STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of Consumers Energy Company for approval of the sale of its River Hydroelectric Generating Fleet, related Power Purchase Agreement, and other relief. /	MPSC Case No. U-21985

PUBLIC

INITIAL BRIEF OF INTERVENOR MICHIGAN DEPARTMENT OF NATURAL RESOURCES

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INTRODUCTION

The Department of Natural Resources has never intervened in the Public Service Commission before. The fact that it has done so here should illustrate the alarm that Consumers Energy's application has raised. In this unprecedented request, Consumers Energy (Consumers) asks the Commission to surrender its jurisdiction over 13 hydroelectric plants, all of which are critical infrastructure, and 12 of which are categorized as high hazard. Instead of continuing to own the dams with public oversight from the Commission, Consumers asks to transfer them—for $1 each—to an out-of-state private equity group that only started buying up hydro dams less than 10 years ago and has flipped or tried to flip every single facility they have ever acquired. That means the group has not typically owned any dam for more than a few years.

DNR was concerned even before Consumers' application was filed. After reviewing the application and participating in discovery and cross examination in this case, DNR's concerns have only deepened. Consumers' proposed transaction is contrary to the public's best interest.

No one from the private equity group that seeks to take over the dams has provided any testimony in this case: neither the parent company, Hull Street Energy, its subsidiary Confluence Hydro, nor any of Confluence's 13 subsidiaries formed solely to own the dams. Consumers has purported to speak for the intended buyers, but it has not provided any evidence that it has the authority to do so.

There are many reasons why Consumers does not meet their burden under MCL 460.6q. But DNR is best situated to focus on two of them. First, the proposed

transfer is not in the public's interest. Michigan has seen first-hand the consequences of allowing aging hydro dams to be fully controlled by private entities accountable only to their bottom line and regulated only by the Federal Energy Regulatory Commission (FERC). When things go wrong, or when it is financially beneficial, private entities can avoid accountability and liability by simply declaring bankruptcy and leaving it to Michigan's taxpayers to clean up the mess. FERC is not an effective dam safety regulator and there are concrete examples of FERC allowing private operators to extract profit from dams for *decades* without taking action to require them to address dam safety deficiencies.

Consumers' own analysis shows that it cannot turn a profit by relicensing the dams and continuing to safely operate them; yet, without any evidence supporting the assertion, Consumers claims that Confluence Hydro can do so. The math does not work. Unfortunately, a reasonable explanation for why Confluence Hydro is interested in this deal is because it presumably knows that FERC will allow it to continue generating revenue from the dams without doing the type of maintenance work that Consumers—a responsible hydro operator—would do. Either that, or the private equity group will simply divest the dams just as it has done with virtually every other facility it has ever acquired. And there is no telling who that new owner would be. Any subsequent transaction would not require any input from the Commission. It is not in the public's interest for the Commission to surrender its jurisdiction over the dams.

Second, Consumers does not meet its burden under MCL 460.6q because, in their effort to show that transferring the dams to Confluence is the lowest cost option, Consumers has dramatically inflated its estimate for what it would cost to decommission their dams. Consumers concedes that its estimates are not informed by the type of real-world data that DNR's witnesses testify should be included in the analysis. And Consumers acknowledges that regulatory agencies would need to evaluate the actions needed to decommission the dams. But Consumers admits it did not seek *any* input from any regulatory agency when creating its estimates.

Instead, Consumers simply assumed that extensive work would be required even though DNR's witnesses from the very regulatory agencies that would need to approve the work—DNR and the Department of Environment, Great Lakes, and Energy (EGLE)—testified that such extensive work would *not* typically be required. The result is an estimate that included hundreds of millions of dollars in unnecessary expenditures.

DNR, however, provides real-world examples of what it has cost to decommission dams in Michigan previously. Those examples prove that Consumers' decommissioning estimates are much too high, and its proposed deal with Confluence Hydro is not, in fact, the lowest cost option. Thus, Consumers has failed to meet its burden under MCL 460.6q, and the Commission should deny its application.

LEGAL STANDARD

Consumers has the "burden of persuasion" in this case, because it is the party that has filed the application. *BCBSM v Governor,* 422 Mich 1, 89 (1985). Thus, Consumers must submit admissible evidence demonstrating that each of the required elements of its application is met. The standard is "preponderance of the evidence," which means that "the evidence supporting the existence of the contested fact outweighs the evidence supporting its nonexistence." *Id*. (citations omitted). That means Consumers must present admissible evidence beyond "an equipoise" as to each of the required elements. *Dillon v Lapeer State Home & Training School,* 364 Mich 1, 8 (1961). Consumers' evidence must *outweigh* the opposing evidence. And because Consumers has the burden in this case, they fail to meet that burden if they do not present reliable evidence to support any of the elements of their application—neither DNR nor any other party has the burden of proving the opposite fact. *S C Gary, Inc v Ford Motor Co,* 92 Mich App 789, 803-804 (1979).

Consumers cannot rely on uncorroborated hearsay or rumor to satisfy its burden. While administrative tribunals are accorded some "flexibility" regarding what is considered reliable evidence, that flexibility "does not go so far as to justify orders" based on "[m]ere uncorroborated hearsay or rumor." *Dillon,* 364 Mich at 8. Nor can "surmise, guess, or conjecture" carry the day. *Id*. It is true that administrative tribunals "may receive and consider evidence which would not be competent in court proceedings," but their decisions "cannot be wholly based on such evidence." *Id*. Instead, the decisions of administrative tribunals still "must have a basis in some competent legal evidence." *Id*. The Commission can reject

evidence offered by Consumers that is unreliable, even if it is not directly contradicted by the other parties. *Cuttle v Concordia Mut Fire Ins Co*, 295 Mich 514, 519 (1940).

