Consumers Energy
Count on Us

July 1, 2026

Ms. Lisa Felice
Executive Secretary
Michigan Public Service Commission
7109 West Saginaw Highway
Post Office Box 30221
Lansing, MI 48909

RE: MPSC Case No. U-21985 – 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.

Dear Ms. Felice:

Enclosed for electronic filing in the above-captioned case, please find the Redacted Version of **Consumers Energy Company's Exceptions to the Proposal for Decision**.

A Confidential version of these Exceptions is being filed under seal with the Executive Secretary of the MPSC. This is a paperless filing and is therefore being filed only in PDF.

Sincerely,

Bret Totoraitis
Digitally signed by Bret A. Totoraitis
Date: 2026.07.01 12:40:32 -04'00'

Bret A. Totoraitis
Phone: 517-788-0835
Email: bret.totoraitis@cmsenergy.com

cc: Parties per Attachment 1 to Proof of Service

S T A T E O F M I C H I G A N

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.	)))))))	Case No. U-21985

REDACTED

EXCEPTIONS OF CONSUMERS ENERGY COMPANY

July 1, 2026

TABLE OF CONTENTS

Page

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.	)))))))	Case No. U-21985

EXCEPTIONS OF CONSUMERS ENERGY COMPANY

I. INTRODUCTION

On June 10, 2026, Administrative Law Judge ("ALJ") Varchetti issued the Proposal for Decision ("PFD") in this proceeding. Consumers Energy Company ("Consumers Energy" or the "Company") files these Exceptions responding to the PFD's recommendation that the Michigan Public Service Commission ("MPSC" or the "Commission") should reject the Company's sale of its 13 river hydroelectric ("hydro") generation plants (hereafter referred to as the "plants," the "facilities," or the "dams") to Confluence Hydro, LLC ("Confluence") and the related Power Purchase Agreement ("PPA") with Confluence ("the transaction"). For the reasons discussed in these Exceptions, the Commission should reject that recommendation and approve the sale and related PPA.

The PFD's recommendation was based on the ALJ's flawed and unwarranted conclusions under MCL 460.6q(7) that (i) the impact of the transaction on customer rates is "inconclusive" (PFD, page 151), (ii) the transaction would have an adverse impact on the safe provision of energy service in Michigan (PFD, page 223), and (iii) the transaction is inconsistent with public policy (PFD, page 262). None of those conclusions is justified by a more reasonable review of the evidence in the record. The ALJ's conclusion with respect to the rate impact of the proposed transaction uses an unreasonable standard for the review of Consumers Energy's business cases, <u>which, if adopted, would effectively guarantee that no utility could ever satisfy the rate consideration under MCL 460.6q(7)(a).</u> The ALJ's conclusion with respect to the transaction's effect on safety unreasonably embraces the wild speculation of certain parties in defiance of the actual evidence indicating that Confluence is a responsible, sophisticated, experienced, and financially capable dam owner. The ALJ's conclusion regarding the supposed inconsistency of the transaction with public policy rests entirely on both of those other meritless conclusions. Consumers Energy's Initial and Reply Briefs in this case set forth the correct way that the Commission should consider the evidence in the context of the requirements of MCL 460.6q(7). The Company incorporates those briefs as part of these Exceptions as if they were fully set forth herein. These Exceptions should be read in conjunction with the Company's briefs as representing the full articulation of the errors in the ALJ's conclusions as well as the reasons that the Commission should approve the transaction.

With respect to safety, in particular, the Company's briefs provide a detailed explanation about how the transaction remains consistent with the safe delivery of energy service. However, to the extent that the Commission has any remaining reservations about the safety of the plants after the sale to Confluence closes, Consumers Energy proposes that it would <u>**accept**</u> a Commission condition on approval of the sale that requires the Company to establish a "Consumers Energy Hydro Safety Fund," to be controlled and administered by the State of Michigan. Under this proposal the Company would <u>**agree**</u> to contribute <u>**all**</u> of the Financial Compensation Mechanism ("FCM") revenue that Consumers Energy earns under the PPA with Confluence over its 30-year term – estimated to be approximately $270 million (see 3 TR 1069) – to the fund. In other words, <u>Consumers Energy is prepared to forgo any profit that the Company</u>

is entitled to earn under the law in connection with the Confluence PPA to help ensure the long-term safety of the 13 hydro plants. Although the ALJ correctly found that the law prevents the Commission from unilaterally denying the FCM on the PPA or limiting the FCM to some amount less than the full contract payments made under the PPA, as proposed by certain parties (see PFD, page 145), the Company is free, at the Company's discretion, to waive its legal right to earn and keep that revenue and is willing to do so in this case. This proposal is a concrete and meaningful response to address the speculative and unsupported safety concerns expressed by certain parties and by the ALJ in this case. Consumers Energy discusses this proposal in more detail later in these Exceptions.

This case is the culmination of a long journey that started more than four years ago when the Company filed its 2022 electric rate case in Case No. U-21224 seeking the first increment of cost recovery for the significant investments (more than $350 million for the Hardy dam alone) that would be needed to relicense and continue operating the hydro plants beginning in 2034. But, Staff, the Attorney General, and other stakeholders opposed the Company's proposed investments in the Hardy facility, taking the position that the value of the power provided by the plant is not enough to justify continued investment by Consumers Energy.

For the communities that have grown up around the dams and for thousands of Michigan recreational users annually, decommissioning the plants would threaten home values, livelihoods, and even priceless memories. This is because decommissioning will include eventual demolition of the dams and eliminating the impoundments which form the "lakes" that the communities surrounding the dams and many Michigan residents have come to love—decommissioning would mean that the impoundments would transition back to the rivers which existed before the dams were constructed. To be clear, "decommissioning" does not involve removing only the power producing infrastructure of the dams, it will include removing the entire infrastructure comprising the dams, as well as the associated impoundments that so many Michiganders have come to cherish.

In light of these considerations, and at the urging of the MPSC Staff ("Staff") and the Attorney General, and with the Commission's approval, Consumers Energy set out to explore whether it would be possible to identify a qualified buyer who could relicense and continue operating the plants more economically than Consumers Energy.

Consumers Energy has done everything that the Commission asked of the Company on the issue of the hydros. The Company engaged third-party consultants with expertise in dam engineering, construction, and decommissioning to objectively evaluate the options using the best engineering information available. When that objective analysis concluded that selling the plants was the best alternative for all interested parties, the Company conducted a robust request for proposals process, found an interested buyer, performed substantial due diligence to ensure the buyer's qualifications, and negotiated a reasonable sale agreement. Throughout this four-year intensive process, Consumers Energy has consistently prioritized the interests of its customers and of the impacted communities. Consumers Energy's request for approval of the sale and related PPA is not motivated by profit. <u>It never has been.</u> Consumers Energy has recommended approval of the sale because <u>it is the right thing to do</u>.

It is important for the Commission to understand the consequences of denying this sale. If the sale transaction is not approved and the transaction is terminated, the Company will do what is best for customers and proceed to decommission the 13 dams, which is the next least expensive option for customers. 3 TR 76. Consumers Energy would announce its intention to pursue decommissioning of the 13 river hydro dams through a phased process, anticipated to last more than 20 years. The Company will prioritize the highest-risk sites first – starting with Hardy, Rogers, Alcona, and Hodenpyl – and immediately evaluate interim risk reduction measures at each location, including assessing the necessity of reservoir drawdowns. The next steps would involve initiating the Federal Energy Regulatory Commission ("FERC") hydro license surrender and decommissioning process for each project, which includes preparing detailed decommissioning plans, conducting environmental reviews, consulting with agencies, and engaging stakeholders. It is important to note that FERC approval is required before any project can be removed from FERC's jurisdiction. For Hardy specifically, Consumers Energy will <u>immediately</u> commence with decommissioning. Continuing to operate the site without replacing the Hardy Auxiliary Spillway presents an unacceptable risk, as there would no longer be a plan to complete this critical project. As an interim risk reduction measure, the Company would begin the normal winter drawdown after Labor Day of this year – i.e., <u>within days of an order rejecting the sale</u> – and <u>keep the reservoir down indefinitely</u>. The Company would also assess whether additional drawdown is required until final decommissioning is achieved. Overall, the strategy is to reduce risk, maintain public safety, and advance through a structured, site-by-site FERC surrender process. There is no further opportunity to explore other options. After four years of intensive effort, we are out of time. Consumers Energy submits that this would be a tragic end to the legacy of these dams given the fact that a good deal is within grasp. The Commission should not let some parties' skepticism cause it to say no to the deal, which is the best outcome for customers and Michigan.

The transaction between Consumers Energy and Confluence is the result of years of study, deliberation, community input, negotiation, and diligence. The transaction provides the only viable option for the 13 hydroelectric facilities in which customers, the communities, the employees, the buyer, the seller, and the state of Michigan all win. For all the reasons provided in the Company's testimony, exhibits, briefs, and these Exceptions, the Commission should grant the Company's request for approval of the sale and related PPA.

II. CONSUMERS ENERGY'S EXCEPTIONS TO THE PFD

A. Exceptions to ALJ's Conclusions Regarding Impact on Customer Rates

1. The ALJ Applied an Incorrect, Unreasonable, and Arbitrary Standard to Evaluate the Company's Business Case

Consumers Energy presented a well-supported business case showing that selling the hydro plants to Confluence would result in a favorable impact on customer rates compared to decommissioning the plants or relicensing the plants and continuing to operate them. See generally 3 TR 57-67, 232-237; Exhibits A-4, A-5, A-6, and A-10. Both Staff and the Attorney General agreed, after analyzing and recommending adjustments to the Company's business case, that selling the plants was the lowest cost option for customers. 3 TR 294, 844. Despite this, the ALJ concluded that the record in this case was "inconclusive" on the question of the impact of the proposed sale on customer rates. PFD, page 151. The ALJ largely based that conclusion on his subordinate conclusions that the decommissioning scenario used in the Company's business case involved "an exceptionally high degree of uncertainty" (PFD, page 83) and that the relicensing scenario also suffered from "uncertainties related to capital expenditures and O&M costs" (PFD, page 99). However, the standard the ALJ applied for considering the evidence presented by Consumers Energy was arbitrary and unreasonable. MCL 460.6q does not require "certainty" or "conclusive" proof about the impact on rates in order for the Commission to approve a proposed sale of a utility asset. If it did, no proposed transaction would ever meet the standard for approval because the rate impact from a proposed transaction always involves forecasts and estimates about the future, which can never be certain.

