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December 4, 2024

Ms. Lisa Felice
Executive Secretary
Michigan Public Service Commission
7109 West Saginaw Hwy, 3rd Floor
Lansing, MI 48909-7721

Re: MPSC Case No. U-21262 - *In the matter of the application of Indiana Michigan Power Company for reconciliation of its power supply cost recovery plan (Case No. U-21261) for the twelve months ending December 31, 2023.*

Dear Ms. Felice:

Attached for electronic filing in this matter are Indiana Michigan Power Company's Response to the Attorney General Dana Nessel, Sierra Club, and Citizens Utility Board of Michigan's Motion to Strike with Proof of Service of same.

If you have any questions, please contact me.

Sincerely,

Dykema Gossett PLLC

Jason T. Hanselman

Enclosure

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STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application of)	
INDIANA MICHIGAN POWER COMPANY for)	
a Power Supply Cost Recovery Reconciliation)	Case No. U-21262
proceeding for the 12-month period)	
ended December 31, 2023.)	
_____)	

**INDIANA MICHIGAN POWER COMPANY’S
RESPONSE TO THE ATTORNEY GENERAL DANA NESSEL, SIERRA CLUB, AND
CITIZENS UTILITY BOARD OF MICHIGAN’S MOTION TO STRIKE**

Pursuant to Rule 432 of the Michigan Public Service Commission’s (“MPSC” or the “Commission”) Rules of Practice and Procedure, Mich Admin Code, R 792.10432, Indiana Michigan Power Company (“I&M” or the “Company”) requests that the Administrative Law Judge (“ALJ”) deny the Attorney General Dana Nessel, Sierra Club, and Citizens Utility Board of Michigan’s (collectively, “Attorney General”) Motion to Strike Portions of I&M witness Jason Stegall’s Rebuttal Testimony (“Motion”).

INTRODUCTION

The Attorney General’s Motion to Strike here seeks to limit the Commission’s evaluation to only information that supports the Attorney General’s position and to exclude evidence that contradicts the Attorney General’s argument. To ensure a complete record for the Commission’s consideration, the Administrative Law Judge should deny the Attorney General’s Motion to Strike.

The Motion to Strike seeks to exclude testimony from Company witness Stegall responding to Attorney General witness Glick’s failure to address the flaw in her calculation caused by using the Campbell 3 and Belle River plants as a comparator to the Ohio Valley Electric Corporation (“OVEC”). Namely, Mr. Stegall provides data showing how Ms. Glick’s calculation failed to address the impact of the Michigan Public Power Agency (“MPPA”) being a partial owner of

Campbell 3 and Belle River. Mr. Stegall's Rebuttal Testimony explains why Ms. Glick's failure to account for MPPA's ownership interest results in an inaccurate calculation given that I&M does not own OVEC. The Attorney General seeks to exclude from the record what Ms. Glick's (and the Commission's) calculations would be if they considered the impact of MPPA's ownership interest on that calculation. Correcting Ms. Glick's mistakes is proper rebuttal that the Administrative Law Judge and Commission should have available for their analysis.

Equally concerning though is the Attorney General's apparent attempt to use a Motion to Strike to collaterally challenge the substantive merits of Mr. Stegall's testimony. Ironically, the Attorney General is using this motion to introduce improper rebuttal in response to Mr. Stegall's testimony by explaining why the Attorney General disagrees with that testimony. Albeit clever, the Attorney General's approach is inappropriate and should be rejected as providing no basis for striking the testimony.

