison purposes, which the Sierra Club argued show that the ICPA's combined energy and capacity cost of $91.87 per megawatt-hour (MWh) is excessive compared to other long-term supply options, such as the PJM base residual auction (BRA) or the cost of new entry (CONE) for various types of generation sources. Sierra Club's initial brief, p. 22.

The Staff reviewed I&M's 2024 PSCR plan and found that it was consistent with past Commission orders and, while it requested a higher PSCR factor, it did not introduce any new issues. The Staff explained that the higher factor was due to higher energy costs, transmission costs, and the roll-in of a large underrecovered balance from 2023. Staff's initial brief, pp. 2-4; 2 Tr 264-265. The Staff did not take issue with I&M's proposed PSCR factor but disagreed with I&M's characterization of purchases from OVEC as non-affiliated purchases because the

[4] MCL 460.6j(7) states that, "the commission shall evaluate the decisions underlying the 5-year forecast filed by a utility under subsection (4). The commission may also indicate any cost items in the 5-year forecast that, on the basis of present evidence, the commission would be unlikely to permit the utility to recover from its customers in rates, rate schedules, or power supply cost recovery factors established in the future." This is also known as a "Section 7 warning."

Commission and Court of Appeals have previously held that OVEC and I&M are affiliates.[5] Staff's initial brief, pp. 3-4. The Staff also took the position that I&M's decisions to extend the ICPA to 2040, and to amend the Unit Power Agreement (UPA) for the Rockport facility in 2018, were reasonable based on the information the company had at the time. However, the Staff contended that the company should continue to evaluate the economics of the contract and if it should become unreasonable, the Staff stated that I&M should take steps to exit or modify the contract. Staff's initial brief, p. 4; *see also*, 2 Tr 271.

To begin his analysis, the ALJ recited the Commission's findings from multiple past Commission orders.[6] PFD, pp. 19-22. The ALJ then agreed with the Sierra Club that the cost of the ICPA is excessive compared to market prices and is, thus, in conflict with the Code of Conduct. *Id*., p. 22. The ALJ recalled the Sierra Club's testimony explaining that I&M projected that it would be billed $50 million for 544,744 MWh of electricity in 2024, which roughly equates to $91.87 per MWh, and that the company would pay between $97.54 per MWh and $414.63 per MWh in the 2025 through 2028 forecast period. The Sierra Club contended that for the ICPA to be economical, the capacity portion of the contract would have to have an average value of $481.10 per megawatt (MW)-day. The ALJ also noted the Sierra Club's testimony that the

[5] The Staff cited the following orders in which the Commission made a finding that OVEC and I&M are affiliates: June 7, 2019 order in Case U-18404 (June 7 order), pp. 7-8; June 23, 2021 order in Case No. U-20224 (June 23 order), pp. 7-13; May 13 order, pp. 13-21; and June 22, 2023 order in Case No. U-21052 (June 22 order), pp. 19-23. The Staff also cited the Court of Appeals opinion holding that the Code of Conduct applies to the ICPA as OVEC and I&M are affiliates. *See*, *In re Application of Indiana Michigan Power Co*, ___ Mich App ___; ___NW3d___ (2024), lv den 8 NW3d 564 (2024).

[6] The past Commission orders referenced and quoted by the ALJ include the February 2, 2023 order in Case No. U-20530 (February 2 order); May 13 order; June 23 order; November 18, 2021 order in Case No. U-20804 (November 18 order), and the June 7 order.

company's utilization of the ICPA would decrease from approximately 37% in 2024 to 6% by 2028. *Id*., p. 23 (citing 2 Tr 219, 221, 224, 227). The ALJ rejected I&M's argument that the ICPA is economical because it has been profitable on an energy-only basis, reasoning that the energy-only metric is an incomplete metric because I&M passes on to its customers total OVEC costs, not just energy costs.

The ALJ also rejected an argument by I&M that challenged the venue of the Sierra Club's issues with the ICPA.

> I&M further argues that if Sierra Club takes issue with the price of demand charges under the ICPA, then that issue rests within FERC's [the Federal Energy Regulatory Commission's] jurisdiction; alternatively, I&M asserts that if Sierra Club takes issue with I&M's participation in the ICPA, then that issue is properly raised in an IRP [integrated resource plan] proceeding. In making these arguments, I&M suggests that a PSCR proceeding is not the proper venue to evaluate demand charges or I&M's participation in the ICPA. However, the issues being evaluated in this proceeding are not demand charges *per se*, nor I&M's participation in the ICPA. Instead, the issues implicated in this matter are review [sic] under Act 304 and compliance with the Code of Conduct. Accordingly, I&M's arguments in this vein lack topicality and will not be further addressed.