Under MCL 460.6q(7), the Commission needs to "consider" the impact of a proposed transaction on rates, but the law does not require favorable rate impacts to be "certain" or "conclusive." In fact, the law doesn't even require the impact on rates to be favorable at all. If, for example, the Commission were to determine that a transaction would have a slightly unfavorable impact on rates, but other factors under MCL 460.6q(7) favored approving the transaction, the Commission has the discretion under the statute to approve it so long as the Commission has factored the consideration of rate impacts into its final decision.

The decision to sell assets, like the hydro plants, or to pursue other options is inherently a business decision. In business decisions, the decision-makers seldom (if ever) have the luxury of perfect information and perfect foresight about the long-term results of the decision. Business decisions always involve some risk. Business decisions should, therefore, be judged on their reasonableness. They cannot properly be judged on their "certainty" or their "conclusiveness" because there never is "certainty" or "conclusiveness." Reasonableness is a function of the information that is reasonably available to the business at the time the decision has to be made.

The ALJ approached his analysis in this case like a lawyer would approach a tort case, a breach of contract claim, or some other civil claim in which a plaintiff seeks redress from a court for the wrongful conduct of a defendant – not like a person would approach evaluating a business decision. In tort cases or breach of contract claims, a court is being asked to impose a legal penalty on a party who has been alleged to have acted wrongfully. In that type of case, it is appropriate to expect that the judicial decision-maker would want to have "certainty" about the party's wrongful acts and "conclusive" proof that the party's actions warrant the imposition of a legal penalty before granting the plaintiff's requested relief. But, this case is not like a tort case or a breach of contract claim. This case is not about imposing legal penalties on a wrongful actor. Cases under MCL

460.6q consider the reasonableness of a utility's proposed major asset sale or the sale of an entire utility business. Here, the law asks the Commission to act as an independent check on the business decision to sell utility assets outside the normal course of business. The Commission's role is to step into the shoes of the utility and render its own business judgment about whether the proposed transaction is reasonable given the information that is reasonably available – not whether the ultimate results of the transaction are "certain" or "conclusive."

The law governing MPSC decisions supports that view. The Commission ultimately has a responsibility to ensure that customer rates are "just and reasonable." MCL 460.557(4). In order to achieve "just and reasonable" rates, the Commission ordinarily applies a standard of "reasonableness and prudence" to utility decisions. See, e.g., MPSC Case No. U-10640-R, February 5, 1997 Opinion and Order, page 9 (finding that the law "does not hold utilities to a standard of omniscience or perfect performance, but rather to a standard of reasonableness and prudence."). "The reasonable utility management test for prudence is whether the costs in question are those a reasonable utility manager would have incurred, in good faith, under the same circumstances and at the relevant point in time." *Residential Ratepayer Consortium v Pub Serv Comm*, 198 Mich App 144, 151; 497 NW2d 558 (1993). See also *Ass'n of Businesses Advocating Tariff Equity v Pub Serv Comm*, 208 Mich App 248, 264-265; 527 NW2d 533 (1994) (finding that the Commission properly applied a prudency test to determine which costs of a failed nuclear plant project were prudent based on what the utility knew or reasonably should have known at the time key decisions were made.). This is the standard that the Commission should have in mind while evaluating the proposed sale under MCL 460.6q.

In this case, the "circumstances" facing Consumers Energy (and the Commission for that matter) are that the Company's dams require significant investments to maintain their FERC licensure – particularly over the next five years. 3 TR 101-102. Most of the existing licenses will expire in 2034 and the relicensing process takes up to seven years to complete. 3 TR 46. This means that the relicensing process must start by 2027 to ensure that the facilities remain continuously licensed to operate without a gap. In the meantime, it is not safe to assume that FERC will allow the existing licenses to continue indefinitely without the major investments that FERC requires, and Consumers Energy would not continue to operate the dams without making the necessary safety investments. 3 TR 102. Therefore, the "relevant point in time" for making this decision is now. As Company witness Richard T. Blumenstock testified, "Staff and the Commission have already demonstrated their reluctance to authorize recovery of the needed investments at these plants because of the insufficient capacity and energy value that those investments would provide to electric customers." 3 TR 102. See also 3 TR 81. All of this adds up to the fact that time is of the essence in making a determination about the future of the hydro plants – one way or the other – and the Company must be careful about the costs it incurs in connection with these plants until the long-term fate of these plants has been decided. A "reasonable utility manager" would not "in good faith" incur any unreasonable or disproportionate costs – nor would such a reasonable manager squander valuable time – to gather or develop the arguably "best" information possible when the manager already has *reasonable* information for making the decision with the money already spent and the time already incurred.

The process to determine the future of the hydro plants has already taken about four years to gather the information the utility could reasonably gather about the three options to either (i) sell the plants, (ii) decommission them, or (iii) make the investments necessary to relicense and continue owning them, as well as to (iv) conduct a reasonable process to find a qualified buyer, (v) perform due diligence, and (vi) negotiate a sale agreement and PPA. Under those conditions, it was reasonable (for example) for the Company to rely on available data about sedimentation volumes and contamination amounts, which had been developed by outside engineering firms with expertise in dam engineering, construction, and decommissioning, even though it would have arguably been possible to develop more detailed information through sediment core sampling or other costly and time-consuming direct testing methods. See Consumers Energy's Reply Brief, pages 33-36 (discussing the evidence showing that it would have cost millions of dollars to perform the additional sediment testing and explaining why incurring such a cost is legally unnecessary).

Certain parties in this case (primarily MHRC, DNR, and ABATE[1]) have argued that Consumers Energy's cost estimates for the three scenarios of its business case were deficient because they relied on imperfect information and that "better" information was theoretically available. Despite the high degree of skepticism that the ALJ showed for all of the Company's expert testimony, the ALJ accepted those intervenor claims with little to no critical analysis. It is important to recognize that those opposing parties did not actually present the supposedly "better" information that they claim was available and show that the Company's information was incorrect – even though (to continue with the sedimentation example) there is broad public access to the impoundments behind the dams which would easily facilitate additional sediment testing. They mainly argued that the mere possibility of "better" information means that the Commission should reject the information that the Company relied on for its own analysis and reject the sale in the absence of such "conclusive" evidence.

Under the exigencies of this case, neither the Company nor the Commission has the luxury of waiting for "conclusive" proof that one of the three options will "certainly" be lower cost and have a lesser rate impact than the others. By suggesting that the evidence is "inconclusive" the

[1] Michigan Hydro Relicensing Coalition, et al. ("MHRC"), the Michigan Department of Natural Resources ("DNR"), and the Association of Businesses Advocating Tariff Equity ("ABATE")

ALJ essentially takes the position that it is premature to make *any* choice between the three available options in terms of their rate impact to customers, creating the illusion that the Company could and should simply remain in "status quo" until it comes forward with more "conclusive" information supporting the rate impact of one of the three options. The ALJ's faulty position ignores the reality that the current situation will **not** remain in "status quo." If the Commission rejects the sale as the ALJ recommended, either decommissioning or relicensing **must** occur – and it must start immediately. The ALJ takes the erroneous view that the sale must be rejected unless there is "conclusive" proof that selling the plants is lower cost, but he fails to recognize that – using his own reasoning – both decommissioning and relicensing must also be rejected, then, because neither of those options have been shown "conclusively" to be lower cost either. However, it is not possible to reject all three options. One of the options must be chosen, and it must be chosen with the available evidence in this case. So, the question cannot be whether there is "conclusive" evidence to support one of the three options. The question must be – based on the evidence available to the Company and the Commission – which of the options is most reasonable, meaning which of the options is *most likely* to be the lowest cost based on what we know today? That is the way reasonable business decisions have to be made. The answer to that question is clear – as the Company said it was from the very beginning. The sale option is clearly the option most likely to be lower cost to customers and have a lesser rate impact. It is true that there are a lot of unknowns when it comes to the ultimate cost of the decommissioning option – but all of those unknowns would lead to higher and higher decommissioning costs if they come to fruition. If the Commission passes on the opportunity to approve this sale, and decommissioning ultimately proves to be more costly than the sale would have been (which is likely based on the estimates performed by WSP USA, Inc. ("WSP")), it will be too late to go back and avoid the added cost to customers. There is no time to go back to the beginning and wait for better data to develop or hope for a different deal that is even lower cost. If the Commission rejects this transaction, Consumers Energy will have no choice but to choose one of the other two options, and the Company has been clear that it will move on to decommissioning, which presents itself as the next lowest cost option available. 3 TR 76.

Consumers Energy submits that this is the reason that the statute requires the Commission to "consider" the impact of a proposed transaction on rates and does not include any requirement for a utility to "conclusively" or "certainly" prove that the transaction will have a favorable impact on rates. The ALJ has applied an unreasonable and arbitrary standard in reaching his recommendation. The Commission should reject that standard and assess the Company's filing through the lens of "reasonableness and prudence." Doing so makes it clear that, given the information reasonably available at the time the decision needs to be made (and without incurring any extraordinary and unwarranted costs), the proposed sale to Confluence is the lowest cost option and will result in a favorable impact on rates compared to the other options. With that proper lens in place, the Company discusses below some of the ALJ's specific findings regarding the Company's business cases.