ARGUMENT

I. MR. STEGALL'S TESTIMONY IS PROPER REBUTTAL TESTIMONY AND SHOULD NOT BE STRICKEN.

A. The Data Underlying Mr. Stegall's Testimony Was Not Available Until After Filing His Direct Testimony.

Under Rule 427 of the Commission's Rules of Practice and Procedure, a party to a Commission proceeding "shall have the right to submit rebuttal evidence." Mich Admin Code, R 792.10427(3). Mr. Stegall's Rebuttal Testimony is well within the commonly understood definition and purpose of rebuttal evidence as "to contradict, repel, explain or disprove evidence

produced by the other party and tending directly to weaken or impeach the same.”¹ The Attorney General claims that part of Mr. Stegall’s Rebuttal Testimony should be struck because it could have been offered in I&M’s direct case, however, the Michigan Supreme Court has held that “[T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor’s case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal” See *Figures*, 451 Mich at 399.

I&M acknowledges that the Commission has held that evidence “which could have been offered in a party’s main case may be rejected if offered as rebuttal evidence.”² Even if the Commission were to adopt that standard rather than the applicable Supreme Court precedent, that is not the situation here. In this instance, the information challenged was not available at the time I&M filed its main case. Here, Mr. Stegall filed his Direct Testimony on March 28, 2024, but the data underlying Mr. Stegall’s Rebuttal Testimony was not available until the Independent Auditor’s Report was issued on April 19, 2024. In other words, Mr. Stegall could not have offered that calculation in direct because the information needed to perform the calculation was not available at that time.

¹ Case No. U-8871, October 13, 1988, Order, p. 2, citing *Kirk v Ford Motor Co*, 147 Mich App 337, 353; 383 NW2d 193 (1985); *People v Dansby*, unpublished opinion of the Court of Appeals of Michigan, issued January 6, 2022 (Case No. 351034), p 38, citing *People v Figures*, 451 Mich 390, 399; 547 NW2d 673 (1996).

² Case No. U-16034-R, March 8, 2012, Order, p. 9.

B. Mr. Stegall's Rebuttal Testimony Directly Responds to Attorney General Witness Glick's Mistaken Calculation.

Mr. Stegall's Rebuttal Testimony is directly responsive to the evidence offered in this case by other parties. Specifically, that testimony is directly responsive to Ms. Glick's Direct Testimony and Mr. Stegall used it to contradict, explain, and disprove Ms. Glick's criticism of the Company's direct case and correct an omission in Ms. Glick's testimony. Mr. Stegall's Rebuttal Testimony attempts to explain why Ms. Glick's failure to account for MPPA's ownership interest results in an inaccurate calculation. Mr. Stegall then explains how to correct Ms. Glick's calculation to reflect the difference in ownership structures between OVEC and Campbell 3/Belle River.

This answer unquestionably contradicts and disproves evidence of the Attorney General regarding the Attorney General's calculation comparing OVEC to Belle River and Campbell 3 in an effort to directly weaken or impeach that evidence. Contrary to the Attorney General's assertion that I&M provided new evidence on rebuttal, "the rebuttal testimony did not concern a collateral matter, but, instead focused on evidence that was material and relevant."³ To the extent it is unclear that the challenged question and answer were responding to Ms. Glick's testimony, reviewing the immediately preceding question provides context and makes clear that this line of questions responds directly to Ms. Glick's position.

II. EVEN IF MR. STEGALL'S TESTIMONY WOULD HAVE BEEN MORE APPROPRIATE AS DIRECT TESTIMONY, THE COMMISSION'S BROAD EVIDENTIARY STANDARDS ALLOW ITS ADMITTANCE TO ENSURE A WELL-DEVELOPED RECORD.

As discussed above, the data Mr. Stegall used for rebuttal testimony was not complete at the time the Company filed its direct case and, therefore, could not have been part of Mr. Stegall's direct testimony. It is nonetheless responsive to the Attorney General's testimony and helpful for

³ *People v Vasher*, 449 Mich 494, 505; 537 NW2d 168 (1995).

the Commission’s analysis regarding price comparisons to the ICPA. In any event, the Commission has a broad evidentiary standard, which allows all relevant evidence and provides the Commission with the discretion to “admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.”⁴ “The rules of evidence, as applied to the Commission, are relaxed, and the presiding officer has discretion to allow any evidence that is of a type that may be commonly relied upon.”⁵ MCL 24.275 contains a similar provision.