PFD, p. 24 (footnotes omitted).

The ALJ next listed the benchmarks used by the Sierra Club for cost comparison of the ICPA to other long-term supply options, namely: (1) the in-year transfer price of $62.11 per MWh; (2) CONE for a combined-cycle plant of $60.62 per MWh; (3) the gross avoidable costs for existing generation for coal set at $63.87 per MWh, for a combined cycle generator set at $39.44 per MWh, and a combustion turbine set at $84.80 per MWh; and (4) the PJM BRA of $37.90 per MWh. PFD, p. 25 (citing 2 Tr 234). The ALJ explained that I&M opposed these benchmarks and, particularly for the PJM BRA, how the Sierra Club converted capacity values from dollars per MW-day to dollars per MWh, which I&M contended necessitates the assumption of a net capacity

factor and that the selection of such a factor can manipulate the capacity values to arrive at a desired result. PFD, p. 25 (citing I&M's initial brief, pp. 25-27 and I&M's reply brief, pp. 9-10).

The ALJ agreed with I&M that converting capacity costs to a dollar per MWh basis can "potentially make resources with a higher capacity factor appear more economic than those with lower capacity factors[,]" but stated that this on its own does not make the benchmark unreliable. PFD, p. 26. The ALJ stated that I&M did not establish that the capacity factors used by the Sierra Club were indeed unreasonable. *Id*. The ALJ also rejected I&M's reliance on the Commission's statement in the May 23, 2024 order in Case No. U-21261 (May 23 order) regarding a price comparison with the PJM market. The ALJ further clarified the Commission's conclusions in I&M's 2021 PSCR plan case where "the Commission did not categorically reject the PJM auction as a benchmark" and stated that, accordingly, the inclusion of the PJM BRA was not improper, particularly when used in conjunction with other benchmarks with prices lower than the ICPA. *Id*., p. 27 (citing the November 18 order, pp. 16-17). The ALJ concluded that the Sierra Club's benchmarks were not perfect apples-to-apples comparisons but are acceptable and sufficiently demonstrate that the ICPA costs are excessive. PFD, p. 27.

The ALJ then turned to the forward-looking assessments of the OVEC units by the American Electric Power Company, ICF International for Duke Energy Ohio, FirstEnergy Solutions, and Moody's Analytics as discussed by the Sierra Club. I&M contended that the studies are outdated, and that the company's IRP contained a more recent and appropriate analysis. The ALJ stated that the Sierra Club gave inconsistent statements regarding the IRP study of the ICPA, namely that the Sierra Club stated that the IRP study showed a $54 million cost savings from a 2030 exit from the ICPA but also testified that a 2030 exit would cost $54 million more. The ALJ then stated that:

> I&M maintains that while the company revised its IRP modeling in response to intervenor criticism, the results still showed that it would be more costly for I&M to

> exit the ICPA early and replace it with generation from another source. Sierra Club's claim that the IRP study showed a cost savings appears to stem from a citation to [I&M witness] Mr. Stegall's rebuttal testimony in Case No. U-21189, but upon review, this [ALJ] finds that this citation does not appear to support Sierra Club's position that I&M's revised IRP modelling showed any cost savings from exiting the ICPA in 2030. Thus, this [ALJ] declines to accord any weight to the argument that I&M's IRP study ostensibly found a cost savings from exiting the ICPA in 2030.

PFD, p. 29 (footnotes omitted). However, the ALJ agreed with the Sierra Club that the IRP analysis may not be an accurate reflection of the long-term economic viability of the ICPA because it did not use the declining OVEC unit utilization rate in its modeling and did not fully account for the increased costs arising from the need to bring OVEC's coal-fired units into compliance with new federal environmental regulations. The ALJ then noted that the Commission's approval of the settlement agreement in the company's IRP case, Case No. U-21189, did not specifically endorse the ICPA or include cost approvals, but rather was an approval of the status quo in the context of a settlement. As such, the ALJ found that I&M did not refute the negative assessments of the ICPA. PFD, pp. 30-31.

