

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the complaint of  
**CONSUMERS ENERGY COMPANY** for  
authority to increase its rates for the  
generation and distribution of  
electricity and for other relief.

Case No. **U-21870**  
**(e-file paperless)**

---

**MICHIGAN PUBLIC SERVICE COMMISSION STAFF'S APPLICATION  
FOR LEAVE TO APPEAL THE DENIAL OF STAFF'S MOTION TO  
AMEND THE JULY 8, 2025, SCHEDULING MEMORANDUM**

The Michigan Public Service Commission Staff (Staff), pursuant to Michigan Administrative Code Rules 792.10433 state as follows:

1. A scheduling memorandum was entered by the ALJ in this matter on July 8, 2025, following a prehearing on July 2, 2025.
2. In addition to the customary filing dates for testimony, rebuttal testimony, motions to strike, responses thereto, briefs and their replies, PFD target date, and cross examination dates, there was an additional requirement that relates to the mandatory presentation of substantive evidence.
3. Specifically, the additional requirement requires any party submitting testimony that addresses the Return on Equity (ROE) to “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 average ROE authorized for regulated utilities in the Unites States for the last five years.” (Scheduling Memo, p 2.).
4. Staff requested this requirement be removed from the scheduling memorandum by motion filed on August 21, 2025.

5. The Attorney General filed a response to Staff's motion on August 22, 2025, concurring with Staff's request.

6. On September 4, 2025, the ALJ denied Staff's motion, and further indicated that clarification as to the ROE requirement provision would be forthcoming.

7. An amended Scheduling Memorandum was rendered by the ALJ on September 5, 2025, and indicated:

Return On Equity (Amended). 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 reported forecasted return on equity for the United States stock market, and b) the reported average ROE authorized for regulated utilities in the United States for the last two or more years. The requested returns and authorized ROEs shall be those as reported in public resources or resources otherwise available to the party. The party may but is not requested to undertake its own calculation or compilation of the requested information. If the party is unable to locate the requested information, the party's ROE testimony shall include a statement that the witness has in good faith attempted to locate the requested information in public resources or resources available to the party. [September 5, 2025 Amended Scheduling Memorandum, p 2.]

8. Staff maintains that the amended scheduling memorandum continues to improperly compel the presentation of substantive evidence at the expense of their due process rights, and even assuming it was an appropriate requirement, the amended provision is no less confusing or unworkable.

9. Additionally, while Staff does not contest the authority granted to a presiding officer through Michigan Rules of Evidence (MRE) 614 to call and question witnesses, it does dispute that empowers a presiding officer the authority

to make demand of substantive prefiled testimony in the manner in which the ruling describes.

10. Mich Admin Code R 792.10433 allows for appeals to the commission from rulings of presiding officers. “During the course of a proceeding, a party may appeal a ruling of the presiding officer by filing an application for leave to appeal from the ruling of the commission.” Mich Admin R Code 792.10433(1).

11. For the reasons more thoroughly articulated in the Brief in Support, Staff respectfully requests the Commission disallow the provision of the scheduling memorandum that compels the parties to offer substantive evidence.

**PRAYER FOR RELIEF**

Wherefore, Staff respectfully requests the Commission grant Staff's request for an immediate limited relief from enforcement of the contested ROE provision, and to grant Staff's application and leave to appeal and order the removal of the requirement for parties to produce substantive evidence.

Respectfully submitted,

**MICHIGAN PUBLIC SERVICE  
COMMISSION STAFF**

Daniel E. Sonneveldt (P58222)  
Nicholas Q. Taylor (81020)  
Alena M. Clark (P73252)  
Assistant Attorneys General  
Public Service Division  
7109 W. Saginaw Hwy., 3rd Floor  
Lansing, MI 48917  
Telephone: (517) 284-8140

**DATED: September 18, 2025**

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the complaint of  
**CONSUMERS ENERGY COMPANY** for  
authority to increase its rates for the  
generation and distribution of  
electricity and for other relief.

Case No. **U-21870**  
**(e-file paperless)**

/

**MICHIGAN PUBLIC SERVICE COMMISSION STAFF'S APPLICATION  
FOR LEAVE TO APPEAL THE DENIAL OF STAFF'S MOTION TO  
AMEND THE JULY 8, 2025, SCHEDULING MEMORANDUM**

As indicated in its motion before the ALJ, Staff appreciate that in order to timely and effectively render a Proposal for Decision (PFD), the Administrative Law Judges (ALJs) in Michigan Public Service Commission (MPSC) cases must exercise discretion where necessary to organize their dockets. However, the fact remains that Staff also has an obligation to present the results of their analysis in a manner they, and their counsel deem appropriate. Where a presiding officer conflates their role as evidence gatekeeper with limitless ability to not only question witnesses, but also to compel the substance of prefiled testimony and analysis over the parties' objection, Staff has no other option but to seek relief from the Commission.

In the proceeding before the ALJ, Staff sought to remove a portion of a Scheduling Memorandum that exceeded the usual scheduling requirements and, in an unprecedented manner, added a requirement for the mandatory production of substantive evidence in the form of the parties' prefiled testimony. Which, as

articulated in Staff's motion could be construed to force a position on a contested matter.

The relevant provision of the memorandum requires any party submitting testimony that addresses the Return on Equity (ROE) to “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 average ROE authorized for regulated utilities in the United States for the last five years.”<sup>1</sup>

While Staff worked to prepare testimony in compliance with the novel directive, it became clear that to follow the directive was not only difficult because the request was subject to varying interpretations, but it would also require Staff to conduct additional analysis and adopt a method of analysis by forcing the use of a specified comparison that it may not have otherwise deemed relevant or necessary. As a result, Staff sought relief with the administrative law judge (ALJ) and respectfully indicated that it opposed the inclusion of such a requirement in a scheduling memorandum because it improperly invaded Staff's due process rights in

---

<sup>1</sup> The language, as amended by the ALJ's ruling, now reads, “Return On Equity (Amended). 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 reported forecasted return on equity for the United States stock market, and b) the reported average ROE authorized for regulated utilities in the United States for the last two or more years. The requested returns and authorized ROEs shall be those as reported in public resources or resources otherwise available to the party. The party may but is not requested to undertake its own calculation or compilation of the requested information. If the party is unable to locate the requested information, the party's ROE testimony shall include a statement that the witness has in good faith attempted to locate the requested information in public resources or resources available to the party.” [September 5, 2025 Amended Scheduling Memo, p 2.]

a number of ways. While the ALJ acknowledged the request was unclear, and ultimately amended the provision, it remains a mandatory provision in the scheduling memorandum for prefiled testimony. The request, even as amended, also remains unclear- and arguably, is now even more unclear.