ARGUMENT

I. Consumers' arguments for why its proposed transaction is in the public interest do not withstand scrutiny.

Consumers must obtain the Commission's approval to transfer its 13 hydro plants and associated 32,000 acres of land to a private equity firm. MCL 460.6q(1). The "factors" the Commission must consider during its review of Consumers' application include whether the transfer would adversely impact customer "rates," adversely impact the provision of "safe" and "reliable" energy, and whether the transfer "is otherwise inconsistent with public policy and interest." MCL 460.61(7)(a), (b), and (e). The Commission requires Consumers to include in its application a "statement explaining the facts relied upon to demonstrate that the proposed transaction is consistent with the public interest." Mich Admin Code, R 460.303(1)(h). Consumers offered the testimony of Richard Blumenstock and Jason Coker for this element. (Attachment A to the Application, 2.)

Section I of this brief discusses why DNR believes the transaction endangers the safe and reliable provision of energy and is otherwise not in the public's best interest. And section II of this brief discusses why the transaction is not the lowest cost option for ratepayers. Consumers only reached that conclusion by dramatically

inflating the estimate for decommissioning the dams. The evidence shows that the cost for decommissioning would be much lower than Consumers suggests.

A. Neither Confluence nor Hull Street Energy have provided testimony in this case, and Consumers is not authorized to speak for them.

Much of Mr. Blumenstock's testimony about why the transaction is in the public's interest focuses on his high regard for Hull Street Energy and Confluence and what he believes their plans for the property may entail. (Blumenstock Direct Testimony, 11-13, 34.) But neither Mr. Blumenstock nor Consumers offers any evidence showing that Mr. Blumenstock can speak for those entities or that his statements can bind them to future actions.

Confluence is a party to this case but offered no testimony into evidence. Hull Street Energy is not even a party to this case. Not only has it offered no testimony, but it repeatedly objected to even answering discovery requests because it was not a party. (See, e.g., Ex DNR-33, 1; Ex DNR-34, 6.) There is *no* sworn testimony in this case from Confluence Hydro or Hull Street Energy. Consumers' repeated characterizations of those entities' plans for the property once the transaction is completed are the type of "uncorroborated hearsay" that cannot form the basis of the Commission's decision. *Dillon,* 364 Mich at 8.

B. Neither Confluence nor Hull Street Energy are contractually required to relicense the dams or continue to operate them.

Consumers wishes to assure the Commission that its proposed transfer is in the public interest because the dams will be in good hands. But the evidence shows

that Hull Street Energy is in the business of flipping hydro dams. It does not matter how well-financed and responsible Confluence and Hull Street Energy purport to be because there is absolutely *nothing* in the contracts that prevents them from doing what they have always done, which is promptly divest themselves of hydro dams. And the Commission would have no role in reviewing the new owners Confluence Hydro selects.

Mr. Blumenstock repeatedly praised Confluence and Hull Street Energy and testified that the transaction is in the public interest because Confluence and Hull Street Energy are "experienced and financially sound…with a track record of safe and responsible operation of hydro facilities." (Blumenstock Direct Testimony, 34:15.) But the contracts do not actually require Confluence to seek to relicense the dams. (Ex DNR-34, 1, stating that the contracts merely "incentivize" the private equity firm to relicense and keep the dams.) Confluence will be free to divest the dams prior to relicensing, if they wish to do so—which would not be in the public interest.

And Consumers also concedes that it does not have "an obligation to ensure that Confluence has committed the capital resources to ensure the safe and compliant operation of the facilities." (Ex DNR-36, 2.) Instead, Consumers candidly acknowledges that it "will have no control or insight into Confluence Hydro's capital plan after Closing." (*Id*.) And Consumers also recognizes that "any future legal liability after Closing will be the responsibility of Confluence Hydro," rather than Consumers. (Ex DNR-36, 1.) In other words, Consumers does not purport to have

the authority to control or bind the actions of Confluence Hydro or Hull Street Energy after closing and concedes that those entities have no contractual obligation to maintain the existing licenses, seek relicensing, or otherwise keep the dams.

It is true that Confluence Hydro has stated in discovery responses that the power purchase agreement "incentivizes it" to keep the dams during the 30-year power purchase agreement, and that it currently "intends" to relicense the dams. (Ex DNR-34, 1.) But the truth remains that they are not contractually obligated to do either thing. An LLC is not a person, it is a legal fiction, and a private equity firm's purpose is to do only one thing: turn a profit. Intentions can change. Contractual agreements provide a degree of certainty for the future despite changing circumstances. But "intentions" and "incentives" change regularly as circumstances change. It speaks volumes that Confluence and Hull Street are unwilling to contractually bind themselves not to do the same thing they have done with the other dams they have owned short-term in the past: flip them to a different owner.

The Commission should look to what Hull Street Energy has done with every single one of the 47 facilities it has owned in the past to determine what it will do with these 13 dams if the Commission allows Consumers to sell them to Confluence and Hull Street. Mr. Blumenstock testified that these prospective buyers have "a track record of safe and responsible operation of hydro facilities." (Blumenstock Direct Testimony, 34:16.) But that is not the entire story. Except for one dam it was unable to sell, Hull Street Energy has *never* owned a dam for more

than five years. (Ex DNR-34, 8.) Of the 47 facilities it has owned, it has flipped 46 of them to a different owner within 2-4 years of when it first acquired the dam. (*Id.*) The only reason they were unable to flip the 47th facility (Boott/Lowell) is because the buyer backed out and they were unable to sell it. (Ex DNR-35, 3.)

It would not be reasonable for the Commission to conclude that Hull Street Energy is now going to fundamentally change their entire business model for the sake of these 13 Consumers Energy dams, especially when Hull Street was unwilling to contractually bind itself to that course of action. It is reasonable, instead, to conclude that Hull Street will seek to promptly divest itself of these 13 dams just as it has done with nearly every other dam it has acquired in the short nine years since it first started acquiring and flipping hydro dams.