Lastly, the ALJ addressed I&M's management of the ICPA beginning with a restatement of the Commission's directive for I&M to continually examine existing contracts as markets change over time and to pursue amendments or new contracts as necessary, as well as the Commission's previous caution to the company that it may not allow recovery of power supply costs without good faith efforts to minimize costs or renegotiate the ICPA. PFD, p. 31 (citing June 22 order, p. 19). The Sierra Club argued that I&M has failed to minimize the costs of the ICPA while I&M countered that negotiation decisions are controlled by OVEC and that the company has presented evidence of OVEC's efforts to reduce costs as well as I&M's efforts to renegotiate the ICPA. Sierra Club's initial brief, pp. 27-30; I&M's initial brief, pp. 16-17. The ALJ noted, however, that the confidential exhibit referenced by I&M to support its position that OVEC has made efforts to

minimize costs was not included in this record, perhaps by mistake. PFD, p. 32. The ALJ found that the Sierra Club ignored I&M's efforts to renegotiate the ICPA and therefore, the ALJ found that I&M has taken a first step to manage the ICPA. However, the ALJ found the record to be insufficient to determine whether I&M's first steps go beyond a mere gesture, explaining as follows:

> based upon the limited evidence presented in this record, this [ALJ] is not prepared to conclude that I&M has made the type of meaningful, good-faith efforts that the Commission has previously referenced. The evidence of I&M's negotiation efforts presented in this case is limited to a single letter sent by I&M to OVEC. As of the date of this PFD, approximately 10 months have elapsed since the date of the letter. However, I&M has provided no follow-up information in this docket regarding the results of its letter or its presumably continuing efforts to seek renegotiation.

PFD, p. 33 (footnotes omitted).

Thus, the ALJ agreed that the ICPA costs are unreasonable under Act 304 and that they are in excess of the market price cap in the Code of Conduct. However, citing the Commission's past decisions where it refrained from doing so, the ALJ declined to recommend that the Commission amend the PSCR plan to remove the above-market costs from the maximum PSCR factor for the 2024 plan year. PFD, p. 38 (citing May 23 order, p. 22, and June 22 order, p. 24). Finding a Section 7 warning to be more appropriate, the ALJ recommended that the Commission warn I&M that the company will be unlikely to recover the uneconomic costs of the ICPA without further detailed evidence that the company is taking reasonable steps to manage the ICPA, including meaningful good faith efforts to renegotiate the contract. PFD, p. 39. The ALJ again noted the limited and stale evidence I&M presented as support of its renegotiation efforts that proved to be inadequate to consider the nature and extent of the company's efforts. The ALJ suggested that the corresponding PSCR reconciliation to the instant plan case is an opportunity for evaluation of I&M's efforts to manage the ICPA. *Id*.

I&M takes exception to the PFD regarding the Section 7 warning, alleging that the ALJ erred by "(i) improperly relying on the flawed market analysis presented by [the Sierra Club], and (ii) unlawfully applying the market price cap to a federally regulated wholesale agreement to suggest the costs paid pursuant to a FERC-approved wholesale rate are unreasonable." I&M's exceptions, p. 1. I&M asks the Commission to reject the ALJ's recommended Section 7 warning for several reasons. First, I&M argues that the ALJ's recommendation is based on the ICPA's value only as a capacity resource, relies on an erroneous market analysis using the Sierra Club's flawed conversion of capacity costs, and ignores the company's five-year forecast showing the ICPA to be a reasonable and prudent power supply resource between 2024 and 2028. *Id*., p. 2.

I&M next excepts to the ALJ's finding that the energy-only analysis did not prove that the ICPA is economical. The company argues that this finding was in error because: (1) the ALJ improperly assumed that both energy and capacity are relevant to determining the economics of the contract, and (2) the issues surrounding the ICPA, including energy and capacity as separate products, should be addressed in an IRP case. *Id*., pp. 3-4. I&M argues that demand charges, which I&M claims is the only contested issue in this case, allow the company to claim the ICPA as a power supply resource and that such decisions regarding choice of power supply resources should be reviewed in an IRP proceeding rather than an Act 304 case. I&M explains that:

> [a]n Act 304 proceeding is not the proper venue to raise questions regarding whether the Company should (hypothetically) transition away from the ICPA to a new resource. Act 304 dictates that a PSCR plan proceeding is an "evaluation of the reasonableness and prudence of [a utility's] decisions to provide power supply in the manner described in the plan, in light of its existing sources of electrical generation, and an explanation of the actions taken by the utility to minimize the cost of fuel to the utility." MCL 460.6j(3) (emphasis added). Stated differently, the issues implicated by Act 304 relate to the reasonableness and prudence of I&M's plan to provide power to customers based on its existing resources, which includes the ICPA consistent with I&M's approved IRP. Id. Whether the ICPA should be an existing resource is better[-]suited for an IRP. And this makes sense because a utility like I&M does not have the flexibility to transition to another long-term

power supply resource halfway through a year.