In the ruling that denied Staff's motion, the ALJ asserted that Staff had improperly framed the issue as one of balancing its due process rights and authority of the presiding officer. Specifically, it was determined that an ALJ had authority to order such a provision in scheduling orders through a series of statutes and MRE 614. While Staff does not dispute that MRE 614 allows for a presiding officer to ask questions of a witness in certain circumstances, Staff disputes that this rule can be stretched to extend to a presiding officer directing a party prefile testimony in this manner. Staff further disputes that any of the statutes cited by the ALJ allow this breadth of discretion either. Thus, Staff now seeks review by the Commission, pursuant to Mich Admin R 792.10433, to determine whether it is appropriate for an ALJ to compel substantive testimony through a scheduling memorandum before this provision may be enforced to its detriment.

#### **I. Authority for Appeal**

As previously indicated, Mich Admin Rule 792.10433 allows for any party in the course of a proceeding to appeal a ruling of a presiding officer to the Commission. The appeal must be sought within 14 days of the ruling, unless otherwise provided by the presiding officer. The administrative rules further provide that the commission shall grant an application and review the presiding officer's ruling if any of the following provisions apply:

(a) A decision on the ruling before submission of the full case to the commission for final decision will materially advance a timely resolution of the proceeding.

(b) A decision on the ruling before submission of the full case to the commission for final decision will prevent substantial harm to the appellant or the public-at-large.

(c) A decision on the ruling before submission of the full case to the commission for final decision is consistent with other criteria that the commission may establish by order. [Mich Admin R 792.10433(2)(a)-(c).]

In the instant matter, there are two reasons that Staff believes interlocutory relief is necessary from the Commission prior to issuance of the PFD, both of which rest on preventing substantial harm to the appellant and the public at large. First, compelling prefiled testimony with a specific analysis, if allowed once, establishes significant negative precedence moving forward. It removes the ability for counsel to object to that line of questions and circumvents a witnesses' ability to respond with a lack of personal knowledge, which is a protection required under MRE 614. Second, compliance with this substantive evidence provision forces a party to supply ROE analysis and comparisons that could be used against that party's own position in this case, as well as future rate cases. For these reasons, immediate appeal is appropriate under Mich Admin R 792.10433(2)(b)).

## **II. Memorandum From Which Relief Is Sought**

In its underlying motion, Staff noted in at least one prior instance wherein a scheduling memorandum was reviewed, the Commission indicated a need to balance the role of an ALJ and the due process rights of the parties appearing before it. MPSC Case No. U-21291, 11/7/2024 Order, pp 3–5. In U-21291, the

Commission acknowledged that the ALJ's right to organize the proceeding must still be understood in the context of due process, at least in some instances. MPSC Case No. U-21291, 11/7/2024 Order, p 5. Which, as cited in Staff's motion, is consistent with the Michigan Administrative Code, that provides, the "procedural rules shall be construed to secure a fair, efficient, and impartial determination of the issues presented in contested cases consistent with due process." Mich Admin Code R 792.10102.

The ALJ rejected this assertion and indicated, "Staff's argument in this regard is misguided." (Ruling, p 3.) Instead, the ALJ opined that the demand for substantive evidence through a scheduling memorandum results from his, "statutorily prescribed duty and obligation to make findings of fact and conclusions of law regarding the issue at state in the case." *Id.* In support of this assertion, the ALJ cited, MCL 24.203, MCL 24.276, and MCL 24.281.

Chapter 24 of Public Act 1899, in sections 201 through 211 the promulgated Administrative Procedures Act is codified. Specifically, section 203, provides a list of definitions from terms "A" through "G", which indeed does define a "contested case" as:

(3) "Contested case" means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal from its decision is taken to another agency, the hearing and the appeal are considered a continuous proceeding as though before a single agency.

MCL 24.276, is entitled "Evidence included in record; consideration of other information; copies of original documents," and it provides,

Sec. 76. Evidence in a contested case, including records and documents in possession of an agency of which it desires to avail itself, shall be offered and made a part of the record. Other factual information or evidence shall not be considered in determination of the case, except as permitted under section 77. Documentary evidence may be received in the form of a copy or excerpt, if the original is not readily available, or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original when available.

MCL 24.281 is entitled “Proposal for decision, requirements; service on parties; filing of exceptions and presentation of arguments; final decision; waiver.”

The language of this statute provides as follows:

Sec. 81. (1) When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served on the parties, and an opportunity is given to each party adversely affected to file exceptions and present written arguments to the officials who are to make the decision. Oral argument may be permitted with consent of the agency.

(2) The proposal for decision shall contain a statement of the reasons therefor[e] and of each issue of fact and law necessary to the proposed decision, prepared by a person who conducted the hearing or who has read the record.

(3) The decision, without further proceedings, shall become the final decision of the agency in the absence of the filing of exceptions or review by action of the agency within the time provided by rule. On appeal from or review of a proposal of decision the agency, except as it may limit the issue upon notice or by rule, shall have all the powers which it would have if it had presided at the hearing.

(4) The parties, by written stipulation or at the hearing, may waive compliance with this section.

The ALJ also asserted that MRE 614 which allows for a judge to “call a witness on its own” and allows a judge to “examine a witness regardless of who calls

the witness” provides the authority for the ALJ to mandate the production of this evidence through a scheduling memorandum. MRE 614 provides:

- (a) Calling. The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.
- (b) Examining. The court may examine a witness regardless of who calls the witness.
- (c) Objections. A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

In further support of these assertions, the ALJ cites two unbinding federal criminal cases, from the Fourth and Eighth Circuits. These cases come from circuits outside of Michigan and arise from questioning of a live witness during a trial. Both of these cases, along with the aforementioned statutes, will be discussed further below.