Further, under Michigan’s Rules of Evidence, all logically relevant evidence is admissible except as otherwise prohibited by the state or federal constitution or other court rules.⁶ To be relevant, evidence must be material and probative of a fact of consequence to the action.⁷ To be material, a fact must be one “in issue” or within the “range of litigated matters in controversy.”⁸ Furthermore, evidence used for the purpose of addressing disputed questions in this case is relevant and admissible, even if that same evidence might be inadmissible for some other purpose.⁹

This standard facilitates the creation of a full and complete record for the Commission to review. While true in every case, it is particularly true here where the Commission has been asking the parties to provide viable market comparators to OVEC prices. Certainly, the Commission should welcome the Company’s rebuttal evidence in this case and not strike this evidence merely because Mr. Stegall presented it in response to calculations the Attorney General proposed.

⁴ Mich Admin Code, R 792.10427(1); see also MCL 24.275 (“[A]n agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.”).

⁵ Case No. U-11830, January 10, 2006, Order, p. 6.

⁶ *People v VanderVliet*, 444 Mich 52, 60–61; 508 NW2d 114 (1993).

⁷ *People v Mills*, 450 Mich 61, 67; 537 NW2d 909 (1993).

⁸ *People v Sabin*, 463 Mich 43, 57; 614 NW2d 888 (2000), quoting *Mills*, 450 Mich at 68.

⁹ *Wilson v Ex-Cell-O Corp*, 12 Mich App 637, 641; 163 NW2d 492 (1968). See also *People v Petri*, 279 Mich App 407, 415; 760 NW2d 882 (2008), citing *Sabin*, 463 Mich at 56.

The Attorney General is not materially prejudiced as she is free to conduct discovery and cross-examination on the rebuttal evidence.

RELIEF REQUESTED

Indiana Michigan Power Company respectfully requests the Administrative Law Judge deny the Attorney General's Motion to Strike a portion of I&M witness Jason Stegall's Rebuttal Testimony. Mr. Stegall's testimony is proper rebuttal evidence, under the appropriate legal standard, because it is tailored specifically to rebut, contradict, explain, and disprove direct evidence offered by other parties and I&M could not reasonably have presented it in direct testimony.

Respectfully submitted,

Dated: December 4, 2024

By: _____
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4931-1145-1395.1

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of)
INDIANA MICHIGAN POWER COMPANY) Case No. U-21262
for reconciliation of its power supply cost)
recovery plan (Case No. U-21261) for the)
twelve months ending December 31, 2023.)

PROOF OF SERVICE

Cassandra A. Jackway, an employee of Dykema Gossett PLLC, says that on the 4th day of December 2024, she served Indiana Michigan Power Company’s Response to the Attorney General Dana Nessel, Sierra Club, and Citizens Utility Board of Michigan’s Motion to Strike upon the following parties via the email addresses indicated:

<u>ADMINISTRATIVE LAW JUDGE</u> Hon. Lesley C. Fairrow	fairrowl1@michigan.gov
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<u>SIERRA CLUB</u> Tony Mendoza Kristin A. Henry	tony.mendoza@sierraclub.org kristin.henry@sierraclub.org
<u>ATTORNEY GENERAL</u> Michael E. Moody Holy Hillyer	ag-enra-spec-lit@michigan.gov Moodym2@michigan.gov holly@tropospherelegal.com
<u>CITIZENS UTILITY BOARD OF MICHIGAN (CUB) AND SIERRA CLUB</u> Christopher M. Bzdok Holly Hillyer Breanna Thomas Natasha Fowles	chris@tropospherelegal.com holly@tropospherelegal.com breanna@tropospherelegal.com natasha@tropospherelegal.com

**CITIZENS UTILITY BOARD OF
MICHIGAN (CUB), SIERRA CLUB
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