2. <u>Sale Scenario</u>

The ALJ offered few criticisms of the Company's sale scenario in its business case, acknowledging that "the sale scenario has a relatively narrow range of cost estimates given that there are limited variables that can alter its total cost." PFD, page 38. The few criticisms he made are likely immaterial to the ultimate decision about whether to approve this sale. Nevertheless, the Company addresses its areas of disagreement with the ALJ's analysis of the sale scenario in the following sections of these Exceptions.

a. Replacement Power Costs

The ALJ ultimately declined to "establish a definitive replacement power cost for use in modeling" because he concluded that "any estimate of replacement power costs decades into the future is inherently uncertain." PFD, page 37. Nevertheless, he termed the Company's $79/MWh estimate of replacement power cost as "problematic" because it relied on a single estimate from a Request for Proposal ("RFP") in one of the Company's recent clean-energy PPA solicitations. PFD, page 37. While the Company agrees that any estimate of replacement power costs decades into the future is "inherently uncertain," that observation only continues to highlight that the ALJ approached this case from entirely the wrong decision-making paradigm and applying an unreasonable standard of "certainty."

The Company's estimate of replacement power costs was reasonable because it was based on the most recent bid the Company had from a directly comparable generation resource. The bid was from a river hydro generation unit and included energy, capacity, and Renewable Energy Credits ("RECs") associated with the resource. 3 TR 58. That means it had similar characteristics to the resources it was replacing and provided a reasonable basis to estimate the costs the Company could expect to replace those exact resources. If the Company had other bids from directly comparable resources, it would have used them, but it did not have them. Company witness Blumenstock's rebuttal testimony also demonstrated that Staff's alternative methodology, when properly inflated to the first year of the analysis period, produced a comparable replacement power cost and that, if anything, the Company's estimate was conservative. 3 TR 78-79. The ALJ's labeling of the Company's replacement power cost estimate as "problematic" was entirely unwarranted, particularly since it had no material impact on the analysis.

b. **Substation Relocation and Upgrade Costs**

The ALJ concluded that the Company's expected substation relocation and upgrade costs associated with the hydro plants should be included in the sale scenario based on his claim that "[t]he relocation costs appear to arise solely from the sale to a third party." PFD, page 37. But that claim is directly contradicted by the testimony of Company witness Blumenstock who explained that "[t]hese upgrades and relocations are necessary and would have eventually been completed in the future when making any substantial upgrades to the interconnection substations . . . ." 3 TR 90. Mr. Blumenstock explained that the sale only "expedited" the timing of the upgrades and relocation work. 3 TR 90. The ALJ acknowledged Mr. Blumenstock's testimony on this point, but claimed that he "provided no timeframe or evidence showing such upgrades were imminent or likely at any time in the near future." PFD, page 37. That reasoning is irrelevant. A cost need not be "imminent" in order for it to be a cost that the Company would incur regardless of the sale. Mr. Blumenstock did not provide a timeframe for the eventual work because the Company does not yet know when the work would occur if not for the sale. That does not change the reality that it will still be required as an appropriate cost of providing electric utility service at some point in the future even absent the sale. The ALJ's conclusion to the contrary is incorrect.

The substation relocation and upgrade costs have only a nominal impact on the sale scenario analysis, so including them in the business case analysis would not change the result that the sale scenario is still the lowest cost option for customers. Ordinarily, then, there would be no reason to argue about the issue in this case. However, the effort to include the costs in the business case here is likely to a set up to claim that Consumers Energy should not be allowed to recover the costs of those relocations and upgrades in a future electric rate case. Therefore, it is important to reiterate that the Company would have incurred these costs eventually regardless of whether it sold the plants. The Commission should not foreclose the Company's opportunity to present these costs in a future rate case where an appropriate record supporting the costs can be considered.

c. <u>Disaggregated Analysis</u>

MHRC witness Douglas B. Jester proposed that the business case analysis should have been done on a disaggregated basis to evaluate whether the sale was reasonable on a plant-by-plant basis. 3 TR 607-614. Company witness Blumenstock rebutted that recommendation, testifying that (i) there are a number of technical reasons why individual sale of the dams would not make sense due to economies of scale and shared fixed costs, (ii) the dams on the same river systems operate in concert and requires coordination that would be difficult to achieve with separate owners, and (iii) the complexity of the transaction and limited time make separate sales practically infeasible. See Consumers Energy's Initial Brief, pages 47-49, for a more detailed discussion. Although the ALJ agreed that Consumers Energy's concerns were valid, he nevertheless concluded that "Mr. Jester's modeling should be considered, with appropriate attention to the strengths and limitations of an approach that disaggregates the economic data" because the ALJ believes that evaluating the dams individually "has benefits and provides useful insights into each dam's economics." PFD, page 38. The Commission should reject that recommendation and give no weight at all to Mr. Jester's proposed disaggregated analysis.

The ALJ did not explain what "benefits" or "useful insights" Mr. Jester's analysis would provide given that it has no practical feasibility. For all of the reasons provided by Mr. Blumenstock, the dams cannot reasonably be sold individually. Furthermore, the entire purpose of this proceeding is to consider the sale that Consumers Energy has negotiated and for which it currently seeks approval. This is not an open-ended proceeding to consider other sales transactions that hypothetically could occur. Consideration of Mr. Jester's disaggregated business case analysis can only confuse the issues in this case and provides no insight into the merits of whether to approve or deny this specific transaction. The Commission should disregard Mr. Jester's disaggregated analysis.

3. Decommissioning Scenario

The bulk of the ALJ's criticisms of the Company's business case relate to the decommissioning scenario. As noted previously, the ALJ concluded that the decommissioning scenario involved "an exceptionally high degree of uncertainty." PFD, page 83. He further claimed that the Company's decommissioning estimates are "likely materially overstated." PFD, page 83. Much of the problem with his analysis and his conclusions is explained by the arbitrary and unreasonable standard that he applied to his analysis as discussed above. Applying the correct standard for evaluating the Company's business case alone is sufficient to show that his conclusions are unwarranted. In addition, the Company addresses other specific defects with the ALJ's analysis of the decommissioning scenario in the following sections of these Exceptions.

a. Owner's Costs and Environmental Risk Adder

In order to develop the final estimate of decommissioning costs for the Company's decommissioning scenario, Consumers Energy applied an additional 40% factor (hereafter referred to as "Owner's Costs") to WSP's estimates of decommissioning costs "to account for Company overheads, engineering services, required studies, permitting, internal project management, legal fees, etc.," which was necessary to "reflect the full scope of project execution." 3 TR 62. The Company also added additional costs to WSP's estimates (hereafter referred to as the "Environmental Risk Adder") to account for site-specific environmental uncertainties not fully accounted for in WSP's estimates. 3 TR 62.

The ALJ concluded that the Company's Owner's Cost "lack[ed] adequate support in the record." PFD, page 69. The ALJ was somewhat more receptive to the Environmental Risk Adder, stating that it "is not without some merit;" but, the ALJ nevertheless similarly concluded that the

Company's Environmental Risk Adder had "limited support" and that there were "several questionable aspects that warrant significant caution in their consideration." PFD, page 71. Accordingly, the ALJ recommended that the full amount of those adders should not be considered in the decommissioning scenario. These criticisms are without merit and the ALJ's recommendation should be rejected.

With respect to the Owner's Cost, the ALJ acknowledged that the Company justified the 40% Owner's Cost adder in a discovery response to ABATE. PFD, page 70; see Exhibit AB-3, pages 4-5. However, the ALJ claims that the Company's response to ABATE was "not completely satisfying" because WSP had already included 25.5% in its own estimate for some of the costs included in the Company's Owner's Cost adder. PFD, page 70. The ALJ apparently failed to fully and carefully review the information provided in Exhibit AB-3. The Company's discovery response in Exhibit AB-3 included specific percentages of cost that the Company typically incurs for several categories of costs that are included in the Owner's Cost adder. These are: (i) Internal Loadings (which range from 15% to 25%), (ii) Project Management and Support (which range from 5% to 15%), (iii) Owner's Engineer Costs (which range from 3% to 7%), (iv) Legal Fees (which range from 5% to 10%), and (v) Contingency (which ranges from 30% to 50% when the project estimate is a Class 5 engineering estimate). Exhibit AB-3, page 4-5. That means that the total impact from those five categories adds costs that range from 48% to 107% of the project estimate. Because WSP only added 25.5% for those costs, it understated those potential costs by somewhere from 22.5% to 81.5%. Even if we assume that decommissioning in this case will involve only the average of the cost range for each of the five cost categories in the Owner's Cost, it would require an adder of 77.5% (the average of 48% and 107%), which clearly demonstrates that WSP's 25.5% adder was insufficient. These costs could have justified an additional adder by the Company of 52% for Owner's Costs, but the Company conservatively elected to add only 40% more. The Company's Owner's Cost adder is very reasonable.

The Company explained that its determination of the Owner's Cost adder was also supported by recent decommissioning experience. The ALJ also critiqued that claim because, he claimed, the recent experience was "apparently based upon forecasted, indirect costs for the Karn and Campbell plant retirements, not actual data." PFD, page 70. That claim is not entirely accurate as it appears that the ALJ once again failed to carefully review the evidence in the record. Exhibit AB-14, page 1, clearly states that the decommissioning work at D.E. Karn ("Karn") is "substantially complete." That means that, at least for Karn, the "recent experience" that informed the Company's assessment of the Owner's Cost estimates as they relate to decommissioning projects is largely historical and actual experience. The "recent experience" related to J.H. Campbell ("Campbell") is admittedly still based on estimates, but even then, they are estimates from a decommissioning project at a much more advanced stage of engineering and planning than the estimates provided by WSP for the hydro facilities, which means they are more reliable and have a lower range of potential error. There is no merit to the ALJ's criticism of the Company's Owner's Cost estimate.

With respect to the Environmental Risk Adder, the ALJ expressed concern about two "issues" with the analysis used by the Company to develop those cost adders. First, [Begin Confidential] [redacted]

[redacted] [End Confidential] PFD, page 73. Both of those issues reflect the ALJ's lack of personal knowledge of engineering concepts related to dam removal work, not any defect in the analysis. That is not a reasonable or proper basis for assuming that the Company's Environmental Risk Adder is "questionable."