The statement from Confluence (and apparently Hull Street) that it "intends" to relicense the dams is further undercut by the fact that Confluence has not prepared an estimate of how much it would cost to relicense the dams. Consumers believes it would cost "$1.842 billion" to relicense the dams. (Ex DNR-37, 1.) And when asked why Confluence thinks it could do it for less, Confluence explained that it *has not even prepared an estimate of how much relicensing would cost*. (Ex DNR-33, 3.) This lack of planning illustrates the fact that Confluence has never even owned or operated a hydro dam before (as opposed to its parent Hull Street Energy), let alone gone through the relicensing process. As Ms. Mistak puts it, FERC "[r]elicensing is an intensive process and Confluence Hydro, LLC has no history of carrying out that process." (Mistak Direct Testimony, 18:16.) It is not reasonable to

believe that Confluence truly "intends" to relicense the dams in a few years—something it was unwilling to contractually bind itself to do—when it has not even calculated how much it would cost to do so or how it could do so for hundreds of millions of dollars less than Consumers, a very experienced hydro dam operator, is able to do so.

There is an additional reason to suspect whether Confluence Hydro will even attempt to relicense the dams, let alone do so successfully. Right now, despite Consumers' extensive efforts to improve water quality, "all 11 of the hydropower projects on the Muskegon, Manistee, and Au Sable rivers are consistently not meeting water temperature standards at downstream monitoring locations." (Mistak Direct Testimony, 21:19.) Confluence Hydro would need to obtain a Clean Water Act Section 401 Water Quality Certification from EGLE to relicense the dams. As Ms. Mistak testified, if "EGLE is unable to provide a Clean Water Act Section 401 Water Quality Certification for the projects, it would mean the projects may not be able to be relicensed by FERC." (Mistak Direct Testimony, 23:17.) DNR asked Confluence Hydro what their plan was to address the problem that Consumers has struggled to address, and Confluence merely stated that they have "not identified a specific plan to address water quality issues" but are "working to identify potential mitigations and evaluate their technical and economic feasibility." (Mistak Direct Testimony, 23:3.) As Ms. Mistak explained, it "is concerning that Confluence Hydro, LLC does not have a plan to address this issue." (Mistak Direct Testimony, 23:19.)

In summary: Confluence Hydro claims that it plans to relicense the dams—a highly complex process Confluence Hydro has never done and is not contractually obligated to do. But it does not know how much it would cost and cannot explain why it can do so at a profit when Consumers has explained that the process is too expensive to justify the expense. And Confluence Hydro has no plan for addressing water quality problems at the dams, one of the key impediments to successfully relicensing the dams.

The Commission should not rely on the meager evidence Consumers has offered to try to reassure the Commission that Confluence and Hull Street Energy are not going to flip the dams. In his rebuttal testimony for Consumers, Mr. Monroe testified that "Consumers Energy is confident in Hull Street Energy's intent to relicense the 13 river hydro dams." (Monrose Rebuttal Testimony, 12:15.) And he explained in discovery that this belief should be "apparent from [Confluence's] words" during negotiations, and "continued comments" from Hull Street Energy. (Ex DNR-36, 6.) But, again, neither Confluence Hydro nor Hull Street Energy have offered any testimony at all in this case. And neither Confluence nor Hull Street were willing to contractually bind themselves to that course of action. Consumers' second and third hand reassurances that the Commission should just take the buyers' "word" for it is precisely the type of "uncorroborated hearsay" and "conjecture" that the Michigan Supreme Court has directed *cannot* form the basis of the Commission's decision. *Dillon,* 364 Mich at 8.

C. Confluence is not obligated to maintain public access to land.

It is hard to ignore that in addition to 13 power plants, Confluence Hydro would be receiving 32,000 acres of real estate in this transaction, more than 16,000 acres of which is not impounded. That is because even un-impounded land is included in FERC's project boundaries for the projects. It is reasonable to conclude that Confluence perceives that land as one of the reasons it apparently believes it can turn a profit with this transaction.

Hydro dams impose well known "negative effects…on natural resources," such as "water quality degradation, prevention of migration by fish and other aquatic organisms, altered sediment movement, and altered flow regimes." (Mistak Direct Testimony, 19:16, 19:20, 20:25.) To help "mitigate for the negative effects of damming a river," FERC requires dam owners to open their lands within the project boundaries to the public for recreational purposes—something for which "the DNR has strongly advocated." (Mistak Direct Testimony, 25:15.) And for that same reason, DNR has "strongly opposed any attempts to shrink [FERC] project boundaries." (Mistak Direct Testimony, 25:17.)

Unfortunately, as Ms. Mistak testified, there has been "a troubling pattern whereby FERC is increasingly allowing dramatic reductions to project boundaries, both as stand-alone requests by licensees and in relicensing proceedings, and is largely ignoring recommendations by resource agencies to retain existing project boundaries for the benefit of the public." (Mistak Direct Testimony, 26:16.)

Right now, "DNR has a long history of working collaboratively with Consumers Energy" on matters such as "land management (including wildlife

management and public recreation)." (Mistak Direct Testimony, 10:11.) But Confluence has no contractual obligation to continue that type of collaboration. If the Commission surrenders its jurisdiction over the dams as Consumers requests and Confluence takes control, then, in the unlikely event that Confluence continues to own the dams long enough to initiate the relicensing process with FERC, Confluence will be free to seek to alienate significant portions of the 32,000 acres of land from the FERC project boundaries. Nothing in their contracts with Consumers prohibits them from doing that. And they acknowledged in their discovery responses that they were only committed to maintaining the project boundaries during the life of the existing licenses, after which time they plan on "engaging stakeholders" on the issue. (Ex DNR-33, 1.)

Because Confluence could profit from the 32,000 acres of land it would own, is free under the contracts to alienate large segments of that land from the FERC project boundaries during relicensing, and FERC has demonstrated a willingness to allow applicants to do just that, "the DNR is concerned that public benefits of Consumers Energy's current land ownership for recreational access are likely to be diminished if the hydropower projects are owned by Confluence Hydro, LLC." (Mistak Direct Testimony, 26:20.) Thus, it is contrary to the public's interest to allow Consumers to transfer the dams, including the project lands, to Confluence Hydro.

