

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of)	
Consumers Energy Company)	
for authority to increase its rates for)	Case No. U-21870
the generation and distribution of)	
electricity and for other relief.)	
_____)	

RULING ON MOTION TO AMEND THE JULY 8, 2025 SCHEDULING MEMORANDUM

On August 20, 2025, the Michigan Public Service Commission Staff (“Staff”) filed its Motion to Amend the July 8, 2025 Scheduling Memorandum (“Motion”) requesting that a provision within the July 8, 2025 scheduling memo (“Memo”) be removed for the reasons set forth in Staff’s Brief in Support of its Motion to Amend.¹ In its Motion, Staff states that it does not request a hearing on the Motion.² On August 22, 2025, the Michigan Attorney General filed her Response in Support of Staff’s Motion to Amend (“Response”) also requesting that the provision be removed from the Memo.

The Memo provision at issue states as follows:

Return On Equity. Any party submitting testimony regarding the authorized return on equity (ROE) requested by the utility in this case shall submit direct or rebuttal testimony and any supporting exhibits which set forth a) the average expected long-term return on equity for the broader stock market, and b) the

¹ The brief is attached to the Motion with consecutive pagination. As such, any citations to the brief will be referenced at the page(s) of the Motion.

² Motion, p. 2.

average ROE authorized for regulated utilities in the United States for the last five years.³

Staff and the Attorney General offer various arguments in support of having this provision removed from the Memo.

Staff argues that, while an ALJ has discretion to organize their dockets in order to “timely and effectively” render a PFD, the Memo provision “invades Staff’s and Staff Counsel’s rights, duties, and responsibilities to present their arguments in a manner they deem most effective and appropriate,” and “exceeds the scope of authority provided by law.”⁴

Staff asserts that the duties and role of ALJs in matters before the Commission are governed by the Michigan Administrative Rules (“Rules”), and where a topic is not addressed by the Rules, the Rules provide that the ALJ may rely on provisions of the Michigan Court Rules (“MCR”) and the American Bar Association Model Code of Judicial Conduct for State Administrative Law Judges (“CJC”).⁵ Noting that the Rules include several “provisions of authority imbued upon a presiding officer”, Staff states that while the legislature and the Commission have provided “broad discretion for an ALJ to organize their dockets and presentation of evidence” in a manner to ensure cases are considered in a timely manner, that broad discretion must be “balanced against all parties’ fundamental right to due process.”⁶ Staff argues that the ALJ’s authority to organize their dockets “does not extend to the point where it infringes upon

³ Memo, p. 2.

⁴ Motion, p. 3, 8.

⁵ Motion, p. 4, citing Mich Admin Code R 792.10403; Mich Admin Code R 792.10106(10). These Ruling notes that while Rule 106(10) (R 792.10106(10)) does state that the CJC may be referenced in proceedings conducted under the Michigan Administrative Rules, Rule 101(3) provides that Rule 106(10) does not apply to proceedings before the Commission. (R 792.10101(3)).

⁶ Motion, p. 8.

the lawful rights, duties, and responsibilities of the parties and attorneys” that appear before the Commission.⁷ Staff’s argument in this regard is misguided.

This ALJ’s request set forth in the Memo provision is not based on its authority to organize its case dockets. Rather, this request is based upon its statutorily prescribed duty and obligation to make findings of fact and conclusions of law regarding the issues at stake in the case. See MCL 24.203; 24.276; 24.281.⁸ Certainly the determination of a reasonable ROE authorized by the Commission for Consumers is a fundamental issue in this case, and the requested information is directly related to the resolution of that issue. See, discussion, *infra*. Indeed, this ALJ needs to consider all relevant information in evidence to make fully informed findings of fact and conclusions of law.

Asserting that the Michigan Rules of Evidence (MRE) provide that the judge functions as the “preliminary gatekeeper for determinations of admissibility of evidence”, Staff argues that the gatekeeping function requires the judge to manage a docket by making decisions upon evidence “once it is presented by the parties before it,” but that the rules “are silent as to the ability to direct a party as to the substance of the presentation of evidence.”⁹ This Ruling disagrees.