As an example of the first "issue," [Begin Confidential] [redacted] [End Confidential] PFD, page 73. Nowhere in the Company's testimony or analysis did anyone state that [Begin Confidential] [redacted] [End Confidential]

The record in this case provides other key information that offers insights into why [Begin Confidential] [redacted] [End Confidential] More notably, the record shows that there is a unique relationship between the Loud

Dam and the Five Channels Dam. Five Channels reservoir backs up to the Loud Dam's tailwaters. Exhibit A-8, page 60. In other words, Loud Dam controls the flow of water into the Five Channels reservoir and even has the capacity to determine whether Five Channels has any meaningful reservoir. [Begin Confidential] [redacted] [End Confidential] It does not necessarily require a full engineering degree to recognize that there is information in the record that could help explain [Begin Confidential] [redacted] [End Confidential] between those two dams.

Consumers Energy does not dispute that [Begin Confidential] [redacted] [End Confidential]

With respect to the second "issue," the ALJ mostly points out that he does not understand the engineering significance of [Begin Confidential] [redacted] [End Confidential]

Too often, the ALJ chose to speculate where his personal knowledge of dam removal engineering was deficient. For example, the ALJ speculated that [Begin Confidential] [redacted]

[redacted] [End Confidential] However, there was once again information in the record that could have helped to clear up the ALJ's confusion and prevented his undue, unsupported, and incorrect speculation. Exhibit A-9 also lists the storage volume of the 13 hydro plants. Using Mio Dam as an example, Exhibit A-9, page 11, lists [Begin Confidential] [redacted] [End Confidential] 6,061 acre-feet of storage volume [Begin Confidential] [redacted] [End Confidential] under the "Storage" column for the Mio Dam. However, Exhibit A-9 contains an additional critical piece of information. It shows that the storage volume being reported is the "gross storage" volume of the dam. Gross storage represents the total volume of water that the reservoir can hold when it is full. But, *net storage* represents the usable volume that a dam can hold, i.e., the proportion of the gross storage volume that can actually be used for the dam's intended purpose, in this case for hydropower generation. Although the net storage volume is not listed in any of the exhibits, it is more reasonable to conclude that [Begin Confidential] [redacted] [End Confidential] There is no basis for the ALJ's speculation, particularly because – once again – no expert witness in this case challenged the legitimacy or the veracity of those aspects of the Company's development of its Environmental Risk Adder.

Public utility regulatory proceedings frequently involve complex engineering issues and analyses. Consumers Energy is sympathetic to the fact that ALJs are lawyers and are unlikely to have the background education and experience necessary to independently interpret and understand all of the engineering materials that support a contested issue in a utility regulatory proceeding. However, like any other type of litigation, the adversarial process in MPSC proceedings is designed to ensure that all relevant and genuine issues are brought to the forefront of a case by opposing engineers or other professionals with pertinent experience. If there is a legitimate issue with the engineering data supplied by the utility or another party, the opposing parties have the requisite motive to identify it. It is improper for an ALJ to insert himself into the role of advocate on technical issues where he lacks the expertise to be certain that his advocacy is scientifically and operationally sound.

Likewise, it would be logistically impractical to expect that every aspect of every engineering analysis having any bearing on a utility regulatory proceeding can be fully broken down into layman terms in every detail even when no other party contests the validity of the particular analysis. The ALJ must trust the process to some extent. As the Commission has said, "As a general rule, testimony given by a witness to a fact within his or her own knowledge that is not itself improbable or in conflict with other evidence is to be believed and may not be arbitrarily disregarded or rejected." MPSC Case No. U-7785-R, June 16, 1987 Opinion and Order, page 18 (citing Am Jur 2d, Evidence, §§ 1083-1084 and *Boudeman v Arnold*, 200 Mich 162; 166 NW 985 (1918)). Furthermore, the Michigan Supreme Court has recognized that evidence proffered by certain experts, including engineers, is to be "carefully considered" and is "entitled to be given great weight" because of their professional competence. *Nat'l-Std Co v Dep't of Treasury*, 384 Mich 184, 194; 180 NW2d 764 (1970). This is not to say that all evidence offered by an expert witness, even if it is uncontradicted, must be automatically accepted where other record evidence provides valid reasons to doubt it. See, e.g., *Vial v Vial*, 369 Mich 534, 536; 120 NW2d 249 (1963). But, like this case, where the evidence has been reviewed by opposing engineers and other opposing expert witnesses and has not been challenged as incorrect or defective, the mere fact that the ALJ does not independently understand it is not a proper basis to dismiss it.

The ALJ has provided no proper justification for recommending that the Commission apply less than the full amount of the Owner's Cost adder and the Environmental Risk Adder proposed by Consumers Energy to derive the final forecasted decommissioning cost used in the decommissioning scenario. The Commission should reject the PFD's recommendation on this issue and use the Company's forecasted values to evaluate the cost of the decommissioning scenario relative to the sale scenario.

b. Sediment Management and Remediation Costs

(i.) Available Data on Sediment Volumes and Contamination

One of the most significant costs included in WSP's estimate for decommissioning is for the management and removal of sediments, including contaminated sediments. See Exhibit A-9, *passim*. To develop the estimated costs for sediment management and removal, WSP also required estimates of the sediment volumes and characterization of the sediment at each dam. WSP stated that "information related to sediment volumes and characterization are estimated and assumed based on watershed research for potential hazardous contamination." Exhibit A-9, page 14; see also Exhibit DNR-38, pages 1-2 (where the Company details how WSP performed that research). The development of the WSP sediment volumes estimates can be traced back to a 2021 Mead & Hunt decommissioning study for the Company's hydro plants and ultimately back to a 1991 study performed by Lawler, Matusky, and Skelly Engineers ("Lawler"). 3 TR 559-560. The Lawler study used estimated reservoir fill rates based mostly on sediment transport and bank erosion studies to estimate sediment loading rates for most of the Company's dams. 3 TR 560.

Although MHRC witness Martin Melchior argued that the Lawler method is not the best sediment volume estimation methodology for "dam removal design," he admitted that the method is "used in hydropower management." 3 TR 561. That is exactly how Consumers Energy is using them in this case. The WSP decommissioning studies were not meant to achieve "dam removal design." Consumers Energy is not proposing to start dredging tomorrow or potentially ever. The Company's current decision about whether to sell, decommission, or relicense the hydro plants is a "hydropower management" decision. Therefore, even Mr. Melchior's testimony – which strenuously argues against the Company's decommissioning analysis – actually supports the conclusion that the Lawler methodology was sufficient for the purposes it was used for in this case and provided a reasonable basis for WSP's cost estimates for sediment management and removal work for decommissioning the plants.

Certain parties in the case argued that the Company could have developed more precise information regarding the volume of sediment and the extent of contamination by performing comprehensive testing of the sediment at the 13 hydro plants including probing and coresampling. See, e.g., 3 TR 445, 560. However, data collection to develop a more certain estimate of sediment volumes and contaminant levels would take several years to complete (approximately 1.5 to 3 years). 3 TR 100. The Company and the Commission do not have the time to perform that type of more detailed estimation of the sediment volumes and level of contamination present. The decision about whether to sell or decommission the plants has to be made now. Furthermore, that type of testing would cost millions of dollars (up to approximately \$6.9 million). See Consumers Energy's Reply Brief, pages 33-35. The Commission has already been reluctant to allow

Consumers Energy to incur any significant costs for the hydro plants given the uncertainty of their future operations and the possibility of sale. See MPSC Case No. U-21389, March 1, 2024 Order, pages 66-67. It would not have been reasonable for Consumers Energy to spend the time (which it did not have) or the money to perform that level of potentially unneeded analysis and engineering at this stage.

The WSP decommissioning studies represent Class-5 estimates under the Association for the Advancement of Cost Engineering's ("AACE") classification system. See, e.g., Exhibit A-9, page 16. WSP states that this means they are "rough order of magnitude" estimates "used for the initial screening projects for capital expenditure planning." See, e.g., Exhibit A-9, page 16. Again, that's precisely what Mr. Blumenstock's business case analysis in this case is meant to provide: an initial screening for capital expenditure planning so that a reasonably informed decision can be made between three alternative options.

Despite this, the ALJ concluded that there are "significant uncertainties" regarding the volume of sedimentation and the extent of any contaminated sediment and that the WSP estimates of the sediment management and removal costs are "likely to be overstated." PFD, page 75. The ALJ mainly[2] cites his doubts about the Lawler methodology as support for his claim that the WSP's sedimentation volume estimates are "uncertain." PFD, page 76. The ALJ adopted the viewpoint of the opposing parties that, because "physical sampling would yield far more accurate sedimentation estimates based upon present conditions rather than reservoir fill estimates," the

[2] As an aside, the ALJ also criticized the Company's observation in its Initial Brief that there was some sediment sampling from the dams taken about a decade ago and that "it is reasonable to conclude that if [WSP's] studies [from Lawler] were wildly inconsistent with the sampling data in the Company's possession, that information would have been noted." PFD, page 77; referring to Consumers Energy's Initial Brief, page 19. The ALJ claimed that was not a reasonable conclusion because there was no indication WSP was aware of the samples. That reasoning completely ignores the fact that *Consumers Energy* is (and was) aware of the samples. If the Company observed a discrepancy in the data it had and the WSP decommissioning study, it **is** reasonable to conclude it would have been noted. The whole point of hiring WSP was to acquire an objective and accurate evaluation of the best and most cost-effective disposition of the hydro plants following the Commission's urging in Case No. U-21224 and subsequent cases.

Lawler analysis should be rejected. In doing so, the ALJ ignored the Company's explanation that the time and cost of such physical sampling is prohibitive under the circumstances of this case.

Instead, the ALJ focused on – and attempts to refute – Mr. Blumenstock's rebuttal testimony that it would be "premature to fully engineer a decommissioning plan and all related activities that may not occur for many decades and may never occur under Consumers Energy's ownership." PFD, pages 78-79; referring to 3 TR 100. The ALJ calls Mr. Blumenstock's testimony a "false dichotomy" and claims that the Company "seems to ignore the possibility of intermediate steps [between fully engineering a ready-to-implement decommissioning plan or relying on WSP's preliminary estimates], such as conducting any sediment sampling or contaminant testing to improve the reliability of its estimates without fully engineering a final decommissioning plan." PFD, page 78. The ALJ fails to appreciate that the most significant cost for fully engineering the decommissioning plan is the cost of the sediment volume and characterization testing. His "solution" is not a solution. Again, the kind of physical testing that the opposing parties and the ALJ propose would take years and cost millions of dollars – and it is <u>not necessary to inform a *reasonable* decision in this case</u>.