> Although the [ALJ] is correct that the ICPA includes both energy and demand charges, those products cannot be viewed as a single value. Energy and capacity must be addressed separately. For demand charges, because these costs speak directly to the inclusion of the ICPA in the Company's resource portfolio, review cannot be limited to a cost-based analysis. As discussed in the Company's Reply Brief, the Commission recently determined that evaluating a specific resource in a generation portfolio should be conducted in an IRP proceeding to ensure proper consideration of reliability and resource adequacy. March 15, 2024 Order in Case No. U-21459, p. 7 ("Case No. U-21459"); March 15, 2024 Order in Case No. U-20496, p. 8 ("Case No. U-20496"). The same logic applies here: review of ICPA as a power supply resource must include more than a cost-based analysis and should consider reliability and resource adequacy in an IRP. See MCL 460.6t(8).

Id., pp. 4-5 (footnotes omitted, emphasis and second alteration in original).

I&M also argues that the ALJ erred in accepting the Sierra Club's proposed benchmarks for cost comparisons, repeating its arguments that the Sierra Club's conversion to MWh metrics resulted in a flawed market analysis. The company disagrees with the ALJ that the Sierra Club's conversion was not *per se* inaccurate, arguing that "[t]he capacity factor does not simply affect the results – the results are *dependent* on the selection of the net capacity factor." *Id*., p. 6 (emphasis in original). I&M adds that the conversion to MWh is also unnecessary because it is a metric that is not intended to measure capacity value and that the MW-per day basis shows that the ICPA cost of $481.10 per MW-day is lower than CONE at $502 per MW-day. *Id*., p. 7. Regarding the benefits of the ICPA, I&M contends that the ALJ ignored the company's evidence and erred in his application of statutory requirements for a PSCR plan and factors. I&M insists that it presented a satisfactory five-year forecast and that its analysis shows the ICPA to be reasonable and prudent, relying on the Staff's testimony in support and rejecting the ALJ's concerns regarding the OVEC unit's utilization factor. *Id*., pp. 8-9.

In its replies to exceptions, the Staff asks the Commission to reject I&M's analysis that deviates from the established paradigm for Act 304 proceedings. The Staff recalls that I&M's

insistence on bifurcating energy and capacity into separate products is a "tortured conceptualization" of the company's PSCR costs that "widely misses the mark when considering the purpose and focus of Act 304 proceedings." Staff's replies to exceptions, p. 2. The Staff notes that energy and capacity are combined in the context of PSCR cases and that the total amount is billed to customers as a dollar per kWh charge, which the ALJ understood and captured on page 24 of the PFD. Staff's replies to exceptions, p. 2. The Staff recounts that the company has previously made this argument in Case No. U-21261 and it was rejected by the ALJ and the Commission there as well. *Id*., p. 3 (citing May 23 order, p. 19; PFD in Case No. U-21261, filing #U-21261-0065, pp. 28-29).

The Staff argues that the ALJ in this case properly clarified that at issue in this case is the review of the company's OVEC costs pursuant to Act 304 and whether they comply with the Code of Conduct. Staff's replies to exceptions, p. 3 (citing PFD, p. 24). The Staff emphasizes the ALJ's conclusion and adds that such review involves "*costs being recovered from ratepayers through retail rates*." Staff's replies to exceptions, p. 3 (emphasis in original). The Staff contends that despite I&M's misplaced arguments, the company's participation in the ICPA, IRP issues, and FERC-related issues are not the subject of PSCR proceedings. *Id*., p. 4.

Next, the Staff argues that the ALJ's review of energy and capacity charges is consistent with the historical framework of Act 304 in that the previous version of MCL 460.6j(13)(b), prior to amendment by Public Act 341 of 2016, required the Commission to disallow any capacity charges associated with power purchased for periods exceeding six months unless the utility obtained Commission approval. Thus, the Staff contends that energy and capacity are properly reviewed under the PSCR process. The Staff further disagrees with I&M's claim that review of demand charges and application of the Code of Conduct amounts to questioning the use of the ICPA as

power supply source, which I&M claims is a question intended for an IRP. The Staff contends that this is an attempt by I&M to blur the lines between the distinct purposes of these two proceedings and evade a reasonableness and prudence review of the ICPA yet again. *Id*., pp. 4-5.

In its replies to exceptions, the Sierra Club supports the ALJ's review of the ICPA and recommendations regarding the economics of the ICPA. First, the Sierra Club disputes I&M's separation of capacity and energy and argues that the ALJ properly considered the overall costs of the ICPA that I&M is attempting to pass on to customers. Sierra Club's replies to exceptions, pp. 1-2 (citing February 2 order; PFD in Case No. U-20530, filing #U-20530-0094, p. 36). The Sierra Club then argues that the ALJ properly rejected I&M's contention that the energy costs demonstrate the reasonableness and prudence of the ICPA and cites the Commission's previous rejection of the argument that it should consider energy alone in the May 23 order. Sierra Club's replies to exceptions, pp. 2-3 (citing May 23 order, p. 19).