The authority of the ALJ regarding evidence is not limited to determining whether evidence presented by a party should be admitted. Rather, it is clear that the ALJ may require the introduction of relevant evidence. See, *e.g.*, MRE 614 which provides that

⁷ Motion, p. 3.

⁸ MCL 24.203 states that a “contested case” is a proceeding in which a determination of the “legal rights, duties and responsibilities” of a party is “required by law” to be made after an “evidentiary hearing.” MCL 24.276 states that evidence in a contested case “shall be offered and made part of the record.” MCL 24.281(2) provides that the PFD “shall contain a statement of the reasons therefor and of each issue of fact and law necessary to the proposed decision.”

⁹ Motion, p. 5, 6, citing Rule 427 (R 792.10427(1)), MRE 104(a).

the judge “may call a witness on its own,” and that the judge “may examine a witness regardless of who calls the witness.”¹⁰ See, also, e.g., *U.S. v. Karnes*, 531 F. 2d. 214, 216 (CA 4th Cir. 1976):

We agree with the parties that ordinarily the utilization of court witnesses is a matter within the discretion of the trial judge. The leading texts, supported by a plethora of precedents, support the rule. See McCormick on Evidence s 8 (1972); 9 Wigmore on Evidence s 2484 (1940). The power to call and to interrogate court witnesses is said to be derived from the judicial system's basic functions of disclosing truth and administering justice. [FN 1] Indeed, the rule is codified in Rule 614 of the new Federal Rules of Evidence¹¹

A trial judge is not captive within the case as made by the parties. He has the authority, if not the duty, to call witnesses who possess relevant information affecting the outcome of the issues when the parties decline to call them.¹²

In the footnote referenced above, the Court quotes from McCormick on Evidence s 8, p. 12 (1972), as follows:

Under the Anglo-American adversary trial system, the parties and their counsel have the primary responsibility for finding, selecting, and presenting the evidence. However, our system of party-investigation and party-presentation has some limitations. It is a means to the end of disclosing truth and administering justice; and for reaching this end the judge may exercise various powers.

Prominent among these powers is his power to call and question witnesses. The judge in his discretion may examine any witness to bring out needed facts which have not been elicited by the parties.

In this instance, the provision is intended to “bring out” some “needed facts” affecting “the outcome of the [ROE] issues” of this case.

Staff argues that the Memo provision “implicitly requires that the experts concede” that the requested evidence “is a relevant and necessary component of its

¹⁰ MRE 614(a), (b).

¹¹ FRE 614 is identical to MRE 614.

¹² Citation omitted.

determination,” and that the Memo provision mandates the presentation of “potentially irrelevant evidence.”¹³ Similarly, the Attorney General states that she may be required to “develop and provide evidence that is unnecessary, irrelevant or contrary to her case.”¹⁴ Again, this Ruling disagrees.

Should any party submit the information requested by this ALJ, the legal authorities make clear that neither the party nor its expert witness is deemed to admit or concede the relevance or the weight of the evidence. *See, e.g., Smith v. United States*, 331 F.2d 265, 273 (CA 8th Cir. 1964)(“The effect [of one being called as a court’s witness] is that neither party to the suit may be held responsible for the testimony of the witness and both of course may exercise the privilege of cross-examination.”).¹⁵ Thus, Staff, the Attorney General, and any other party providing the requested information may challenge the relevance or the weight of the evidence by way of testimony, exhibit(s), and/or a brief, or may ignore the requested information altogether.¹⁶ Moreover, this ALJ and/or the Commission ultimately may conclude that the requested information should be accorded little or no weight with respect to the issue of what is a reasonable authorized ROE for Consumers given the evidence in this case.

In addition, the Memo provision does not request the presentation of irrelevant evidence. Indeed, this ALJ finds the requested information to be directly and fundamentally relevant to this case. The Supreme Court standards set forth in the

¹³ Motion, p. 10, 11.

¹⁴ Response, p. 3.

¹⁵ Citation omitted.

¹⁶ This Ruling notes that Staff, like other parties, often does not respond to all evidence submitted by other parties in a case and, indeed, will specifically assert that its failure to do so should not be considered to be its agreement with that evidence. *See, e.g.,* Staff’s Initial Brief dated June 25, 2025, filed in Consumers’ last gas rate case (U-21806)(“Given the complexity of this case, the Commission should not construe Staff’s silence on an issue as agreement with one or more of the parties on that issue.”). Dkt. no. 0280, p. 2.