D. Purely private ownership of hydro dams is not in the public's interest.

Dams inherently "pose a significant, ongoing risk to life and property." (Mistak Direct Testimony, 20:25.) And 12 of the 13 dams at issue here are "high hazard" dams, which means operating and maintaining them is a complex task, and the consequences of failure would be severe. (Mistak Direct Testimony, 13:13.) Many are located on rivers that are designated as a Michigan Natural River due to their "exceptional importance" to the public. (Mistak Direct Testimony, 22:15.) Currently, Consumers owns and maintains the dams. It "is and has been a trusted and responsible dam owner who not only responds to FERC dam safety directives but also aims to achieve FERC license conditions." (Mistak Direct Testimony, 10:8.) This type of dangerous infrastructure should not typically be entirely under private control. Thus, it is in the public's best interest that Consumers is heavily regulated and is accountable to the Commission and the public for how these dams are operated and maintained.

Consumers asks the Commission to allow it to transfer the 13 dams away from a heavily regulated utility to an out-of-state private equity firm that will not be accountable to this Commission or the public. Confluence, instead, will be accountable only to their investors to turn a profit with dams that Consumers has determined are, essentially, not profitable. As Ms. Mistak testified, Confluence will be able to "operate to maximize revenue and minimize costs, including costs associated with maintaining FERC license compliance." (Mistak Direct Testimony, 10:23.) Thus, purely private ownership of these dams is not in the public's interest for several reasons.

1. Confluence Hydro is not an experienced hydro dam operator—it is a shell company that has never owned, operated, or relicensed a hydro dam.

Confluence Hydro is "a new hydropower project owner with an unproven track record." (Mistak Direct Testimony, 18:3.) Consumers repeatedly presents Confluence as having "a track record of safe and responsible operation of hydro facilities." (Blumenstock Direct Testimony, 34:16.) But the evidence contradicts that statement. Confluence Hydro has *never* owned a hydro dam, let alone relicensed one or operated and maintained it long term. The 47 facilities Consumers identifies as being owned by Confluence Hydro were actually owned by Hull Street Energy, a different entity that is not even a party to this case. (Ex DNR-34, 8.) And Hull Street Energy only owned them for a short period of time, generally less than five years. As stated, the only reason it still owns even a single dam is because the buyer for that dam backed out of the sale. (Ex DNR-35, 3.) Confluence Hydro is a new LLC apparently formed solely to operate these 13 hydro dams. And they will not be the direct owner of the dams. Instead, Confluence Hydro has or will formed 13 *new* LLCs whose sole purpose for existing will be to own each of the 13 dams. (Ex DNR-34, 5.) As Mr. Coppola testified: "Confluence is currently a shell corporation. It was formed in June 2025 with 13 subsidiaries for the purpose of holding the assets of the Hydro Facilities." (Coppola Direct Testimony, 34:13.)

2. The transaction would decrease the public oversight of critical infrastructure.

Second, Confluence Hydro would be unregulated by the Commission and the public would no longer be represented through the Commission to weigh in on the decisions Confluence Hydro would make about the dams' operations. That would be a substantial loss of existing public oversight for dams that constitute critical infrastructure. It is contrary to the public's interest for the Commission to release this critical infrastructure from its oversight. As Ms. Mistak testified, she has "witnessed systemic problems with other private entities who own critical infrastructure such as hydropower projects and do not have the accountability associated with being a regulated utility company." (Mistak Direct Testimony, 11:1.)

3. FERC has a track record of allowing dam safety deficiencies to persist for decades without taking any meaningful action.

The Federal Energy Regulatory Commission (FERC) is not a reliable dam safety enforcement agency. There are examples of private hydro dam owners in Michigan, regulated solely by FERC, openly flaunting dam safety directives from FERC for *decades*, all the while continuing to generate revenue from the dams, without FERC taking any enforcement action. As Ms. Mistak testified: FERC "is not an effective enforcer of its dam safety standards if the dam owner is unwilling to act. If a noncompliant dam owner would prefer not to invest in complying with FERC's dam safety directives, FERC will allow that situation to persist for many years." (Mistak Direct Testimony, 13:6.) This is not speculation on Ms. Mistak's part, there are concrete examples of this occurring in Michigan.

At the Au Train Dam, a high hazard dam in the Upper Peninsula, "FERC allowed dam safety issues to persist for more than 25 years, doing little more than sending letters reminding the owner to address the dam safety deficiencies. Even after the dam changed hands and multiple owners continued to disregard FERC's numerous demands, FERC still did not take direct enforcement action." (Mistak Direct Testimony, 12:16.) All the while, the various owners of the Au Train Dam continued to generate revenue, without being forced by FERC to reinvest that revenue into the dam safety deficiencies FERC identified. As Mr. Trumble testified, "FERC has stated that they are reluctant to take compliance actions they have at their disposal because those compliance tools often take revenue away from licensees"—the revenue that is supposed to, but does not, go *towards* dam safety upgrades. (Trumble Direct Testimony, 7:3; see also Ex DNR 29, 1.)

FERC believes that the State of Michigan is a more effective dam safety regulator. (Trumble Direct Testimony, 7:6.) Thus, "FERC has demonstrated that they have little recourse other than eventually terminating the license and turning regulatory authority over to the State, often after long periods of non-compliance." (Trumble Direct Testimony, 7:9.) That is precisely what happened at Au Train. The owners extracted all the revenue they could from the project, then declared bankruptcy—leaving the dam safety deficiencies unaddressed. (Mistak Direct Testimony, 13:1.) It was only then, once the owner declared bankruptcy, that FERC revoked the license, passing jurisdiction to the State of Michigan. (Mistak Direct Testimony, 13:1.) Because of the financial condition of the private owner, it is

highly likely that dam safety work at the Au Train Dam will have to be publicly funded later this year.