The Sierra Club then disputes I&M's contention that review of capacity costs amounts to a review of the company's decision to purchase power from OVEC. The Sierra Club argues this is flawed for the following reasons: (1) the Commission has repeatedly found that the ICPA should be regularly evaluated, (2) I&M's interpretation of MCL 460.6j(3) is misplaced because this provision is not a directive to the Commission about what it should consider but is rather a description of what the utility should file in its PSCR plan, (3) the cases I&M cites in support of its argument that the ICPA review should be done in an IRP are distinguishable from the circumstances of this case, and (4) I&M's IRP settlement specifically excluded consideration of OVEC and ICPA costs. Sierra Club's replies to exceptions, pp. 4-5.

Next, the Sierra Club defends the ALJ's reliance on the market comparisons the Sierra Club provided on record. Regarding the assumed net capacity factor used to convert capacity costs

from MW-day to MWh that I&M contested, the Sierra Club asserts that it did not use its own estimates but instead relied on I&M's projected capacity factors. Further, the Sierra Club points to the Commission's previous adoption of a Section 7 warning based in part on these same comparisons and the Commission's previous findings that the projected capacity factors are relevant to the reasonableness and prudence of the OVEC costs. Sierra Club's replies to exceptions, pp. 6-7.

The Sierra Club also asks the Commission to reject I&M's contention in exceptions that because the Staff accepted the company's five-year forecast, a Section 7 warning is unwarranted. The Sierra Club contends that I&M erred in stating that the ALJ failed to consider the Staff's conclusion. Rather, the Sierra Club argues that I&M ignored that the Staff emphasized that it was not making a long-term recommendation regarding the reasonableness of the costs of the ICPA. The Sierra Club maintains that the ALJ properly recommended issuing a Section 7 warning based on evidence demonstrating the ICPA's excessive costs and rejected I&M's reliance on its IRP modeling because of the flaws laid out in the PFD. Sierra Club's replies to exceptions, pp. 8-9 (citing PFD, pp. 29-31).

Having reviewed the record in this matter, the Commission finds the ALJ's findings and recommendations with respect to the ICPA to be well-reasoned and based on a preponderance of evidence on the record. *See*, PFD, pp. 22-34. The Commission agrees that a Section 7 warning with respect to the ICPA costs in excess of the market price cap established by the Code of Conduct is appropriate.

The record in this case demonstrates that the ICPA continues to be a costly supply choice when compared to other currently available long-term supply options, with excess costs ranging from $3.85 million up to $29.4 million. *See*, 2 Tr 234; *see also*, 2 Tr 225-227. The approximate

costs in the 2024 PSCR plan year of $91.87 per MWh and the forecasted 2025 through 2028 costs between $97.54 per MWh and $414.63 per MWh coupled with the declining utilization rate through 2028 paint a picture of a high-cost resource delivering decreasing value to ratepayers. *See*, 2 Tr 219-228; Exhibit IM-17; Exhibits SC-3, SC-4, SC-6, SC-15, and SC-18 Confidential. I&M continues to rely on the counterargument that the ICPA is profitable on an energy only-basis, but the Commission again rejects this justification and agrees with the ALJ. *See*, 2 Tr 126-129. I&M passes its total OVEC ICPA costs onto ratepayers, not energy costs alone. Therefore, the Commission properly considers the total costs as dictated by Act 304 and reviews these costs in tandem with the Code of Conduct, as the Commission has already determined several times. *See*, MCL 460.6j(6); MCL 460.10ee(8); Mich Admin Code, R 460.10108(4) (Rule 8(4)); June 23 order, p. 12; May 13 order, p. 17; April 11, 2024 order in Case No. U-20805, p. 13; and *In re Indiana Michigan Power Co*.

As to price comparisons, the Commission agrees that, while not perfect direct comparisons, the benchmarks provided by the Sierra Club in this case are appropriately relied upon to determine comparable market prices. *See*, 2 Tr 233-234. While I&M argues that the Sierra Club's methodology to convert dollars per MW-day to dollars per MWh creates a skewed result depending on the capacity factor selected, the Commission is not persuaded that the company showed an actual error resulting from the conversion. As the Commission has previously found the Sierra Club's methodology to be acceptable and I&M has not demonstrated an error in this case, the Commission agrees with the ALJ regarding the benchmarks applied.