Staff disputes that any of the authorities listed by the ALJ support the proposition that inherent in an ALJ's authority is the ability to compel prefilled testimony with analysis of the ALJ's choosing in an administrative proceeding before the MPSC, particularly in a scheduling memorandum. Staff continues to acknowledge that the ALJs have an important role in these proceedings that indeed involve a wide breadth of discretion, including the authority explicitly granted in MRE 614; but discretion is not absolute, and it cannot come at the price of impeding any party's due process rights.

### III. Discussion

#### A. **It is a violation of Staff's due process rights for an ALJ to order the creation and production of substantive evidence with analysis of the ALJ's choosing in scheduling memorandum.**

Staff respectfully notes, again, that an ALJ has an important and arduous task of wading through voluminous testimony. As a result, there is no dispute that an ALJ has significant authority over the proceedings and that can even extend into the format in which conclusions are presented. Staff acknowledged this authority in its motion but indicated that it must be balanced against its due process rights. Despite the ALJ's contentions that Staff's citation to Michigan rules and laws was "misguided," Staff maintains the position it asserted in its motion before the ALJ is the appropriate framework for this analysis. In the ruling that denied Staff's motion, the role of an ALJ is mistakenly conflated and in so doing, created an opening for increasingly burdensome and unworkable evidentiary demands through scheduling memorandums. Viewed in the context of an already complicated 10-month rate making case, Staff's concerns are even more elevated.

Commission input is particularly timely because the appropriate comparisons in a rate case for Returns on Equity are a contested issue in a rate case<sup>2</sup>. Thus, the mandate for specific comparisons as listed by the ALJ can be seen as forcing a stance on the appropriate comparison which Staff believes is an unjust invasion into their ability to present their expert conclusions in a manner, it, and its counsel, deem most appropriate. There is a distinction between requesting clarifying

---

<sup>2</sup> For example, see MPSC Case No. U-21585, 3/21/2025 Order, p 236–254.

questions by a judge during a trial, as allowed in MRE 614, and compelling prefiled expert witness testimony which implicitly steers the ship in the course of conducting its analysis beyond the appropriate use of MRE 614 and thus invading the role of the parties. This provision should not be included in this, or any other scheduling memorandum.<sup>3</sup>

**1. The statutes cited in the ALJ's ruling do not provide authority to compel prefiled testimony.**

As it relates to the statutes cited by the ALJ in support of the ROE provision, Staff does not agree that any portion of those statutes authorizes an ALJ to compel substantive prefiled testimony with analysis of the ALJ's choosing. While it is unclear what definition specifically the ALJ was referring to as important to his analysis, Staff notes that MCL 24.203(3) codifies that contested cases include a determination of the legal rights, duties, or privileges of a named party.

MCL 24.276, which requires contested cases be decided on record evidence, also does not indicate any authority wherein an ALJ may compel *sua sponte* in a scheduling memorandum substantive testimony.

The final statute cited in the ALJ's ruling—MCL 24.281—describes proposals for decisions and procedures and service related thereto. MCL 24.281 would seem to become implicated only upon the parties' presentation of evidence. Nonetheless, it is from the obligation to render a decision on the evidence presented that the ALJ reads into the statute the ability to solicit and order the parties to present prefiled

---

<sup>3</sup> In addition to this provision existing in this scheduling memorandum, it has also been added to the NSP Rate Case, U-21903.

testimony in a scheduling memorandum with particularized analysis, regardless of that parties' position in the case. The ALJ opined:

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 issues at stake in the case. See MCL 24.203; 24.276; 24.281. 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. Indeed, this ALJ needs to consider all relevant information in evidence to make a fully informed finding of fact and conclusion of law. [Opinion, p 3, internal citations omitted]

Staff disputes this application of the statutes. As explained in Staff's motion, the parties present evidence and, upon the evidence presented, the ALJ as a "gatekeeper" determines the admissibility of the evidence which the parties have relied upon in order to reach their expert opinions. The ALJ then renders a ruling, based upon the evidence presented, including clarifying questions through MRE 614, which will be discussed further in Section III.A.2 below. Staff agrees that ROE is a Commission determined variable, as articulated in the rate making criteria MPSC Case No. U-18238. However, if it were the intent of the Commission to dictate the specific comparisons parties must use to establish or support their recommended conclusion on this issue, it would have done so.

There is no language in any of the statutes cited in the ruling that could reasonably lead to the authority of an ALJ to dictate the methodology and analysis about which any expert can be compelled to testify. Moreover, the ALJ's position seems to presuppose that the record, as presented by the parties, would be deficient without the compelled comparisons. However, if this theory were accepted, it would

suggest the compelled comparisons were necessary and that ROE determinations without them are somehow deficient. Countless previous Commission orders demonstrate that this is not so. See e.g. MPSC Case No. U-21585, 3/21/2025 Order, p 236–254.

**2. The Rules of Evidence do not provide the authority for and ALJ to compel prefilled substantive testimony.**

Unlike the statutes cited, the ALJ's assertion of MRE 614 as a source for judicial inquiry is more squarely on point. Staff has never disputed that such authority exists. However, as clearly stated by the Michigan Supreme Court, this rule is to be guarded very carefully and is not absolute. *People v Stevens*, 498 Mich 162 (2015), *People v Swilley*, 504 Mich 350 (2019). Nor, is there any instance that Staff can find where this rule was used in an administrative proceeding to empower a presiding officer to demand specific substantive prefilled testimony with specific expert analysis. Indeed, even the cases cited by the ALJ do not illustrate this point.