A similar, but more tragic, series of events played out at the Edenville Dam near Midland. FERC advised the dam owner as long ago as 1978 that the dam could not meet federal spillway capacity standards. (Ex MHRC-62, 11.) But FERC still licensed the dam, and the various owners extracted revenue from selling electricity for *decades* without ever complying with FERC's dam safety directives. As Ms. Mistak testified, "the dam owner did very little to come into compliance with FERC's dam safety directives, but FERC did nothing more than continue to send the owner letters." (Mistak Direct Testimony, 12:5.) FERC finally revoked the owner's license in September 2018, and the dam failed shortly thereafter in May 2020, causing vast devastation. (Mistak Direct Testimony, 12:7.) The dam owner promptly filed for bankruptcy after the dam failed. See *In re Boyce Hydro, LLC*, No. 20-21214-DOB (Bankr ED Mich). Ultimately, the cost for recovering from the devastation fell in part to the private landowners and their insurers, but primarily to state taxpayers—who have contributed hundreds of millions of dollars to address the mess created by Edenville Dam's private owner. See, e.g., 150 PA 2020, 166 PA 2020, and 53 PA 2022.

These are examples of the risk the public incurs when critical, high hazard infrastructure is owned by unaccountable private owners operating solely to generate profit and that are regulated only by FERC. The private owners were permitted to extract millions of dollars in revenue from the dams for decades

without any meaningful pressure on them to invest that revenue into dam safety improvements. Essentially, those private owners were permitted to run the risk of delaying dam safety improvements for as long as possible and then use the bankruptcy system to avoid liability once their luck ran out.

Consumers has determined that it would cost $1.842 billion to relicense the dams and continue operating them, which is why it asks to instead pay Confluence Hydro $1.252 billion over 30 years to take over the dams so Confluence can purportedly relicense and continue operating them. (Ex DNR-37, 1.) If Consumers cannot profitably relicense and operate the dams at $1.842 billion, why is Confluence Hydro so confident that it can turn a profit for its investors at $1.252 billion? Neither Confluence Hydro nor Hull Street Energy has offered any testimony in this case to explain. Nor has Consumers offered testimony to resolve this puzzle.

Unfortunately, it is reasonable to conclude that the reason Confluence is interested in this transaction is because Confluence believes that, with the Commission no longer involved, either it, or a new owner Confluence flips the dams to, can delay dam safety improvements for many years without any meaningful repercussions from FERC. Thus, Confluence (or some other owner) can collect substantial revenue from Consumers' ratepayers under the power purchase agreement for many years without having to make the types of substantial investments that Consumers is both willing and able to make.

And as Mr. Trumble testified, there are substantial improvements needed at the dams. [BEGIN CONFIDENTIAL INFORMATION] [redacted] [END CONFIDENTIAL INFORMATION]. If Consumers continues to own the dams, then it "has the ability to invest in dam safety and recover those costs, whatever they may be, through increases in electric rates to their customers. This structure has proven to be successful in the past, even when constructing very large, expensive projects." (Trumble Direct Testimony, 18:8.) But that successful arrangement will disappear if the Commission surrenders its jurisdiction and Confluence takes over.

It is not in the public's interest for the Commission to surrender its regulation of these dams. Surrendering its jurisdiction over the dams will expose the public to the same risks that the public and private property owners around the Edenville Dam were exposed to, and which the public downstream of the Au Train Dam is currently exposed to. History shows that a private owner, unaccountable to the public, and answering only to FERC, can go for years collecting revenue without

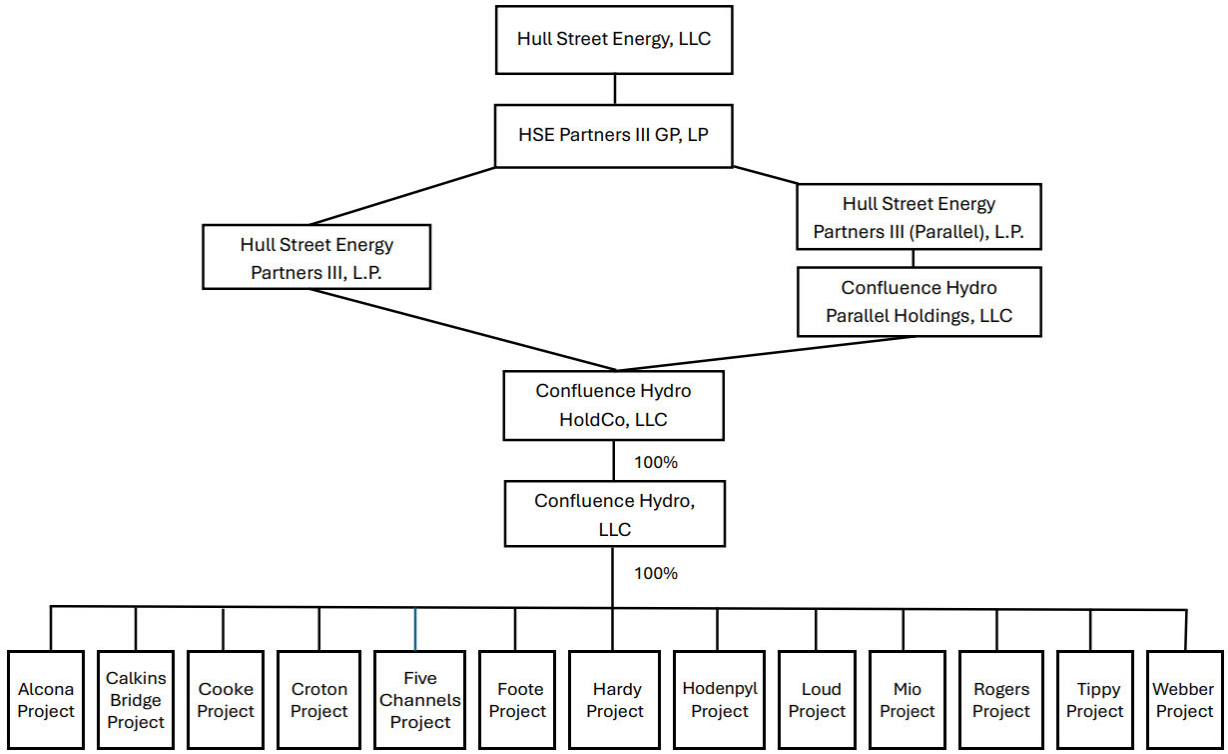
investing in dam safety improvements because FERC will do little more than send the private owner reminder letters. It is reasonable to conclude that Confluence Hydro is aware of this history and that is why it believes it can still make a profit operating the dams even though it (or the new owner it flips the dams to) will receive $590,000,000 less than the amount Consumers has determined it would cost to operate the dams. It is not in the public's interest to allow this transaction.