Turning to the I&M's management of the ICPA, the Commission agrees with the ALJ that the evidence in this case showing I&M's attempts to renegotiate the OVEC contract is sparse. While I&M testified to the savings identified and achieved through the OVEC's "Continuous

Improvement" efforts, the underlying supporting exhibit was not provided. And, as the ALJ pointed out, I&M is describing OVEC's efforts, not its own, and any resulting and achieved cost decreases to the ICPA have not been made clear. *See*, 2 Tr 124-125; PFD, pp. 32-33. As to the letter from I&M to OVEC requesting negotiations of the ICPA, the letter was dated well before the close of the record in this case and the issuance of the PFD. *See*, PFD, p. 33; *see also*, Confidential Exhibit IM-22. I&M provided no further evidence of any response from OVEC or follow-up communications or further efforts. Thus, the Commission agrees with the ALJ that the single letter does not rise to the level of meaningful negotiation.

2. The Code of Conduct

Following a recitation of Rule 8(4) of the Commission's Code of Conduct, the ALJ rejected I&M's categorization on the record of the purchases from OVEC as non-affiliated purchases. The ALJ pointed to the Commission's repeated findings that OVEC and I&M are affiliates under Rule 8(4) and reaffirmed those findings. PFD, p. 34. The ALJ then recounted the series of arguments that I&M made here and in previous cases disputing the application of the Code of Conduct to the ICPA. The ALJ rejected these arguments as duplicative of previous arguments addressed and rejected by the Commission. Without a showing of new evidence or a change in circumstances, the ALJ reasoned that the Commission's well-settled legal analysis should not be relitigated. The ALJ then incorporated by reference the Commission's previous orders addressing the topic in recommending rejection of I&M's arguments. *Id*., p. 35. The ALJ also cited the Michigan Court of Appeals' rejection of I&M's arguments regarding the application of the Code of Conduct. *Id*., p. 36. Thus, the ALJ reaffirmed that I&M and OVEC are affiliates pursuant to the Code of Conduct such that Rule 8(4) applies to the ICPA. *Id*., p. 38.

I&M takes exception to the ALJ's conclusions regarding the application of the Code of Conduct and that the company had presented no evidence or change in circumstances to warrant deviation from the Commission's prior orders and the Court of Appeals decision. I&M argues that the issue of whether the Commission is preempted by federal law from applying the market-price cap to the ICPA was not addressed by the Commission, the Court of Appeals, or the ALJ in this case, and should be addressed by the Commission in the instant order. The company contends that FERC has exclusive jurisdiction over wholesale rates and that states may not bar regulated utilities from passing through to retail customers FERC-mandated wholesale rates. I&M's exceptions, pp. 9-10 (relying on *Miss Power & Light Co v Mississippi*, 487 US 354, 371-372; 108 S Ct 2428; 101 L Ed 2d 322 (1988); *Nantahala Power & Light Co v Thornburg*, 476 US 953, 963-964; 106 S Ct 2349; 90 L Ed 2d 943 (1986); *Ass'n of Businesses Advocating Tariff Equity v Pub Serv Comm*, 192 Mich App 19, 26; 480 NW2d 585 (1991). I&M contends that it has similar rate obligations under the ICPA and that the Commission is preempted by federal law from determining that a portion of the costs paid pursuant to a FERC-approved rate are unrecoverable. I&M's exceptions, p. 11.

In its replies to exceptions, the Staff contends that I&M mischaracterizes the Court of Appeals opinion in *In re Indiana Michigan Power Company* to assert that the Commission's application of the Code of Conduct amounts to a price cap on a FERC-approved wholesale agreement. The Staff contends that the Court clearly understood the limits of the Commission's decision when it found that the Commission had not explicitly ordered I&M to enter into or terminate a particular contract, but rather that the Commission's decision passed the losses from the ICPA onto I&M's shareholders instead of I&M's ratepayers. Staff's replies to exceptions, p. 6 (quoting *In re Indiana*

Michigan Power Company, ___ Mich App at ___, slip op at 11). Additionally, the Staff argues that:

> [c]learly, the court understood that the Commission's application of the Code's price cap was an action to regulate costs for Michigan ratepayers, not to affect the contract, or contract costs, between I&M and OVEC. In support of this clear distinction, the court approvingly cited *Kentucky West Virginia Gas Co v Pennsylvania Pub [U]tility Comm*, 837 F2d 600, 609 (3rd Cir. 1988) which provided: "Regarding the states' traditional power to consider the prudence of a retailer's purchasing decision in setting retail rates, we find no reason why utilities must be permitted to recover costs that are imprudently incurred; those should be borne by the stockholders, not the rate payers." Id. (emphasis added). That is exactly the issue here: the setting of retail rates.