The ALJ's ruling cites two nonbinding federal criminal cases from the Fourth and Eighth Circuits in support of his asserted authority through MRE 614 to compel prefilled testimony in a scheduling memorandum. *U.S. v Karnes*, 531 F2d 214 (CA 4<sup>th</sup> Cir 1976); *Smith v United States*, 221 F2d 265 (CA 8<sup>th</sup> Cir 1964). The Commission should consider several points in weighing these cases. First, they are not binding on the Commission. Second, there is a clear distinction between allowing parties to present their evidence in a manner they deem appropriate, and then a judge seeking clarification from a live witness during a trial, versus demanding several witnesses present specific prefilled testimony and thus dictating

the course of those parties' evidentiary presentations in a manner they may not have been inclined to include as part of their case. A further distinction exists in the fact that at trial a party may raise objection before the witnesses answers. Despite the requirement under MRE 614 that parties be given an opportunity to object to judicial inquiry, MRE 614(c), this is not available in this instance. It is unclear what mechanisms are available to object to a party's own testimony once filed.<sup>4</sup> What is clear is that no such objection can be made before the party expends time and resources to prepare and file the compelled testimony.

Rather than judicial questioning of live witnesses, a more accurate comparison to the instant requirement using the cases cited in the ruling denying Staff's Motion, would instead be a judge, prior to the trial, directing law enforcement to conduct a particular investigation the judge predetermined to be relevant, using investigative techniques the judge thought best, and presented in a manner the judge preferred. Given this more analogous example, the distinction between asking a witness clarification questions on the stand or even calling a witness to the stand at trial, versus compelling substantive testimony with an expert analysis of the judge's choosing is evident. And this distinction is paramount to the present analysis.

Michigan appellate courts have consistently recognized that it is not the court's place to make a party's case for them. Where a party makes an assertion,

---

<sup>4</sup> For instance, is the expectation for a party to offer testimony as ordered and then file a motion to strike their own testimony as irrelevant? Is a party expected to contradict itself in rebuttal? Neither of these options seem logical or an efficient use of time.

like reasonableness of a certain ROE, it would indeed be improper to leave it to the court to unravel and elaborate their arguments and then search for the authority either to sustain or reject the party's position. See *Mettler Wallon, LLC v. Melrose Twp*, 281 Mich App 184, 200 (2008), citing *Mitcham v Detroit*, 355 Mich 182, 203, (1959). See, generally, *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388 (2004).

Which is to say, if a party does not present sufficient evidence to prove its position of ROE, that is the party's failing, and the judges' ruling should follow accordingly.

A review of the comments as provided in the rule itself are further instructive. MRE 614 was adopted to be effective on March 1, 1978, and indicate that the rule was created to mirror the Federal Rules of Evidence. The Federal Rules comment indicates that while the authority of a judge to question witnesses is well established,

[t]he authority is, of course, abused when the judge abandons his proper role and assumes that of advocate, the manner in which interrogation should be conducted, and the proper extent of its exercise are not susceptible of formulation in a rule. The omission in no sense precludes course of review from continuing to reverse for abuse. [Federal Rule 614, Note to Subdivisions (a) and (b) (emphasis added).]

In MPSC rate cases, in which the appropriate comparisons for ROE determinations are a contested issue, compelling a party's witness to adopt an analysis with specific comparisons that the witness may not agree with inherently advocates for a particular resolution. Consider if this ROE provision were indeed permissible under MRE 614, would it then also be permissible for an ALJ to demand substantive testimony on any issue they must reach a conclusion of law? If

so, the ALJ could next compel Staff to sponsor testimony comparing capital spending across all utilities in the nation for the last 5 years. Yet, Staff may not view those other capital expenditure plans as relevant to its analysis and ultimate recommendation in the case. This demand, as well as other similar required analyses that could derive from allowing the challenged provision in the instant case to stand, would be clearly excessive.

Interestingly, the matter of specific requirements of testimony has been considered by the Michigan Public Service Commission (MPSC) before. There is a prior instance that addressed whether it is appropriate to dictate the specific contents of a witness's testimony. In MPSC Case No. U-8871, the ALJ struck portions of Staff's prefiled testimony because, "he found the witness was not competent to testify on the availability and future price of natural gas as a fuel for the generation of electricity." *Id.* at 1. While Staff sought immediate appeal of the striking of the testimony, the Commission denied the appeal as untimely. However, in so doing, it acknowledged that upon the rendering of the PFD, if the Commission deemed the record inadequate, the Commission could reopen the record. *Id.* Then, upon the rendering of the PFD in that case, the Commission reconsidered Staff's argument and ordered the ALJ to reopen the record. Staff was then permitted to offer the testimony from the witness, and the witness was subject to cross examination.

The Midland Cogeneration Venture Limited Partnership (MCV) and Consumers Power Company (Consumers) filed separate applications for rehearing in Case No. U-8871, alleging the Commission abused its discretion where it allowed

Staff to refile testimony because it “unfairly permitted Staff to refile testimony.” MPSC Case No. U-8871, 9/22/1988 Order Denying Apps for Rehearing, p 2. In so doing, Consumers claimed the Commission inappropriately indicated, “what Staff’s case should have included. . . .” *Id.* In denying both applications the Commission stated:

**The Commission did not tell the Staff what the Staff’s case should include.** Rather, it gave the Staff an opportunity to file supplemental evidence on a point that the Commission believed to be significant. Contrary to Consumers’ allegations, neither the APA nor the January 14, 1988 order require the Commission to base its decision only upon the evidence submitted by the parties. MCL 24.275 states that “the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable” in a contested case proceeding. Rule 614 of the Michigan Rules of Evidence (MRE) specifically allows a trial court, on its own motion, to call a witness. Further, MRE 706 allows a court, on its own motion, to appoint expert witnesses of its own selection. Additionally, MCL 24.280(d) allows the Commission to regulate the course of a hearing, to set the time and place for continued hearings, and to fix the time of filing of briefs and other documents. In *Baker v General Motors* (after remand), 420 Mich 463 (1984), the Michigan Supreme Court ruled that MCL 24.280(d) did not preclude an administrative agency from reopening a record to admit additional evidence. The Commission is charged with protecting the public interest. In fulfilling that charge, the Commission is neither statutorily limited to the evidence submitted by parties nor expressly precluded from searching for additional, relevant evidence on its own initiative. [*Id.* at 3 (emphasis added).]