Again, Consumers Energy does not dispute that the actual volume and character of the sediment deposits at the 13 hydro plants remains subject to some uncertainty. As previously discussed, the Company has obtained the best information that is *reasonably* available within the existing time and cost constraints. That information – while not perfect – is sufficient to make a *reasonable* decision about the broader question of whether it is likely less costly to sell the hydro plants or to decommission them. The ALJ has made the perfect the enemy of the good – as the saying goes. As discussed in more detail above, the ALJ applies the wrong standard to evaluate the Company's request for approval in this case.

Even more concerning is the ALJ's conclusion that WSP's sediment management and removal costs are "likely" to be overstated. To reasonably support a claim about what costs are "likely" *at these specific dams* would require some affirmative and contradictory evidence about the *costs at these specific dams*. No such evidence exists in this case. Certain witnesses in this case (mainly for MHRC and DNR) have offered speculation about how and why the costs at these dams *might* be lower than WSP's estimates based on their experience with *other* dam removal projects *that have not been shown to be comparable* to the removal of Consumers Energy's 13 hydro plants. In fact, the few specific examples of other dam projects identified by those witness are clearly *dissimilar* to Consumers Energy's dams in material ways. See Consumers Energy's Reply Brief, pages 25-26. Even MHRC witness Melchior – who ardently opposed WSP's estimates of the dam decommissioning costs in this case – testified that the Commission should consider the decommissioning costs as a range from $770 million to $3.1 billion. 3 TR 576. WSP's estimate of decommissioning cost of $1.542 billion (Exhibit A-8) falls at only the thirty-third percentile of the range of costs identified by Mr. Melchior. 3 TR 113. Given that record evidence, there is just no valid basis for claiming that the cost of the decommissioning is "likely" to be less than WSP's estimate. Even the Company's opponents in this case admit it *could* be considerably more. The ALJ's claims that the Company's decommissioning costs are "likely to be overstated" should be rejected.

(ii.) <u>Allegedly Non-Standard Work</u>

The ALJ also claims that the intervening parties presented "substantial testimony showing that the Company's decommissioning costs included several assumptions, practices, or measures that are usually unnecessary, atypical, or otherwise are not standard practice for dam removals." PFD, page 79. The ALJ accepted DNR witness Trumble's argument that the estimated costs of these practices should be excluded from the decommissioning scenario to "make it more consistent with typical Michigan dam removals." PFD, page 79. The Commission should reject this recommendation for two main reasons.

First, the bulk of the costs for allegedly "non-standard" or "atypical" work relates directly to the sediment management and removal issues discussed above. DNR witness Lucas A. Trumble identified the following allegedly "non-standard" work in his testimony: "hydraulic dredging of the former stream channel prior to drawdown;" "dredging of the entire or large portions of the drained reservoirs without first accurately quantifying the volume of sediment that has deposited;" "removal and offsite disposal of large volumes of presumed contaminated sediments without first performing sediment quality analyses;" and "very large grading costs for the entire reservoir area." 3 TR 444. All of those line items are heavily contingent on the volume and characterization of the sediment at the dams. For the most part, this is not a separate issue from the sediment issues discussed above. They are the same issue presented a different way.

The remaining line items that Mr. Trumble identified as allegedly "non-standard" work, such as the amount of seeding and planting included in WSP's decommissioning cost estimates (see 3 TR 444), would have a relatively small impact on the overall decommissioning estimate – even if they were completely eliminated – which Mr. Trumble did not suggest was necessary. For example, the seeding and planting costs included in WSP's cost estimate total approximately $79 million for all 13 hydro plants (compared to WSP's total decommissioning cost estimate of $1.539 billion). See Exhibit A-9, pages 87, 104, 120, 137, 154, 170, 207, 248, 260, 316, 329, 342, and 379. Even if the Company eliminated all of its seeding and planting costs (which is clearly not realistic) from the decommissioning estimates, that amount represents only 5.1% of WSP's total decommissioning costs and 4.4% of the Company's Net Present Value ("NPV") for its Base case for its decommissioning costs after accounting for Consumers Energy's adders (see Exhibit A-7).

Second – and most important – the fact that the work identified in WSP's decommissioning cost estimate may not be consistent with "typical Michigan dam removals" is not a valid reason to dismiss the validity of WSP's estimates. According to MHRC's own exhibit, "[d]am height was the strongest predictor of removal costs, followed by average annual discharge, project complexity, and drainage area." See Exhibit MHRC-37, page 10. The study further stated that "[r]egional removal costs did not show any strong relationships except for the Southwest, where removal costs tended to be lower." Exhibit MHRC-37, page 10. As Mr. Blumenstock explained in discovery: "[E]ven if another dam was decommissioned in Michigan, it may not be a good comparator to Consumers Energy's dam removal if the dam was materially different in size, construction, located on a materially different river system or location, involved materially different sediment management requirements, etc." Exhibit DNR-36, page 7. In order for the ALJ's reasoning to be valid, it would first be necessary to show that Consumers Energy's 13 hydro plants are materially similar to other "typical Michigan dam removals," but no witness made such a showing. Although DNR, in particular, attempts to compare Consumers Energy's decommissioning cost estimates broadly to the costs of a small number of other dams decommissioned in Michigan, DNR makes no effort to show that those dams are comparable in size, construction, river system, or sediment management requirements.

The only specific dam removal project in Michigan that DNR witness Trumble discussed was the Boyne Falls Dam project, which Mr. Trumble held out as "consistent with what I typically would expect to see for a dam removal project in Michigan." 3 TR 446. But, Boyne Falls Dam was only 23 feet in height, had an impoundment of only 7 acres at the time of its removal, and had a storage volume that was so negligible that it wasn't even identified in the dam removal design document other than to say that the water depth was "very shallow with the average depth observed during the field investigation in 2025 to be about 0.62 feet at accessible areas of the impoundment." Exhibit DNR-28, pages 9 and 11. The dam removal design document for the Boyne Falls Dam didn't identify the drainage area of the dam, but it did note that the entire South Branch of the Boyne River (where the dam was located) had a watershed of only 72 square miles, which necessarily means that the Boyne Falls Dam's drainage area was less than that. See Exhibit DNR-28, page 11. Hence, the Boyne Falls Dam was <u>significantly</u> smaller than the *smallest* of Consumers Energy's 13 hydro facilities. Calkins Bridge Dam is Consumers Energy's smallest dam in terms of dam height at only 30 feet (see Exhibit A-9, page 179) and Five Channels Dam is Consumers Energy's smallest dam in terms of both impoundment size (212 acres) and storage capacity (3,419 acre-feet) (see Exhibit A-9, page 12). Hodenpyl Dam is Consumers Energy's smallest dam in terms of drainage area at 983 square miles. Exhibit MHRC-56, page 84. In contrast to the Boyne Falls Dam, Hardy Dam, which is – by far – the largest dam in Michigan (both currently and historically) has a dam height of 114 feet, an impoundment covering 3,902 acres, and a storage capacity of a whopping 134,973 acre-feet. Exhibit A-9, page 271. Hardy Dam has a drainage area of 1,910 square miles. Because Consumers Energy's dams are materially different than such "typical" Michigan dams that have previously been removed, Mr. Trumble's experience with previous "typical" Michigan dam removals is unhelpful for determining whether the same or different work may be necessary for removing Consumers Energy's dams.

In addition to Mr. Trumble's discussion of a "typical" Michigan dam removal project, DNR witness Jessica L. Mistak and MHRC witness Melchior attempted to compare WSP's decommissioning estimates to the Boardman River Dams removal project in Michigan. Ms. Mistak discussed the removal of the Boardman River Dams in terms of cost comparability to WSP's estimates but did not specifically discuss whether the types of work performed at those dams was comparable in any respect to the work that WSP estimated would be required for decommissioning at Consumers Energy's dams. See 3 TR 420. MHRC witness Melchior identified certain work included in the WSP estimates for Consumers Energy's dams and contrasted it to the work to remove the dams on the Boardman River in Michigan. See 3 TR 568-569, 575, 580. In particular, Mr. Melchior compared the sediment management and dredging activities for the Boardman River Dam removal project to WSP's estimates for those sedimentation-related activities, implying that WSP's estimates may be overstated. 3 TR 575, 580. However, once again, neither witness offered any details to demonstrate that the dams on the Boardman River were actually comparable to Consumers Energy's dams. They were not.

Although the dam height of two of three Boardman Dams was similar to some of Consumers Energy's intermediate sized dams,[3] the Boardman River Dams were not comparable to Consumers Energy's dams at all in at least one important respect: drainage area. The drainage area of a dam is important because drainage area represents the portion of the river's watershed that is upstream of the dam. The more drainage area a dam has, the more sedimentation can flow to the dam as water flows over the watershed land into the river.

In the FERC order approving the conditional surrender of the operating licenses for the Boardman River Dams, the drainage areas for the three Boardman River Dams were identified as

[3] Exhibit DNR-26, page 45, lists the dam height for the Boardman Dam and the Brown Bridge Dam (the two largest of the Boardman River Dams) as 59 feet and 46 feet, respectively. Those are similar in height to Consumers Energy's Alcona Dam (60 feet), Foote Dam (55 feet), Croton Dam (53 feet), Cooke Dam (50 feet), Rogers Dam (48 feet), and Five Channels Dam (45 feet). See Exhibit A-9, pages 12-13, 272. The Sabin Dam, which is the smallest of the Boardman River Dams, had a dam height of only 21 feet (Exhibit DNR-26, page 47), which is smaller than the smallest Consumers Energy dam in terms of dam height, i.e. the Calkins Bridge Dam at 30 feet (Exhibit A-9, page 179).