Bluefield and *Hope* cases¹⁷ for establishing a reasonable ROE – which standards the Michigan Supreme Court and the Commission have long-recognized and applied¹⁸ -- are clear that determining a reasonable ROE involves a consideration of comparable returns by other companies with comparable risks. See, e.g., *Hope, supra.* p. 603 (“[T]he return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks.”). As such, an evaluation of the requested information – the return on equity for the broader stock market(s) and the ROEs recently authorized for other regulated utilities – is directly related to determining a reasonable ROE.

Staff argues that the requested evidence creates “issues in the formation of a foundation for related exhibits, and preparation for cross examination,” and that “there are a number of ways” in which the presentation of this evidence “could prejudice a party, cause avoidable impeachment of an expert’s credibility, and thereby force their counsel into unethical territory.”¹⁹ However, Staff does not identify any example of such issues or potential prejudices, and this ALJ cannot think of any. Again, as discussed, *supra*, Staff is not deemed responsible for, nor necessarily supportive of, any information requested by the ALJ, and Staff is free to challenge that evidence by way of other evidence or argument, or ignore the evidence altogether. See, *Smith v. United States, supra.*

¹⁷ *Bluefield Water Works Co. v. Public Service Commission of West Virginia*, 262 US 679 (1923); *Federal Power Comm. V. Hope Natural Gas Co.*, 320 US 591 (1944).

¹⁸ *Michigan Bell Telephone v. MPSC*, 332 Mich 7, 38, 50 NW2d 826 (1952); Case No. U-5365, Opinion and Order, September 28, 1978.

¹⁹ Motion, p. 11.

Staff asserts that if the requested evidence is not presented, the Memo indicates that Staff risks having their testimony and arguments being rejected from consideration by the ALJ. This assertion is false; the Memo does not state any potential ramifications if the requested evidence is not provided. The Memo does set forth various requirements for any briefs submitted by the parties and does state that if a brief is determined to not “substantially comply” with the brief requirements, the “non-conforming brief” may be disregarded or stricken.²⁰ Obviously, having an ALJ potentially disregarding a non-conforming brief is not the same thing as the ALJ rejecting testimony.

Both Staff and the Attorney General assert that the Memo provision is unclear regarding the specific evidence being requested, with some of the terms being undefined and susceptible to varying meanings.²¹ Staff and the Attorney General also raise concerns about how the requested information should be calculated, and the Attorney General raises concerns about the “resources available to her” with which to find the requested information.²² This Ruling finds that these concerns are well taken. As such, the Memo provision will be amended to clarify the nature of information being requested and the limited manner of producing the requested information.

²⁰ The Ruling notes that the Commission has stated that the potential disregarding or striking of a non-conforming brief is an appropriate sanction for disregarding the ALJ’s legally enforceable directives. See, Case No. U-20322, Order, September 26, 2019, p. 5-6; Case No. U-21291, Order, November 11, 2024, p. 4.

²¹ Motion, p. 12; Response, p. 2.

²² Motion, p. 12; Response, p. 3, 2.

Accordingly, the Motion is DENIED. However, the Memo provision shall be amended for clarification purposes.

MICHIGAN OFFICE OF ADMINISTRATIVE
HEARINGS AND RULES
For the Michigan Public Service Commission

Jonathan F.
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Jonathan F. Thoits
Administrative Law Judge

September 4, 2025
Lansing, Michigan

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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STATE OF MICHIGAN)
) SS. Case No. U-21870
County of Ingham)
_____)

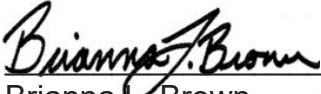
PROOF OF SERVICE

Meaghan Dobie being duly sworn, deposes and says that on September 4, 2025, she served a copy of the attached Ruling on Motion to Amend the July 8, 2025 Scheduling Memorandum via email and/or first-class mail, to the persons as shown on the attached service list.



Meaghan Dobie

Subscribed and sworn to before me this
4th day of September 2025.



Brianna L. Brown
Notary Public, Gratiot County, Michigan
My Commission Expires July 4, 2028

Case No. U-21870
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