This case is interesting for a couple reasons. First, it illustrates that an ALJ’s function as a gatekeeper, and where a party seeks to introduce evidence, the ALJ can determine it is not admissible. Staff does not contest this authority, although this too has limits. Secondly, the Commission clearly indicated it was not directing a party on what it must file; but rather, given its authority to reopen the record, where the Commission deemed more information necessary, it allowed a party to present the evidence that the party wished to use to support its

conclusions. The party crafted the substance of its testimony- it was not ordered to do so.

Turning to language MRE 614, arguably there are two relevant provisions: (a) which allows a judge to call a witness, and (b) the ability to question the witness. Unfortunately, neither provision can be stretched to compel prefiled substantive testimony. First, the ability to call a witness, even in the cases cited in the ruling below, circumstances are involved wherein a live trial is taking place, and the questions are asked in the context of clarification of testimony already presented. But what of the instance wherein a judge calls a witness, not called by a party? The Michigan Court of Appeals in several unpublished decisions, as well as the Federal District Court of the Eastern District of Michigan have offered guidance here as well. For example, in *Franklin*<sup>5</sup>, where a defendant sought appeal from a trial court judge calling a handwriting expert to testify *sua sponte*, pursuant to MRE 614(a), the Court noted, “[t]he defendant correctly observes that the trial court ‘may not assume the prosecutor’s role with the advantages unavailable to the prosecutor’s role in this case.’” However, because in that instance, the court called the witness following the production of evidence of the parties, the expert was called to resolve conflicting testimony, and “the court allowed both parties to provide input on the selection of the expert, and after the expert was called, all parties were permitted to cross examine the expert, the Court ultimately did not find any wrongdoing on the part of the trial court judge. *Id.* at 2. The witness was called to clarify in this

---

<sup>5</sup> *People v Franklin*, unpublished opinion of the Court of Appeals, issued January 19, 2012 (Docket No. 300371).

instance at trial; the parties were not directed on how to conduct their analysis or present the substance of their testimony but instead presented their case and then clarity was deemed necessary.

Similarly, in another unpublished case, the Michigan Court of Appeals noted:

MRE 614(a) provides: “The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.” MRE 614(b) further provides: “The court may interrogate witnesses, whether called by itself or by a party.” The trial court can, *after both parties have rested*, express a desire that a witness testify and then allow the prosecution to reopen the case and question the witness *where there are conflicting versions of the testimony and the court does not know what to believe*.<sup>6</sup>

Finally, perhaps the most compelling authority on this topic yet, is a case wherein our Federal District Court of the Eastern District determined that where a judge improperly calls and questions a witness, it crosses the line of judicial impartiality and thus is a violation of a litigant’s constitutional rights and merits the granting of a writ of habeas corpus. *Wallace v Bell*, 387 F Supp 2d, 736-38 (ED Mich, 2005). In *Wallace*, the Court noted:

[A] trial judge may call a witness on his [or her] own or question witnesses that appear before him or her is beyond debate. But there are limits on the extent of permissible trial court intervention. The Sixth Circuit has observed:

The presiding judge should conduct a trial in an orderly way with a view to eliciting the truth and to attaining justice between the parties. He must see that the issues are not obscured and that the testimony is not misunderstood. The trial court has the right to interrogate witnesses for this purpose. The presiding

---

<sup>6</sup> *People v White*, unpublished opinion of the Court of Appeals, issued April 13, 2004 (Docket No. 246021), citing *People v Betts*, 155 Mich App 478, 480-482; 400 NW2d 650 (1986), emphasis added.

judge, however, must be careful to always be calmly judicial, dispassionate and impartial. He should sedulously avoid all appearances of advocacy as to those questions which are ultimately to be submitted to the jury. The basic requirement is one of impartiality and [sic] demeanor as well as in actions. *United States v. Dandy*, 998 F.2d 1344, 1354 (6th Cir.1993) (internal quotes and citations omitted). Once the trial judge pierces the veil of judicial impartiality, bias infects the proceedings and the Due Process Clause is offended.

[*Id.* at 738.]

Considering the manner in which our Courts have addressed the judicial calling of witnesses, it is apparent that MRE 614(a) is not limitless. Context and timing are necessary considerations when determining the appropriateness of the judicial inquiry. The authority granted in MRE 614 is not provided without boundaries. Again here, the distinction is made plain, it is permissible use of this discretion where a party can first exercise its role, and upon presenting evidence a judge, while maintaining the veil of judicial impartiality, may call an additional witness to offer clarity. This is not the same scenario where a judge prematurely directs all parties to prefile testimony and thus dictates the form of their investigation and analysis before their case even starts taking shape. This is particularly problematic where the right to object becomes less effective because the investigation is completed irrespective of the ruling that is made later at a time of binding in testimony. There is no authority, nor does the ruling offer any instance wherein a judge has exercised discretion in such a manner as was exercised in this instance.

Turning next to MRE 614(b), the ability of a judge to question witnesses, several sources of Michigan litigation likewise demonstrate that the rules of

evidence cannot be viewed to support this extension of authority to an ALJ either. First, in an appeal from a magistrate's determination in a worker's compensation matter, the Worker's Compensation Appellate Commission (WCAC) grappled with a magistrate's ability to ask questions of an *in pro per* litigant in a live proceeding.

*Aldis v Detroit Board of Education*, WCAC Docket No. 99-0133, February 17, 2000.