E. Because private owners can seek bankruptcy protection, the public ultimately bears the cost when private dam owners walk away.

Consumers argues that the transaction is in the public interest because the "transaction transfers liabilities associated with the Facilities that otherwise present future rate risks for customers." (Blumenstock Direct Testimony, 34:12.) But as Ms. Mistak testified, she has "witnessed problems with hydropower project owners who use complicated structuring of LLCs to limit liability and declare bankruptcy for single assets, all while ignoring FERC regulatory requirements." (Mistak Direct Testimony, 11:6.) Indeed, the history of privately owned dams in Michigan shows that the liabilities for failed or abandoned dams still ultimately fall on the public, because the private entities that own them can simply file for bankruptcy.

The private investors associated with Hull Street Energy are aware of that protection, of course, and have layered the transaction to ensure that they are protected from liability. The graph below from PDF page 420 of Consumers' 2284-

page public application illustrates the layers constructed into the ownership of the dams:



What is more, Confluence Hydro, LLC apparently has or will form 13 *additional* LLCs to own each of the individual 13 dams. (Ex DNR-34, 5.)

As Mr. Coppola testified: "Confluence is currently a shell corporation." (Coppola Direct Testimony, 34:13.) So, if there is a failure of the dam, or it is decided that neglecting or abandoning one of the dams best serves the bottom line, the liabilities for those events fall onto an LLC housed within several LLCs, which can declare bankruptcy. Thus, if something goes wrong, the "liabilities" that Mr. Blumenstock testifies will be transferred away from ratepayers, (Blumenstock Direct Testimony, 34:12), will ultimately fall back onto the public—which is

precisely what happened with the Edenville Dam and what will almost certainly happen with the Au Train Dam, as explained above.

Mr. Coppola identified this problem, explaining that "the operating cash flows are not likely to be sufficient for Confluence to satisfy potential liabilities it may incur in the future. To make Confluence viable for the long term, it is critical for [Hull Street Energy] to provide financial guarantees that it will backstop any shortfalls in Confluence's ability to meet its financial obligations." (Coppola Direct Testimony, 35:5.) So, he recommended to the Commission that it require that Hull Street Energy "will guarantee all environmental and other liabilities and obligations of Confluence Hydro." (Coppola Direct Testimony, 47:16.) Unsurprisingly, Consumers flatly rejected that requirement, explaining that "[a]ny conditions or adjustments to the transaction are not appropriate" and "Confluence Hydro and Consumers Energy are not open to" any potential change to the liability-insulating structure built into the transaction. (Blumenstock Rebuttal Testimony, 2:6.)

The evidence does not support Consumers' claim that all liabilities for these aging, very expensive, high hazard dams are transferring away from ratepayers to an out-of-state private equity firm. Instead, it is reasonable to believe that any significant liabilities that arise will fall back onto Michigan's taxpayers, which include the very ratepayers Consumers purports to be protecting. This is precisely what has happened with other privately owned hydro dams in the past. It is

contrary to the public's interest for the Commission to surrender its jurisdiction and allow a highly regulated utility to transfer the dams to a private equity group.

F. The transaction is not the only way the impoundments can survive.

Consumers argues that the proposed transaction is in the public's interest because it will "preserv[e] the Facilities and their related impoundments for the communities that rely on them for recreation and tourism." (Blumenstock Direct Testimony, 34:14.) Consumers has threatened to remove all 13 dams if the Commission does not allow the transaction. (Blumenstock Rebuttal Testimony, 4:2.) To be sure, there are circumstances in which it would be too expensive to safely maintain a project to justify its continued operation, which is precisely why Consumers' own consultant advised it to decommission two of the 13 dams. (Blumenstock Direct Testimony, 9:8.) That is the eventuality that DNR and other resource agencies have spent more than 30 years trying to persuade Consumers and FERC to plan for. (Mistak Direct Testimony, 8:11–9:4.) And it may be the appropriate solution for some of the 13 dams. (Mistak Direct Testimony, 33:6–33:13.)

Nevertheless, eliminating the impoundment is not always the only solution for an unprofitable dam. Michigan has a well-established, longstanding process by which counties can create special assessment districts to fund the acquisition of dams to maintain impoundments that serve their communities. See MCL 324.30701, et seq. As Ms. Mistak explained, "if enacted, a Circuit Court-ordered

legal lake level would allow for a special assessment district of benefited property owners to defray the costs of establishing and maintaining an established lake level. These costs may include…operation and maintenance of the control structure (dam) to maintain the legal lake level." (Mistak Direct Testimony, 33:17.)

That is the solution Midland and Gladwin Counties pursued to protect the value that the Edenville Dam's impoundment added to the communities around the impoundment. Even though neither the Edenville Dam nor any of the other three dams in that system are still hydro dams that generate electricity, those counties have established a special assessment district to fund the maintenance of the impoundments because the communities value them so highly. See *Heron Cove Ass'n v Midland Co Bd of Comm'rs*, unpublished opinion of the Court of Appeals, issued January 6, 2025 (Docket No. 371649), 2025 WL 37903 (background on the process followed by the counties in that situation). Thus, contrary to Consumers' testimony that the only alternative to the proposed transaction is the removal of the 13 impoundments, there are other options available that can serve the public's interest.