Staff's replies to exceptions, pp. 6-7. Relying on *Kentucky West Virginia Gas Co v Pennsylvania Pub Utility Comm*, the Staff asserts that the Commission's application of the Code of Conduct is not a strike-price to a FERC-approved wholesale rate, but an action within its legitimate authority to determine the reasonableness of seeking recovery from Michigan ratepayers for ICPA costs. Further, the Staff contends that I&M "plays fast and loose" with defining the ICPA as FERC-approved since FERC had accepted the 2004 and 2010 amendments to the ICPA but had not approved them. Staff's replies to exceptions, p. 7. The Staff quoted the Commission's findings on this point where it quoted the FERC order:

> This action does not constitute approval of any service, rate, charge, classification, or any rule, regulation, contract, or practice affecting such rate or service provided for in the filed documents; nor shall such action be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate; and such action is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against any of the applicant(s).

Id. (citing May 13 order, p. 20 (quoting December 13, 2004 FERC letter in Docket Nos. ER04-1026-000 and ER04-1026-001; May 23, 2011 FERC letter in Docket Nos. ER11-3181-000, ER11-3440-000, and ER11-3441-000)). Further relying on the May 13 order, the Staff recalls that:

> [t]he Commission additionally pointed out, that the *Kentucky* court relied on [the fact that] "FERC's own interpretation of its authority recognizes that FERC does not determine the prudence of making a purchase and that "[i]f distributor buys gas at wholesale and then sells it at retail, the state, not FERC, sets the rate for that second sale.[']" (Id. (quoting *Kentucky West Virginia Gas Co*, 837 F2d at 609) (emphasis added)). That is the basis of the [ALJ]'s recommendation in this case. The issue is retail rates—what I&M is trying to charge its Michigan customers.

Staff's replies to exceptions, p. 8. As such, the Staff argues that the application of the Code of Conduct is not preempted by federal law and is, rather, an appropriate protection of utility customers from the inherent dangers of affiliate transactions.

The Sierra Club also challenges I&M's contention that the Code of Conduct is preempted by federal law and argues that:

> [t]he Federal Power Act recognizes this Commission's exclusive jurisdiction over retail rates charged to Michigan customers. While preemption through the filed-rate doctrine precludes an entity from challenging an actual wholesale rate approved by FERC, a state utility commission is always permitted to address the reasonableness of including those costs in retail customers' rates[.]

Sierra Club's replies to exceptions, pp. 10-11 (footnotes omitted). Similar to the Staff, the Sierra Club quotes and refers to *Kentucky West Virginia Gas Co* in support as well as *Nantahala Power & Light Co* and a FERC order in which FERC held that approval of a wholesale rate does not preclude state commissions from deciding if it is reasonable for the wholesale purchaser to pay a particular price in light of alternatives. Sierra Club's replies to exceptions, pp. 11-12 (citing 84 FERC ¶¶ 61,194, 61,973 (August 21, 1998)). Like the Staff, the Sierra Club explains that the passing through of ICPA costs to Michigan customers is at issue and then points to the Commission's previous decisions on this issue in the May 13 order, the June 23 order, and the November 18 order. Sierra Club's replies to exceptions, p. 12. Lastly, the Sierra Club also points out that the ICPA is not a FERC-approved rate as I&M contends. *Id*., p. 13 (citing December 13, 2004 FERC letter in Docket Nos. ER04-1026-000 and ER04-1026-001; May 23, 2011 FERC letter

in Docket Nos. ER11-3181-000, ER11-3440-000, and ER11-3441-000; May 13 order, p. 20; June 23 order, p. 13; November 18 order, pp. 18-19).

Finding the ALJ's recommendation regarding the application of the Code of Conduct to be well-reasoned and supported by the record in this case as well as the Commission's previous decisions on this matter, the Commission adopts the ALJ's recommendation on this issue. While I&M asserts in its exceptions that the Commission has not opined on the question of federal preemption, this is not the case. The Commission addressed this question directly in the May 13 order as follows:

> 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.