269 square miles (Sabin Dam), 267 square miles (Boardman Dam) and 151 square miles (Brown Bridge Dam). 114 FERC ¶ 62,274, issued March 17, 2006, pages 4-5. In contrast, the smallest drainage area among Consumers Energy's dams is at the Hodenpyl Dam, which has a drainage area of 983 square miles (Exhibit MHRC-56, page 84) – nearly four times the size of the Sabin Dam. Consumers Energy's entire fleet of 13 dams has an average drainage area of 1,666 square miles (see Exhibit MHRC-56, pages 31, 49, 65, 84, 104, 123, 141, 159, 176, 193, 208, 225, and 240), which is <u>more than six times greater than the largest of the Boardman River Dams</u>. The amount of land contributing sedimentation to Consumers Energy's dams <u>dwarfs</u> the land area contributing sedimentation to the Boardman River Dams. Therefore, it should be unsurprising that the Boardman River Dams experienced less necessary sediment management work and lower sedimentation-related costs than WSP projected for Consumers Energy's dams. Once again, if the Boardman River Dams are meant to represent the "typical" decommissioning experience in Michigan, then Consumers Energy's dams are clearly "atypical." Like the Boyne Falls Dam, the Boardman River Dams were also not appropriately comparable to Consumers Energy's dams.

MHRC witness Melchior only identified two other decommissioning tasks where he compared WSP's estimates to the same work at the Boardman River Dams. With respect to grade control work, which WSP has included in the Consumers Energy decommissioning estimates, Mr. Melchior acknowledged that such grade control work *was* needed at two of the three Boardman River Dams. 3 TR 568. This supports that WSP's assessment of the need for the grade control work could be perfectly reasonable. With respect to the use of riprap for bank stabilization, Mr. Melchior questioned whether WSP's estimate of the amount of riprap needed (15%-20% of the restored channels) was accurate by comparing it to the amount of riprap used for the Boardman River Dam removals (3.8% of the restored channels). 3 TR 569. However, he could not conclusively say that WSP's assessment was incorrect. He acknowledged that such bank stabilization "can be warranted at some bank locations in dam removal situations," but that determining the correct amount "requires significant geomorphic and engineering analysis." 3 TR 569. Since that analysis has not been performed, Mr. Melchior could not truthfully testify that the amount of riprap estimated by WSP is not needed. In any case, the cost of riprap included is already negligible at $9.75 million for all 13 dams, which represents just 0.6% of WSP's total decommissioning cost estimate. See Exhibit A-9, pages 87, 104, 120, 137, 154, 170, 207, 248, 260, 316, 329, 342, and 379. Even if the amount were reduced to the 3.8% of restored channels implied by the Boardman River Dam removal project, it would still be necessary to spend at least $1.85 million (where $9.75 million/20 percent = $1.85 million/3.8 percent) to $2.47 million (where $9.75 million/15 percent = $2.47 million/3.8 percent) for riprap.

In reality, there are few dams in the United States, much less in Michigan, that are comparable to Consumers Energy's Muskegon River Dams (Hardy, Rogers, and Croton), for example. Some of the best comparators to the Muskegon Dams, that were only briefly mentioned by one opposing witness (See 3 TR 521), are the Klamath River Dams in California that were removed in 2023 and 2024. See Exhibit DNR-26, page 45. Although the parties carefully avoided discussing the comparability of the Klamath River Dam removal project to WSP's decommissioning cost estimates, the FERC order approving the partial license transfer to the entity that would perform the decommissioning project noted a total project cost of $445.575 million, and the FERC order approving the surrender of the license and removal of the facilities noted proposed funding for the decommissioning project of $450 million. See 172 FERC ¶ 61,062, issued July 16, 2020 (para. 52); 181 FERC ¶ 61,122, issued November 17, 2022, Para. 75. Inflated to 2026 levels, those costs would be about $506 million in today's dollars, which is very comparable to WSP's estimate for the Muskegon River Dams (approximately $503 million). See Exhibit A-9, pages 316, 329, and 342.

While the ALJ failed to fully acknowledge it, WSP has specific experience engineering, designing, and managing dam decommissioning projects, including extensive experience as "the lead environmental and engineering contractor supporting FERC's Office of Energy Projects." Exhibit MHRC-82, page 2. In that capacity, WSP assists the FERC Division of Hydropower Licensing and the FERC Division of Hydropower Administration and Compliance in "regulation of hydropower facilities throughout the United States." Exhibit MHRC-82, page 2. That work includes the preparation of numerous National Environmental Policy Act ("NEPA") documents for FERC addressing "the effects of license surrenders on sediment transport, aquatic habitat, anadromous fish passage, terrestrial habitat, invasive species, recreation, aesthetics, socioeconomics, and cultural resources." Exhibit MHRC-82, page 3. WSP is frequently called upon through this work to address "the potential for the release of contaminated sediments, barriers to movement of aquatic species, ground disturbance associated with the decommissioning and deconstruction of project facilities, removal of cultural resources from federal protection, conflicting preferences of still water vs flowing water recreation activities, and conversion of lakefront properties to a riverine system." Exhibit MHRC-82, page 3. Finally, as part of its analysis for FERC, WSP is frequently in a position to recommend "environmental protection, mitigation, and enhancement measures to adequately protect or minimize adverse effects on environmental and economic resources." Exhibit MHRC-82, page 3. That also means that WSP is uniquely qualified to know and understand what FERC's expectations for sediment management and river restoration are. See Exhibit MHRC-82.

In other words, WSP has extensive experience with *FERC's* "typical" expectations for sediment management and removal requirements, which may be very different than Mr. Trumble's, Ms. Mistak's, and Mr. Melchior's experience with the "typical" Michigan small dam removal project. In WSP's expert opinion, the allegedly "non-standard" work that the DNR and MHRC witnesses and the ALJ criticized is likely to be necessary. Failure to include those cost risks in the decommissioning analysis will very likely understate the true cost of decommissioning and could result in the Commission erroneously rejecting a good sale to Confluence that would save customers money in the long run.

There is no merit to the ALJ's conclusion that the "typical" Michigan decommissioning examples offered by certain witnesses constituted compelling evidence that "the Company's decommissioning costs included several assumptions, practices, or measures that are usually unnecessary, atypical, or otherwise are not standard practice for dam removals." The witnesses failed to show that their "typical" practices were at comparable dams to Consumers Energy, and the record overwhelmingly shows that those dams were not comparable. The Commission should reject the ALJ's invitation to discredit WSP's decommissioning cost estimates on this basis.

c. <u>USGS Alternative Decommissioning Cost Estimate</u>

MHRC witnesses Melchior and Jester propose an "alternative" decommissioning estimate based on using U.S. Geological Survey ("USGS") information (and related publicly available watershed/sediment data) as a proxy to "approximate potential cost to remove the Consumers Energy dams." 3 TR 581. Consumers Energy responded that the Commission should reject MHRC's USGS-based proposal because it is not a complete, engineering-based substitute for WSP's planning-level estimate and it would inappropriately treat generalized public data as a stand in for the site-specific conditions that drive dam-removal costs. See Consumers Energy's Initial Brief, page 34. To his credit, the ALJ acknowledged that Consumers Energy has a valid point "that the USGS model results using generalized public data from past dam removals are not a substitute for site-specific conditions that drive dam removal costs." PFD, page 81. Nevertheless, the ALJ concluded that the results from the USGS model should be treated "as a reference point rather than as an estimate of actual decommissioning costs." PFD, page 82. He also tried to liken Consumers Energy's sediment volume estimates to the USGS data, characterizing them as "speculative estimates" because the Company did not use actual sampling of site-specific sediment volumes or contamination levels. PFD, page 81. The ALJ's reasoning is without merit.

The ALJ's recommendation to use the USGS model as a "reference point" suffers from the same flaw as discussed above regarding the use of allegedly "typical" Michigan decommissioning cases as a comparison to WSP's estimates. The reference point is useless if it doesn't compare comparable dam removal projects. Mr. Blumenstock testified:

> The USGS study data source contains 668 decommissioning instances, many of which are much smaller than the Company's facilities and are not FERC regulated. Only a small subset of the instances is comparable to the Company's river hydro fleet. There are only five that are within the range of the Company's portfolio for dam heights in Michigan. There are only 31 that would be similar for dam heights to the Company's portfolio. The most expensive removals of the larger structures do not have contaminated sediments or mechanical removal of sediments, the very cost item that drove up the decommissioning estimates. [3 TR 113-114.]

In short, the USGS model is composed mostly of non-comparable dam removal projects. Furthermore, the authors that produced the USGS model stated in their related study that "[e]rrors between predicted and actual costs were larger for larger sized and more expensive dam removal projects." Exhibit MHRC-37, page 10. As Mr. Blumenstock observed, that means the tool is "not suitable for predicting decommissioning costs for the Company's river hydro facilities" since Consumers Energy's hydro facilities are larger than most of the dams included in the USGS database. 3 TR 114. Mr. Blumenstock also noted that the model has a low statistical accuracy at only an R^2 regression value of 0.57, meaning that the model only explains 57% of the variance observed in the data. See 3 TR 113. Critically, the authors that produced the USGS model admitted in their related study that they "surmise that in most cases, the cost data represent an underestimate of the true and total cost of dam removal." Exhibit MHRC-37, page 13. That is not a recipe for a meaningful "reference point" to evaluate WSP's cost estimates.

As to the ALJ's comparison of the USGS data to the sedimentation data used in the WSP decommissioning estimates, it is a false equivalence. The USGS data has no relationship to Consumers Energy's dams at all. In contrast, the Lawler methodology used site-specific data from the Consumers Energy dam sites to calculate the volume of sediment expected to be deposited over time. The Lawler methodology relied on sediment loading rates for each of the dams individually, which were themselves calculated using sediment transport and bank erosion studies that were specific to each dam. Exhibit MHRC-30, pages 3-4. It also used the dry bulk density of the inflowing sediment to each particular dam, which was calculated based on the sediment transport rate at each dam determined in the earlier study. Exhibit MHRC-30, page 4. Contrary to the ALJ's claim, the Lawler methodology was a site-specific analysis even though it did not use the ALJ's preferred methodology of direct sampling sedimentation at each site. The ALJ's attempt to equate the Lawler data to the USGS data must be rejected because it is demonstrably false.

d. Partial or Non-Power Decommissioning

Finally with respect to the Company's decommissioning scenario, the ALJ concluded that the Company's analysis was "incomplete" because, in the ALJ's view, the Company did not meaningfully assess a partial decommissioning scenario or a non-power decommissioning scenario. PFD, page 112. The ALJ also claimed that there is a "possibility under state law that local communities could assume ownership [of the dams] by establishing a special assessment district to fund maintenance of a dam." PFD, page 111. Neither argument has merit.