In this instance, the appeal involved a claim "that the magistrate improperly injected himself into the proceedings as an advocate for plaintiff, depriving defendant of its right to a fair and impartial hearing." *Id.* at 1. The WCAC commenced its analysis by noting, "we find the conduct of the magistrate squarely within the discretionary authority to oversee the trial according to statute, our interpretations of statute, and parallel rules governing the conduct of civil judges." And while agreeing that, "sources unanimously agree that a trial judge necessarily possess broad discretion concerning the process of introducing evidence at trial..." the WCAC also indicated, "[discretion] unquestionably is not absolute." *Id.* at 1 and

3. The *Aldis* decision eloquently continued:

The appellate courts mandate various constraints on this authority to promote fairness in the process and to preserve the impartiality of judges. Two such rulings delineate clarification of facts and expansion of an already initiated path of inquiry as justifiable reasons for judicial questioning of witnesses. *In re Forfeiture of \$53.00*, 178 Mich App 480 (1989); *Stocker v Rose*, 174 Mich App 14 (1989). In addition, a judge must never "pierce the veil of judicial impartiality". *People v Burgess*, 153 Mich App 715 (1986). To avoid piercing that veil, **a judge must not invade the role of trial counsel or ask prejudicial questions.** *Id.* Beyond protecting impartiality, **fundamental fairness suffers when a judge's conduct requires attorneys to formally object to the conduct by requesting the judge to find the judge's own conduct improper.** *People v Roby*, 145 Mich App 138 (1985).

We find this guidance from the appellate courts directly applicable to our administrative proceedings. Both in civil court and in the Workers Compensation system, trial judges must conduct proceedings to reveal the critical facts in search of the truth through nearly identical grants of authority. With that goal in mind, overseers of trial must exercise the authority with great care. Such discretionary decisions must never be exercised when they will compromise fairness and impartiality. [*Id.* at 3.]

The *Aldis* finding was not unique, and again in *Graves v Wayne County*, the WCAC again took up the issue of whether a presiding officer had exceeded their authority where they questioned a witness. *Graves v Wayne County*, Docket No. 98-0343, March 6, 2000. In *Graves*, the WCAC opined again that while broad discretion is granted by MRE 614 to ask question a witness, their discretion is “unquestionably not absolute.” *Id.* at 3. Again, the WCAC agreed on appeal that the magistrate had exceeded the ability to ask questions as provided by MRE 614. *Id.* at 3. The *Graves* decision noted:

In many ways, the magistrate's inquiry of plaintiff in this case exceeds the inexcusable questioning in *Aldis*, supra. In this case, plaintiff retained an attorney who attended trial and was very capable of asking the appropriate questions necessary to establish the elements of a claim. The magistrate had no legitimate reason to initiate questioning and continue inquiry... . As in *Aldis*, supra, this magistrate injected himself into the process **without the justification of either clarification of issues or extension of an already initiated inquiry.** [*Id.* at 3. Emphasis added.]

*Aldis* and *Graves* are both Michigan administrative proceedings that both involve similar questions of addressing the breadth of MRE 614(b). In both these instances their commissions' decisions demonstrate there is an obvious distinction between questions of clarification and interjection of the presiding officer's position

into the litigation process. The Commission should view these decisions as persuasive authority when deciding Staff's Application.

The Workers Compensation Commission is not alone in determining that MRE 614(b) is not an absolute license for a judge to ask any questions they wish. The Michigan Supremes have also offered insight on "whether a trial judge's conduct pierced the veil of judicial impartiality" where the judge asked questions of a witness, in the case of *People v Stevens*, 498 Mich 162 (2015). Upon acknowledgment that prior to this holding, there was not a clear test as to how to determine whether a judge's conduct pierced the veil of impartiality, the *Stevens* Court took the opportunity to articulate a clear standard for such determinations. *Id.* at 171.

The *Stevens* Court noted that in determining whether a judge's questioning pierced the veil of impartiality, it was necessary to conduct a fact-specific analysis and noted: "A single inappropriate act does not necessarily give the appearance of advocacy or partiality, but a single instance of misconduct may be so egregious that it pierces the veil of impartiality." These errors must then be considered within the context of the case, or "totality of circumstances." *Id.* at 171-172. And while the Court noted there were a number of ways in which a judge may pierce the veil of impartiality, "inappropriate questioning of witnesses" was unequivocally listed. *Id.* It continued to note,

[f]or instance, when evaluating a judge's questioning of witnesses, a reviewing court must first bear in mind that such interrogation is appropriate under MRE 614(b). This Court has stated that the central object of judicial questioning should be to clarify. Therefore, it is appropriate for a judge to question witnesses to produce fuller and

more exact testimony or to elicit additional relevant information. Judicial questioning, nevertheless, has boundaries.” [*Id.* at 173-174.]

In a subsequent opinion rendered in 2019, the Michigan Supreme Court specifically addressed the application of this standard as it applied to judicial questioning and determined that a trial court judge’s questioning of a witness exceeded the scope of MRE 614. Upon articulating the precedent established in *Stevens*, the *Swilley* Court noted, “it is appropriate for a judge to ask questions of a witness that are designed to make clear otherwise unclear, vague or confusing testimony... But it is not the role of the court to impeach a witness or undermine a witness’s general credibility.” *People v Swilley*, 504 Mich 350, 373 (2019). Further, “A judge’s responsibility does not include emphasizing or exposing potential weaknesses in a witness’s testimony or conveying the judge’s personal view on whether a witness should be believed.” *Id.*

Again, this authority is not directly on point because it relates to criminal proceedings in state court. However, as the ruling itself relies on authority from the criminal context, and because the Michigan Supreme Court was articulating the scope of that authority, it is appropriate for the Commission to consider. The Michigan Supreme Court has clearly indicated that while judges may ask questions, this right is, as echoed by the Michigan Workers Compensation Commission, is not absolute and cannot be considered in a vacuum. But rather, it is appropriate to view use of this authority in the “totality of the circumstances.” *Stevens*, 498 Mich at 171-172. MRE 614 unequivocally, does not provide an ALJ the ability to ask any questions it may want to ask. These sources read together make apparent that a judge may ask questions of clarification—it to clarify the evidence a party has

determined it wishes to produce. MRE 614 does not provide the authority to compel a specified investigation, render an analysis, and put it in prefiled testimony; particularly where the party has objected to production thereof<sup>7</sup> and where doing so may emphasize one party's position over another. As stated by the Michigan Supreme Court "it is appropriate for a judge to ask questions of a witness that are designed to make clear otherwise unclear, vague or confusing testimony... But it is not the role of the court to impeach a witness or undermine a witness's general credibility." *People v Swilley*, 504 Mich 350, 373 (2019).