II. Decommissioning the dams would not be nearly as expensive as Consumers estimates.

The heart of Consumers' argument in support of the proposed transaction is that it is "the lowest cost option" compared to relicensing the dams or decommissioning them. (Blumenstock Direct Testimony, 34:11.) DNR strongly disagrees with that argument. The evidence does not support it. As noted above,

fully decommissioning may not be appropriate for all dams where the local community is committed to maintaining the impoundments. Even so, Consumers overestimates the potential cost of decommissioning in this case. As Ms. Mistak aptly puts it: the "costs provided by Consumers Energy are not only significantly higher than actual dam removal costs reported elsewhere, but also include measures that are not typically included in dam removal projects." (Mistak Direct Testimony, 27:8.)

A. Consumers concedes that its estimates were not informed by regulatory agencies and lack real-world data.

Consumers concedes that "regulatory agencies" would need to be involved to accurately determine what steps Consumers would need to take to decommission any of the dams. (Blumenstock Rebuttal Testimony, 28:18.) But Consumers admits that their decommissioning estimates are not informed by data specific to the 13 dams, nor do they account for what the regulatory agencies would actually require for decommissioning at any of the 13 dams. Mr. Blumenstock testified that "Consumers Energy has not collected data or had final negotiations with regulatory agencies regarding decommissioning; so at this time, the Company cannot definitely identify what activities will be required or how much sediment or contamination is present." (Blumenstock Rebuttal Testimony, 28:18.) In fact, Consumers did not merely fail to reach "final negotiations," it has not even had any *preliminary* negotiations with regulatory agencies on the topic. (Ex DNR-36, 5.) This admission by Consumers that their decommissioning estimates are not informed by real-world

data or by a determination by any regulatory agencies of what would be required for decommissioning is enough for the Commission to conclude that Consumers has not met its burden of proof on this issue.

As noted above, Consumers fails to meet their burden if they do not present reliable evidence to support any of the elements of their application—neither DNR nor any other party has the burden of proving the opposite fact. *S C Gary, Inc v Ford Motor Co,* 92 Mich App 789, 803-804 (1979). Indeed, the Commission should reject evidence offered by Consumers that is unreliable, even if it is not directly contradicted by the other parties. *Cuttle v Concordia Mut Fire Ins Co*, 295 Mich 514, 519 (1940). As Ms. Mistak put it: "[w]ithout realistic and accurate decommissioning costs, it is not clear to me how [Consumers' decommissioning] estimates can be viewed as reliable." (Mistak Direct Testimony, 31:5.)

B. Consumers' estimates include excessive work that regulatory agencies do not typically require for dam removal.

Again, Consumers, by their own admission, did not seek input from any of the regulatory agencies that Consumers recognizes would need to be involved in decommissioning. DNR has presented evidence from representatives of those very regulatory agencies, DNR and EGLE. Both Ms. Mistak (for DNR) and Mr. Trumble (for EGLE) have been involved in decommissioning dams in Michigan. (Mistak Direct Testimony, 27:5; Trumble Direct Testimony, 20:2.) Indeed, Mr. Trumble has "experience with over 50 dam removal projects in the state of Michigan." (Trumble Direct Testimony, 20:2.)

Mr. Trumble summarizes the many costs in Consumers' estimate that, according to Mr. Trumble, are "not standard practice" in Michigan and typically do "not occur." (Trumble Direct Testimony, 19:20–20:17.) The most substantial expense Consumers added to their estimates was the assumption "of dredging and excavation volumes that include very large portions of the exposed reservoir bottom," which in turn "requires that those areas are seeded and stabilized." (Trumble Direct Testimony, 22:11–23:5.) In Mr. Trumble's "experience," which includes over 50 decommissioning projects in Michigan, that level of work is not typically required. (*Id*.) Consumers simply assumed, without gathering real-world data or consulting regulatory agencies, that such work would be required at each of the dams. Mr. Trumble explained that Consumers' decision to make that assumption meant that their "cost estimates increase[d] by tens of millions and sometimes over a hundred million dollars, when compared to what [he] consider[s] a more typical approach to dam removal in Michigan." (Trumble Direct Testimony, 23:3.)

Mr. Trumble carefully reviewed the estimates provided by Consumers' consultant, WSP, and while still "using the WSP methodology," he eliminated the costs that would not typically be required in Michigan. (Trumble Direct Testimony, 23:10–24:16.) Doing that removed $593,865,663 from Consumers' estimate, dropping it from $1,531,657,020 to $937,791,357. (*Id*.) And that is assuming the complete removal of all 13 projects which, as explained above, is likely not required

either because the local community takes it over or the dam's operating and maintenance costs are low enough to justify its continued operation.

Ms. Mistak's testimony supports Mr. Trumble's testimony. She also notes that Consumers' estimates assumed the need to do extensive work that is not typically required. (Mistak Direct Testimony, 27:10.) She recounts that DNR has long criticized Consumers for overinflating its estimates for dam removal, since at least 2007. (Mistak Direct Testimony, 27:13–28:11.) But the work WSP did for Consumers for the purposes of their application here is inflated even more than the work done in the past.