As the Company explained in its Initial Brief, partial or non-power decommissioning options require Consumers Energy to continue to bear substantial financial obligations post-decommissioning for assets that would no longer be used or useful to provide electric utility service to customers. See Consumers Energy's Initial Brief, pages 24-29. Those future costs would essentially be the same costs as required in the relicensing scenario because, as a responsible dam owner, Consumers Energy would still have to address all of the same safety concerns that exist if the Company intended to continue operating the plants for power generation. If those costs cannot be justified by the modest amount of energy and capacity that the plants would produce as generation units, then the same costs can certainly not be justified by plants that produce nothing. Company witness Blumenstock was unequivocally clear: "Consumers Energy will not consider or pursue a non-power partial decommissioning approach." 3 TR 96.

Furthermore, Consumers Energy does not have unilateral control to determine whether it will decommission using an option less than full decommissioning. Exhibit DNR-26, which is a "Practitioner's Guide to Hydropower Dam Removal" jointly published by American Rivers and Hydropower Reform Coalition, notes that FERC issued a policy statement in 1995, which concluded, among other things, that FERC "has authority on which project features should be removed during decommissioning, beyond the standard removal of turbines and generators." Exhibit DNR-26, page 36 (citing 60 Fed Reg 340 (Jan. 4, 1995)). In other words, FERC has the authority to direct that a utility *must* perform full dam decommissioning and *may not* use a no-power or partial removal alternative. The MPSC does not have the authority to countermand such a directive if it were to be issued.

As to community ownership, the ALJ is not correct in opining that it is a realistic possibility. The Company has been actively soliciting interested buyers for the plants for the past three years since it issued its RFP in the summer of 2023. 3 TR 49. Despite extensive community engagement by Consumers Energy throughout the entire process (see 3 TR 255-269), only two communities indicated they had any financial ability to contribute funding toward the hydro plants on the Muskegon River, totaling $170,000. 3 TR 86. That amount is utterly insufficient to maintain the dams. Mr. Blumenstock testified that "[t]he Company has spoken with local communities about ownership, and with the exception of the Allegan community, there was no appetite for ownership." 3 TR 102. He noted that, "[i]n those same conversations, local communities cited that they had no ability or desire to raise taxes, so a special tax assessment is not a realistic or feasible path forward." 3 TR 102-103. [Begin Confidential] [redacted] [End Confidential]

More fundamentally, there is no longer time to develop such an alternative even if there was realistic financial interest or ability. This process has taken over four years to get to this point. The plants are approaching license expiration, and the Company must either sell the plants, begin making the investments that FERC expects for relicensure (or even continued licensure), or begin to decommission the plants <u>now</u>. The opportunity for community ownership has passed. There were no viable and interested takers.

The ALJ's conclusion that the Company's decommissioning analysis was "incomplete" is incorrect and should be rejected. There is also no merit to his belief that a community owner will emerge to maintain the hydro plants. There is one interested buyer who is both financially and technically capable of owning and operating these plants indefinitely into the future – Confluence. The Commission should not regard partial or non-power decommissioning scenarios or community ownership as viable options in lieu of approving the sale transaction currently before the Commission for consideration.

4. <u>Relicensing Scenario</u>

With respect to the relicensing scenario, the ALJ concluded that "significant questions remain about the Company's relicensing scenario given the questionable nature of the decommissioning costs embedded in this scenario . . . ." PFD, page 99. In other words, the ALJ's unwarranted conclusions about the decommissioning scenario also impact his conclusions about the relicensing scenario since the costs of decommissioning at some future time after relicensing are necessarily repeated in the relicensing scenario. The ALJ's incorrect conclusions about the decommissioning scenario were addressed above and need not be repeated here. Because his conclusions were invalid there, they are equally invalid as he uses those conclusions to cast doubt on the Company's relicensing scenario.

Aside from that issue, the ALJ also expressed some "uncertainties" related to the Company's forecast of capital and Operation and Maintenance ("O&M") expense in its relicensing scenario. PFD, page 99. Once again, much of the problem with his analysis and his conclusions is explained by the arbitrary and unreasonable standard that he applied to his analysis as discussed above. Applying the correct standard for evaluating the Company's business case alone is sufficient to show that his conclusions are unwarranted. But, in a sense, the discussion is entirely academic as it relates to the relicensing scenario. Despite the ALJ's unduly pessimistic conclusions regarding the elements of Consumers Energy's business case and his unwarranted embrace of unreasonable adjustments proposed by other parties, even the ALJ ultimately concluded that "any relicensing range grounded in this PFD's findings above would still likely exceed the . . . range Staff proposes for the sale and PPA." PFD, page 120. In other words, the ALJ recognized that there is no remotely plausible scenario where relicensing is the lowest cost option available. On that, at least, the Company agrees. Nevertheless, the Company addresses specific defects with the ALJ's analysis of the capital and O&M in the relicensing scenario in the following sections of these Exceptions.

a. <u>**Capital Cost Projections**</u>

With respect to the Company's forecast of capital expenditures for the hydro plants in a relicensing scenario, the ALJ agreed with Consumers Energy that some amount of capital above the amounts needed for the hydro plant relicensing overhauls was likely needed into the future, but questioned whether the $22.1 million amount developed by Consumers Energy was the appropriate amount. PFD, page 96. The ALJ also questioned whether the Company ever responded to ABATE's criticism of the escalation of certain capital costs included in WSP's estimates for future capital at the hydro plants. PFD, pages 96-97. The ALJ's concerns are unwarranted.

Regarding the first issues, the ALJ acknowledged that the $22.1 million of capital expenditures for needed investments other than the overhaul and rehabilitation work was based on a three-year average of the Company's actual capital expenditures for 2018, 2019, and 2020 that captured a typical level of capital spending before any of the overhaul work began. PFD, page 96. However, the ALJ expressed doubts about whether the average was "truly representative of past costs generally." PFD, page 96. He also questioned whether capital expenditures should be expected to continue at past levels after significant upgrades are made to overhaul the dams to achieve relicensure. PFD, page 96. Once again, the main problem with the ALJ's analysis is the standard he applies. Company witness Blumenstock testified that "applying a multi-year average is a reasonable way to capture ongoing capital for dam-safety and asset-integrity needs in the out-years." 3 TR 98. No witness challenged the reasonableness of Mr. Blumenstock's methodology for estimating a typical pre-upgrade investment level.

The Company does not dispute that neither Consumers Energy nor the Commission can know with certainty exactly how much capital the dams would require if they were relicensed and the Company continued to operate them indefinitely. But, a functional business cannot be paralyzed by uncertainty. It must make decisions based on the best available evidence at the time the decision must be made. It is possible that some plants will not require their full share of the $22.1 million in every year over the more-than-50-year time horizon captured in the relicensing scenario. But, it is equally possible that other plants will require more than their share of the $22.1 million. Over time, those variations will likely smooth out across the fleet. The estimate is not "certain," but it is reasonable. It provides sufficiently reasonable information to recognize that the relicensing scenario is more expensive than the other available options for the hydro plants and the most likely to adversely impact customer rates.

As to his question about whether the same pace of capital spending might be expected to continue after the hydro plant upgrades needed for relicensing, the answer is that the upgrades mainly address new FERC safety concerns about the plants, such as construction of new enhanced spillways. They do not generally address routine operational investments required at the plants. The hydro plants are already over a hundred years old on average. By the end of the period considered in the relicensing scenario, that average age will be well over 150 years. Even much newer plants require regular capital investments to keep them operational. Certainly, these aging plants will require additional investments comparable to the investments required while they are in their current state. Mr. Blumenstock explained these are "real, recurring needs" and that "[o]mitting these costs is not prudent for an aging hydro fleet." 3 TR 98.

Regarding the ALJ's second issue, to clarify – Mr. Blumenstock's rebuttal testimony <u>was</u> meant to address ABATE's criticism of the escalation of certain capital costs included in WSP's estimates. Mr. Blumenstock explained that "[w]here current engineering produced improved estimates, the Company replaced older WSP inputs to reflect the best available information." 3 TR 97. He further explained that "[u]sing updated engineering for known projects is therefore appropriate and consistent with WSP's own estimate guidance." 3 TR 97-98. When ABATE proposed an alternative capital estimate that resorted back to WSP's original estimates, Mr. Blumenstock explained that the Company's updated engineering "provides more current scope and cost detail than the older study values." There was no cause for the ALJ's uncertainty.

One last issue merits response in connection with the Company's capital forecasts in the relicensing scenario. The ALJ did not accept ABATE's claims that the Company would experience a 66% increase in annual energy production at the hydro plants with only a $90 million investment for upgrades. PFD, page 98; see 3 TR 352-353. The ALJ recognized that there may be "complications, operational constraints, or other factors that sharply limit the ability of generator upgrades to meaningfully increase output and reduce the costs of the relicensing scenario." PFD, page 98. However, the ALJ also believed that the Company shouldn't prematurely dismiss the idea of some possible generator upgrades "without any engineering study or economic analysis being performed." PFD, page 98. The ALJ failed to mention as part of his reasoning that the Company pointed out in its briefing that ABATE derived that $90 million investment figure by subtracting the wrong numbers in a WSP workbook. See Consumers Energy's Initial Brief, page

45. That is the crux of the problem with the ALJ's belief that the Company should perform some type of additional analysis. Company witness Blumenstock explained in rebuttal testimony that "[t]he cost to upgrade far outweighs the value of the incremental energy and capacity." 3 TR 97. That expert testimony was not speculation. Although the Company has not performed any formal engineering studies or economic analyses evaluating whether upgrade costs outweigh upgrade value, the Company is sufficiently familiar with the cost and the value that it is evident – without any formal analysis – that the "[g]enerator upgrades are not supported by compelling business cases." 3 TR 97. A formal analysis is not always required. Mr. Blumenstock was unequivocal in his expert testimony.

b. <u>O&M Expense Projections</u>

Similar to the other costs involved in the decommissioning and relicensing scenarios, the ALJ expressed undue skepticism regarding the Company's estimates of its O&M costs for the hydro plants under the relicensing scenario. The ALJ agreed with the Company's response to ABATE that there was "some justification for anticipating higher O&M costs" due to (i) higher major maintenance expected for an aging fleet and (ii) new FERC Part 12D comprehensive assessment activities plus remediation of any findings. PFD, page 97. However, he argued that the Company did not provide "specific justification" for the amount of the major maintenance increases and claimed that the Company appears to have "simply estimated" to O&M that might result from the new Part 12D requirements. PFD, page 97.