3. **The ethical ramifications of compelling testimony should have been sufficient to demonstrate that the ROE provision should have been removed by the ALJ.**

Additionally, while Staff respectfully submits that its motions makes clear the ethical ramifications of forcing an expert witness to offer specific testimony with judicially-compelled analysis under oath that the witness may not have otherwise sponsored, these concerns are important enough to articulate further. The ruling stated, "Staff does not identify any example of such issues or potential prejudices, and this ALJ cannot think of any." (Ruling, p 6). When a party submits expert testimony, and they do so under oath, there are certain implications that necessarily follow. For instance, witnesses are signing their names onto an expert opinion based upon which the witness may be cross-examined, even if submitted at the ALJ's behest. The witness can be called to account for their methodology and by extension their integrity and credibility are subject to impeachment. If expert

---

<sup>7</sup> Staff views its motion below as objection to the scheduling memorandum.

witnesses are forced to present evidence they do not agree with as part of reaching their expert opinion, this certainly can be used by a skillful attorney to impeach that witness's credibility in more ways than one. If the witness cannot speak to the validity or details of the analysis they are compelled to sponsor, they could be attacked on cross examination about the manner in which they conducted said analysis, implying laziness, lack of preparedness, or lack of thoroughness. Perhaps it could be said that the ALJ and Commission could disregard that impeachment—provide no weight to it. Yet, the testimony is public record and could be still used against the witness in another case. There is little anyone can do to control the manner in which another trier of fact may weigh that evidence no matter how this ALJ intends it to be used in this singular case.

Additionally, it obliterates counsel's obligation to present evidence it believes is necessary, relevant, and, by extension, admissible. First, consider the context of this request and the seemingly endless topics on which similar analyses could be compelled if this approach were upheld. Second, Staff's motion went to lengths citing counsel's obligation to the rules of ethics. Staff submits that this presentation makes clear that forcing a party to sponsor evidence it does not believe is relevant, necessary, or supportive of the party's position, could be seen to force counsel to violate their ethical duties. As it is not for the judge to invade the role of a party, it is improper for an attorney to dictate the manner in which a witness, particularly an expert, performs their analysis.

Simply stated, a scheduling memorandum should not be used as a mechanism to prematurely usurp the role of the parties before they even have a

chance to decide how to present their case. As aforementioned in MPSC Case No. U-8871, even the Commission has previously indicated that its own role was not to dictate to a party how to present its case. To reiterate the arguments raised in the underlying motion, and those raised in this Application, there is not any authority to support a presiding officer's exercise of authority to order such a provision in a scheduling memorandum. This is not to say that there are no circumstances wherein it would be reasonable for an ALJ to ask questions—as the prior authorities in *Franklin*, *While*, *Wallace*, *Aldis*, *Graves*, *Stevens*, and *Swilley* all describe, and Staff has not contested. The difference is viewed in the totality of the circumstances, given the timing and the implications of ordering as a portion of prefiled testimony is not the same as calling a witness or questioning a witness for clarification purposes. The Commission must see the use of this authority in a scheduling memorandum for the unfair balance of judicial discretion and a party's due process rights that it is. This provision of the scheduling memorandum is improper and must be stricken.

**B. Even assuming *arguendo* that it is appropriate for an ALJ to mandate parties to conduct certain investigations and perform analyses, the mandate, and even more so with the amended memorandum, is too vague for the parties to comply with.**

Notwithstanding the glaring legal ramifications of substantive evidence production being mandated in a scheduling memo, there are also the practical ramifications, which the ALJ failed to address in his denial of Staff's motion. First, to reiterate Staff's prior concerns of the necessary cost it thrusts upon a party who may have otherwise not felt compelled to do said investigation and analysis, this

concern was thoroughly expressed by the Attorney General in her response to Staff's motion. AG's Response in Support, p 3. These concerns remain, even with the amendment.

The "amended" order reads as follows:

Return On Equity (Amended). 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 reported forecasted return on equity for the United States stock market, and b) the reported average ROE authorized for regulated utilities in the United States for the last two or more years. The requested returns and authorized ROEs shall be those as reported in public resources or resources otherwise available to the party. The party may but is not requested to undertake its own calculation or compilation of the requested information. If the party is unable to locate the requested information, the party's ROE testimony shall include a statement that the witness has in good faith attempted to locate the requested information in public resources or resources available to the party.

[September 5, 2025 Amended Scheduling Memo, p 2.]

First, there are several terms from the ALJs memo that are subject to varying definitions. For example, "return on equity." Return on equity is different than stock market returns. In addition to return on equity and stock market returns being different concepts, one is generally more available than the other, which further complicates interpretation of, and compliance with, this provision.

Also, the use of "forecasted" instead of "expected" in this provision is vague and confusing. It is not clear if those terms are being used synonymously or if the terms are separate and distinct. This distinction could impact the reliance on historical data to inform the analysis.

Additionally, the requirement for “the reported forecasted return on equity for the United States Stock Market” does little to provide clarity on what the ALJ is seeking. Staff is aware of no singular metric that accepted encompassing the entire “United States Stock Market.” Moreover, there are multiple (more than ten) stock market exchanges in the U.S., and over four-thousand publicly listed stocks. To simply demand “forecasted return on equity for the United States Stock Market” would potentially force an expert to add countless hours of investigation and analysis with limitless interpretations of what exactly the ALJ is looking for. Therefore, even assuming this was a lawful judicial question of clarification allowed by MRE 614, it does not offer clarity. In fact, it does the opposition and frustrates the duties of an expert further at each parties’ own recoupable expense.

Furthermore, it is unclear by what the ALJ means by “future return.” The requirement says nothing about the appropriate timeframe that should be considered. Is the requirement asking for one year, five years, thirty years returns? Should those returns be averaged in a particular way? There is also no direction over what the methodology the ALJ expects each party to apply. The countless manners in which a party can present this evidence does not provide clarity, it adds confusion into the experts’ analysis.