May 13 order, p. 21. The ALJ's recommended rejection of I&M's same argument in the company's 2022 PSCR plan case, Case No. U-20530, which was adopted by the Commission, also referenced the above-quoted passage from the May 13 order. February 2 order, p. 16. I&M has put forth no new facts or circumstances that would warrant a departure from the Commission's previous conclusion on this issue. Further, the Court of Appeals has opined on the applicability of the Code of Conduct and found that it does indeed apply to the ICPA with OVEC. *See*, *In re Application of Indiana Michigan Power Co*. As the ALJ noted, the Michigan Supreme Court also denied I&M's appeal of the Court of Appeals opinion. *See*, *In re Application of Indiana Michigan Power Co*, ___Mich App ___; ___NW3d___ (2024), lv den 8 NW3d 564 (2024).

Thus, the Commission concludes that the question of the application of the Code of Conduct to the ICPA is well-settled and adopts the PFD on this issue.

3. The Rockport Facility

The Sierra Club requested that the Commission caution I&M that the company will be unlikely to recover the operational costs of the Rockport plant associated with uneconomical self-commitment decisions. The Sierra Club reasoned that I&M is projecting the costs of the plant to be significantly more expensive due to the projected capacity factor of less than 10% in the 2025-2028 period. Specifically, the Sierra Club testified that Rockport Unit 1 is projected to incur $466.3 million (present value) in excess costs relative to market value of energy and capacity based on unit cost data over the next five years. 2 Tr 254-255. I&M countered that the Rockport commitment decisions have been addressed in previous PSCR plan and reconciliation cases, the company recognizes its obligation to operate the plant economically, I&M has made changes to comply with the Commission's orders, and commitment decisions are better addressed in PSCR reconciliation proceedings. I&M's initial brief, p. 31.

The ALJ agreed with I&M that the appropriate venue to review the company's operational decisions for the Rockport facility is in the corresponding PSCR reconciliation proceeding. The ALJ also noted that the Commission has previously stated that it is inappropriate to assume that I&M would make imprudent commitment decisions inconsistent with its planned operations and that operational decisions are best addressed in reconciliation cases. PFD, pp. 37-38 (citing June 22 order, p. 24). Thus, the ALJ declined to recommend that the Commission issue a Section 7 warning with respect to the Rockport facility. PFD, p. 38.

The Commission agrees with the ALJ that it would be premature to judge I&M's operation of the Rockport Unit before the fact and further agrees that the proper venue to address I&M's operational and commitment decisions is in the corresponding reconciliation proceeding. As such, the Commission adopts the ALJ's recommendation on this issue. The Commission also notes that

the Sierra Club did not file exceptions to the PFD and, therefore, has waived any objection to the PFD, including any potential objection on the issue. *See*, Mich Admin Code, R 792.10435(2).

THEREFORE, IT IS ORDERED that:

A. The application filed by Indiana Michigan Power Company for a power supply cost recovery plan for the 12 months ending December 31, 2024, is approved, as set forth in this order.

B. Indiana Michigan Power Company's proposed power supply cost recovery factor of 11.44 mills per kilowatt-hour is approved, and the company's five-year forecast is accepted.

C. The Commission issues a warning under MCL 460.6j(7) and the Commission's Code of Conduct, Mich Admin Code, R 460.10101 *et seq*., that Indiana Michigan Power Company may not be able to recover its full costs under the Ohio Valley Electric Corporation's Intercompany Power Agreement without evidence demonstrating good faith efforts by Indiana Michigan Power Company to minimize the costs of the Intercompany Power Agreement, which may include renegotiation of the contract.

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 notifications should be sent to the Executive Secretary at LARA-MPSC-Edockets@michigan.gov and to the Michigan Department of Attorney General - Public Service Division at sheac1@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

Katherine L. Peretick, Commissioner

By its action of October 10, 2024.

Lisa Felice, Executive Secretary

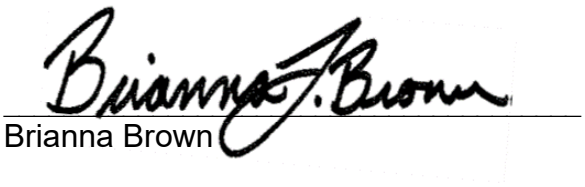
P R O O F O F S E R V I C E

STATE OF MICHIGAN)

Case No. U-21427

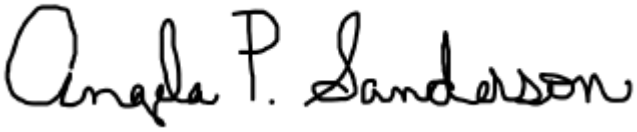
County of Ingham)

Brianna Brown being duly sworn, deposes and says that on October 10, 2024 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 10th day of October 2024.



Angela P. Sanderson
Notary Public, Shiawassee County, Michigan
As acting in Eaton County
My Commission Expires: May 21, 2030

Service List for Case: U-21427

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