Consumers' 2013 estimate for full removal of the 13 project was $358,802,091, which DNR believed was overinflated at the time. Yet, for the purposes of their application to the Commission, Consumers has *more than quadrupled* that estimate to $1,539,461,996. This information is summarized on page 29 of Ms. Mistak's direct testimony:

Dam Removal Total Cost Comparison

Complete Removal

Dam	Mead & Hunt 2007*	Mead & Hunt 2013**	WSP 2025***
Foote	$21,516,702.00	$24,845,988.00	$121,496,940.00
Alcona	$15,279,607.00	$17,640,447.00	$81,680,654.00
Mio	$16,167,578.00	$18,884,783.00	$82,791,646.00
Loud	$13,227,978.00	$15,195,137.00	$47,075,060.00
Cooke	$21,829,955.00	$28,887,989.00	$103,103,058.00
Five channels	$13,211,411.00	$15,191,437.00	$39,587,216.00
Rogers	$20,916,522.00	$24,314,238.00	$75,362,505.00
Hardy	$46,998,402.00	$53,565,770.00	$280,432,071.00
Croton	$31,441,987.00	$38,828,999.00	$147,014,561.00
Tippy	$27,023,785.00	$31,415,469.00	$96,249,846.00
Hodenpyl	$53,279,155.00	$63,023,442.00	$195,493,171.00
Calkins Bridge		$9,486,252.00	$209,327,853.00
Webber		$17,522,140.00	$59,847,415.00
Total	**$280,893,082.00**	**$358,802,091.00**	**$1,539,461,996.00**

*Mead & Hunt 2007 in 2006 dollars
**Mead & Hunt 2013 in 2012 dollars
***WSP 2025 in 2022 dollars

Certainly, some increase should be expected due to inflation between 2013 to 2025. But the increase Consumers presents here is, frankly, breathtaking.

C. Real-world dam removal projects in Michigan confirm that Consumers' estimates are much too high.

Mr. Trumble readily acknowledges that his analysis lowering Consumers' cost estimates simply followed "the WSP methodology" and does not reflect "actual project costs" because those costs would require "more detailed engineering studies" that Consumers concedes it did not perform. (Trumble Direct Testimony, 23:14–24:1.) But that does not mean data for comparable dams does not exist. There is a well-known dam removal manual called the Practitioner's Guide to Hydropower Dam Removal, and, on page 31 of her direct testimony, Ms. Mistak identified three examples from the manual of comparably sized dams that have been removed in recent years to highlight just how unusually high Consumers' estimates are:

- Boardman Dam: $10,500,000 removed 2017;[27]
- Brown Bridge Dam (page 48): $4,400,000, removed 2013;[28] and
- Sabin Dam (page 48): $6,000,000, removed 2018.[29]

But Ms. Mistak provided an even more updated example from December 2025. The Boyne Falls project is a former Consumers Energy dam that Consumers transferred to the local village for $1 in 1956 and which, unsurprisingly, needs to be removed, and "further demonstrate[s] how uneconomical hydropower dams often become a public liability and financial burden." (Mistak Direct Testimony, 32:16.)

GEI Consultants was hired to estimate the cost for removing the Boyne Falls project and they did the type of "thorough evaluation of existing conditions," that

Consumers failed to do here, such as "reviewing archival documentation, conducting topographic and bathymetric surveys, analyzing sediment characteristics, delineating wetlands, assessing habitat for threatened and endangered species, defining river reference conditions, and examining geotechnical data and utility conflicts." (Mistak Direct Testimony, 32:4.) Ms. Mistak testified that those "steps and approaches" are what "are typically conducted when developing realistic and accurate dam removal cost estimates." (Mistak Direct Testimony, 32:9.) And Mr. Trumble agrees. (Trumble Direct Testimony, 22:5.)

GEI Consultants estimated in December 2025 that complete removal and river restoration at the Boyne Falls project would cost between $11,433,100 and $13,283,000. (Mistak Direct Testimony, 31:19.) This pales in comparison to the shockingly high decommissioning estimates Consumers has presented to the Commission.

Consumers' reaction to these real-world examples provided by the very regulatory agencies that Consumers agrees would need to be involved in a dam removal project shows that Consumers has not taken this element of their application seriously. Mr. Blumenstock—who has never been involved with decommissioning any dam anywhere in any way (Hrg Transcript, 137:18–138:1)—dismissed the testimony from the regulatory agencies as mere "hypothetical, pie-in-the-sky scenarios." (Blumenstock Rebuttal Testimony, 33:14.) Consumers insists, instead, that the "decision point in this case" does not require them to provide the "level of detail" needed to develop the type of realistic dam removal expenses that

DNR's witnesses are focused on. (Blumenstock Rebuttal Testimony, 29:3.) DNR respectfully, and strongly, disagrees.

Consumers has asked the Commission to surrender its jurisdiction over these high hazard pieces of critical infrastructure to an out-of-state private equity group that has flipped, or tried to flip, every other hydro dam it has ever owned in its short, less-than-ten-year life span. Consumers purports to justify this unprecedented request, primarily, because transferring the dams to that group is the lowest cost option for ratepayers compared to decommissioning the dams. How can it possibly argue that there is no need for it, at this "decision point" in the case, to work up a realistic estimate for what it could actually cost to decommission the dams? Consumers has provided a reliable estimate of what it would cost to pay Confluence for 30 years under the power purchase agreement, so it stands to reason that the estimate of what it would cost to decommission the dams—the expense they are comparing the power purchase agreement against—should be at least as equally reliable.

As DNR's unrebutted testimony shows, it was both reasonable and possible for Consumers to obtain realistic estimates of what it would cost to decommission its 13 projects, but Consumers simply chose not to do so. Instead, Consumers presented estimates that more than *quadruple* its estimates from 2013 and that, by its own admission, are not informed by real-world data or input from any regulatory agencies. Therefore, Consumers has failed to satisfy its evidentiary burden for this element of their application, and the Commission should deny its application.

CONCLUSION AND RELIEF REQUESTED

Consumers' proposed deal with a private equity group is not in the public's best interest, nor is it the lowest cost option. Thus, Consumers has failed to meet its burden under MCL 460.6q, and the Commission should deny its application.

Respectfully submitted,

Dana Nessel
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PROOF OF SERVICE - U-21985

The undersigned certifies that a copy of the ***DNR's public Initial Brief*** was served upon the parties listed below by e-mailing the same to them at their respective e-mail addresses on the 13th day of April 2026.

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