#### IV. Conclusion

For the above-mentioned reasons, Staff respectfully request the Commission order that the ALJ remove the provisions of the scheduling memorandum that improperly mandate the parties present prefiled testimony in the manner in which this scheduling memorandum does. Similar to how the Commission has already acknowledged in Case No. U-21291, this is a matter of balancing the duties of the ALJ and the rights to the parties before it. It is necessary to strike this provision to ensure a fair and impartial determination by the ALJ and ultimately the Commission. Parties must be able to present their arguments substantively; in the matter they determine best demonstrates their position. To force a party to present evidence in this fashion is impermissible penetration of a party's providence to present their case and irreparably forces them to cut into time and resources they would have delegated elsewhere. Not to mention the ethical predicaments that it unnecessarily creates.

There is no dispute that authority exists for an ALJ to call a witness or question a witness as defined in MRE 614. However, as stated in Michigan administrative proceedings, the Michigan Court of Appeals, the Michigan Supreme Court, and the Federal District Court of the Eastern District of Michigan, this should be a closely guarded ability, and used in limited circumstances wherein context and timing are considered. There is not any authority cited in the ruling denying Staff's motion, nor any that Staff is otherwise aware of, where MRE 614 has been wielded in such a manner, and it should not be permitted to stand.

Accordingly, Staff respectfully requests the Commission grant Staff's application for leave to appeal and strike the provision of the scheduling memorandum that unlawfully compels substantive prefiled testimony

Respectfully submitted,

**MICHIGAN PUBLIC SERVICE  
COMMISSION STAFF**

Alena M. Clark (P73252)  
Daniel E. Sonneveldt (P58222)  
Nicholas Q. Taylor (81020)  
Assistant Attorneys General  
Public Service Division  
7109 W. Saginaw Hwy., 3rd Floor  
Lansing, MI 48917  
Telephone: (517) 284-8140

**DATED: September 18, 2025**



**Association of Businesses  
Advocating Tariff Equity**

Michael J. Pattwell  
Stephen A. Campbell  
Benjamin J. Holwerda  
James Dauphinais  
[mpattwell@clarkhill.com](mailto:mpattwell@clarkhill.com)  
[scampbell@clarkhill.com](mailto:scampbell@clarkhill.com)  
[bholwerda@clarkhill.com](mailto:bholwerda@clarkhill.com)  
[jdauphinais@consultbai.com](mailto:jdauphinais@consultbai.com)

**Urban Core Collective**

Amanda Urban  
Mark Templeton  
Jacob Schuhardt  
Madison S. Wilson  
[aurbanlaw@gmail.com](mailto:aurbanlaw@gmail.com)  
[templeton@uchicago.edu](mailto:templeton@uchicago.edu)  
[jschuhardt@uchicago.edu](mailto:jschuhardt@uchicago.edu)  
[madisonwilson@uchicago.edu](mailto:madisonwilson@uchicago.edu)

**Great Lakes Renewable Energy  
Association**

Don Keskey  
Carol Dane  
[dkeskey@publiclawresourcecenter.com](mailto:dkeskey@publiclawresourcecenter.com)  
[cdane@publiclawresourcecenter.com](mailto:cdane@publiclawresourcecenter.com)

**The Kroger Company**

Kurt J. Boehm  
Jody Kyler Cohn  
Michael L. Kurtz  
Justin Bieber  
[kboehm@bkllawfirm.com](mailto:kboehm@bkllawfirm.com)  
[jkylercohn@bkllawfirm.com](mailto:jkylercohn@bkllawfirm.com)  
[mkurtz@bkllawfirm.com](mailto:mkurtz@bkllawfirm.com)  
[jbieber@energystrat.com](mailto:jbieber@energystrat.com)

**Walmart, Inc.**

Melissa M. Horne  
[mhorne@hcc-law.com](mailto:mhorne@hcc-law.com)

**Michigan Cable**

**Telecommunications Association**

Sean P. Gallagher  
Jon Austin  
[sgallagher@fraserlawfirm.com](mailto:sgallagher@fraserlawfirm.com)  
[jaustin@fraserlawfirm.com](mailto:jaustin@fraserlawfirm.com)

**Michigan Electric Transmission  
Company**

Olivia R.C.A. Flower  
Richard J. Aaron  
Courtney F. Kissel  
Anthony J. Hunt  
Hannah Buzolits  
[oflower@dykema.com](mailto:oflower@dykema.com)  
[raaron@dykema.com](mailto:raaron@dykema.com)  
[ckissel@dykema.com](mailto:ckissel@dykema.com)  
[ahunt@dykema.com](mailto:ahunt@dykema.com)  
[hbuzolits@dykema.com](mailto:hbuzolits@dykema.com)

**Counsel for Energy Michigan,  
Foundry Association of Michigan,  
Michigan Energy Innovation  
Business Council (“Michigan  
EIBC”), Institute for Energy  
Innovation (“IEI”), Advanced  
Energy United (“United), and  
Energy Michigan Inc.**

Timothy J. Lundgren

Justin K. Ooms

Laura A. Chappelle

Lydia Lubbers

[tjlundgren@varnumlaw.com](mailto:tjlundgren@varnumlaw.com)

[jkooms@varnumlaw.com](mailto:jkooms@varnumlaw.com)

[lachappelle@varnumlaw.com](mailto:lachappelle@varnumlaw.com)

[lmubbers@varnumlaw.com](mailto:lmubbers@varnumlaw.com)

**The Ecology Center,  
Environmental Law & Policy  
Center, Union of Concerned  
Scientists, and Vote Solar (CEO)**

Daniel Abrams

Katie Duckworth

Alondra Estrada

Katie Toolan

[dabrams@elpc.org](mailto:dabrams@elpc.org)

[kduckworth@elpc.org](mailto:kduckworth@elpc.org)

[aestrada@elpc.org](mailto:aestrada@elpc.org)

[ktoolan@elpc.org](mailto:ktoolan@elpc.org).

---

Cherie A. R. Shea

Subscribed and sworn to before me  
this 18<sup>th</sup> day of **September, 2025**.

---

De Ann M. Payne, Notary Public  
State of Michigan, County of Eaton  
Acting in the County of Eaton  
My Commission Expires: 11-29-31