Once again, the ALJ applies an unreasonable standard to his evaluation of the record on the forecasted O&M expense. Mr. Blumenstock testified that the "near-term O&M inputs draw from current planning data 10 (e.g., long-term (10-year) financial planning)." 3 TR 99. He also pointed out that ABATE witness Brian C. Andrews did not "refute [the Company's estimates] with contrary engineering or program evidence." 3 TR 98. Although it is a somewhat indirect way to say it, Mr. Blumenstock's testimony implies that the Company's own estimates were based on "engineering or program evidence." Mr. Blumenstock explained the inputs and calculations in more detail in discovery. He explained:

> The O&M expense shown in Exhibit A-6 incorporated data from multiple sources. Initially, historical O&M expense was used to set a base level of O&M expense for each unit. This included the fixed costs for labor, materials, outside services, and support services for the sites. The LTFP was then incorporated to include known major repairs, license initiatives, and license renewal activities. Finally, the Company's hydro engineering team determined an increase in O&M expense based on the anticipated results from the recent FERC Part 12D Comprehensive Assessments. [Exhibit AB-14, page 17.]

Undoubtedly, some engineering judgment was used to arrive at the final version of the figures incorporated into the business case. The Company suspects *that* is what the ALJ was trying to get to the heart of through his skepticism of the Company's estimate. It is clear that the ALJ has difficulty with accepting that forecasted costs necessarily rely to some extent on good old-fashioned experience and professional judgement. Unfortunately, there is still no foolproof way to predict the future. That does not mean that the Company's estimates have no value and should be summarily dismissed. As with the Company's capital estimates, the O&M estimate is not "certain," but it is reasonable. It provides sufficiently reasonable information to recognize that the relicensing scenario is more expensive than the other available options for the hydro plants and the most likely scenario to adversely impact customer rates. The ALJ's recommendation that they should be considered only with "considerable caution" should be rejected.

5. **Summary of the Company's Exceptions to the ALJ's Business Case Analysis and Conclusions**

The ALJ applied an unreasonable standard throughout his evaluation of the Company's business case – demanding a level of "certainty" and "conclusiveness" that is unrealistic of any estimate of future economic activity or the likely economic results of a business decision. His analysis was characterized by an unwarranted skepticism of the testimony and evidence presented by Consumers Energy's witnesses and a correspondingly unwarranted willingness to accept even the most speculative claims by opposing witnesses. The reasons that the ALJ provided for his conclusions that numerous elements of the Company's business case were inadequate to support the sale as the lowest cost option were not valid as shown by a more careful review of the evidence presented in this case and by a more reasonable understanding of the level of confidence necessary to make an appropriate business decision. The Commission should reject the ALJ's ultimate conclusion that the business case was "inconclusive" and his conclusion that the decommissioning costs are "likely overstated." Those conclusions are without merit. Instead, the Commission should find that the Company's business case was reasonable in light of the reasonably available information at the time this decision has to be made. The Commission should also find that, given the reasonable information available, approving the sale of the hydro plants to Confluence is the lowest cost option and will likely have a favorable impact on customer rates compared to the alternatives.

B. <u>Exceptions to ALJ's Conclusions Regarding Impact on Safe Delivery of Energy Service</u>

The Company excepts to the PFD's conclusion related to the impact on the safe delivery of energy service in Michigan. Overall, the PFD's unreasonably pessimistic view on the financial capabilities of Confluence, which given the construction of the transaction, is not a valid concern as explained below. The transaction was carefully negotiated with safety as a priority. The PFD incorrectly concludes that "the proposed transaction would have an adverse impact on the safe provision of energy service." PFD, page 223. The PFD reflects a belief that, due to the corporate structure of Confluence and concerns about FERC enforcement, the transaction will have a negative impact on the safe provision of energy service. The PFD generally overly relies on hypothetical concerns that should not outweigh the objective factual evidence on the record showing that the transaction was constructed to alleviate the exact concerns the PFD overemphasizes. The PFD's concerns could be described as generally *assuming* that the transaction is not safe because Confluence *might not* properly invest in dam safety and the dams *may* eventually fail because of a lack of investment. All of that is speculation. Given the Company's commitment of the revenue arising from the statutory FCM toward dam safety, the financial backing of Hull Street, and the revenue from the PPA the PFD's conclusions should be disregarded, and the Commission should recognize the steps the Company and Confluence have taken to ensure the safe delivery of energy service for the foreseeable future of the dams.

1. Confluence's Commitment, Incentives, and Financial Capability

The PFD inappropriately focuses on the hypothetical possibility of Confluence divesting the dams and weighs those hypothetical possibilities heavily against the objective evidence in the record regarding Confluence's financial capabilities and commitment as well as the legal obligations of the two parties involved in the transaction. Much of the analysis provided by the PFD relies on the possibility that Confluence might not invest enough in dam safety rather than what the record reflects. The PFD claims "private ownership presents a distinct risk profile that is not present under regulated utility ownership." PFD, page 189. The Company will address why the distinct risk profile of a private owner is overstated below. The PFD correctly notes the evidence indicates there are "meaningful incentives to convince experienced employees to remain with confluence" thus its technical ability to maintain the dams is not at question. PFD, page 190. Given the critical technical expertise going to Confluence, much of the PFD ignores the evidence of how the transaction came together and instead relies on the possible hypothetical scenario where dams are not invested in properly because Confluence does not have the financial wherewithal to maintain the dams. The record demonstrates that Confluence as a competent buyer will safely operate the dams as supported by the PPA, the financial backing of Confluence's parent company, and the Company's additional financial backing and commitments.

The record demonstrates that Confluence is committed to the long-term ownership and operation of the hydro facilities and possesses both the financial incentives and financial capability necessary to fulfill that commitment. The Company has demonstrated that the transaction was specifically structured to place the facilities in the hands of "a safe, committed, and financially competent company," following an extensive RFP process and diligence review of prospective buyers. Consumers Energy's Initial Brief, page 7. Confluence's interests are directly aligned with continued ownership and operation because the PPA "ensures that Confluence will have sufficient annual revenues to fund capital and maintenance," while Confluence is "incented to safely and reliably operate the facilities so that it can receive revenue ... for the entire term of the PPA." Consumers Energy's Initial Brief, page 9. The record demonstrates that Confluence has the financial resources necessary to support its obligations, [Begin Confidential] [redacted] [End Confidential] 3 TR 945-946. As the Company further explained, the transaction documents "work together to establish a comprehensive scheme of incentives" designed to encourage long-term ownership, continued investment, and compliance with FERC requirements. Consumers Energy's Initial Brief, page 10. The details of Confluence's ownership commitment, the incentives embedded in the PPA, and Confluence's financial capability are discussed more fully below.

a. <u>Implications of Private Ownership and LLC Business Structure</u>

The ALJ goes to great lengths to assure the Commission that his conclusion about the transaction being "adverse" to the provision of safe energy service in Michigan is not grounded on the perspective that "private ownership should inherently be disfavored" or that "ownership through LLCs [limited liability companies] or similar corporate structures is inherently problematic." See PFD, pages 189, 203-204. See also, PFD, page 223. Yet, the majority of his analysis then explains why he believes this particular transaction would render energy service in Michigan unsafe because of the very attributes of the buyer that inhere to private ownership and limited-liability business structures. The Company addressed the scare-tactics regarding private ownership and the limited-liability business structure employed by certain parties to this case extensively in its Reply Brief. See Consumers Energy's Reply Brief, pages 11-18. Though he denies it, the ALJ's analysis uncritically accepts those fear-based claims.

The ALJ claims that the absence of rate regulation on Confluence (an attribute that inheres in private ownership) means that any required upgrades or safety measures would reduce Confluence's profits and that Confluence would have "little financial incentive to make such investments because it cannot recover such costs in rates or earn a return on them." PFD, pages 188-189. He also claims that "a private owner directly bears the costs of ownership including maintenance and safety measures" (another attribute that inheres in private ownership) and that this would give Confluence "a financial incentive to minimize such spending to maximize profit." PFD, page 189. Finally, he claims that the absence of regulatory cost-recovery mechanisms (another attribute that inheres in private ownership) would make a private owner, such as Confluence, "seek to minimize" maintenance and safety-related expenditures. PFD, page 189. These claims are fraught with misunderstanding and unwarranted assumptions about the nature of competitive private business.

First, these claims completely ignore the fact that a private business, such as Confluence, also does not make *any* profit if its plants don't operate and produce a marketable product. It is true that, for private businesses, *maximizing* profits requires *minimizing* costs. But, minimizing costs does not and <u>cannot</u> include completely avoiding the costs necessary to operate. There is a tipping point to the cost calculus that the ALJ describes. Competitive private businesses, like Confluence, are stewards of their investors' money, and they have a responsibility – and an incentive – to profit in a sustainable way in order to allow their investors to fully recoup their investments over time and to attract the future investments they will need to continue operating in perpetuity.

Second, minimizing costs to maximize profits does not – of necessity – imply behaving as a bad actor. Avoiding necessary safety costs is not the only way to "minimize costs." In fact, it is a bad way to minimize costs. For the reasons discussed above, avoiding necessary costs is a *counterproductive* way to minimize costs. Competitive private businesses minimize costs by innovating, increasing efficiencies, eliminating waste, looking for economies of scale, implementing automation and technology, strategic resource procurement, outsourcing, contracting, workforce optimization, carefully planning work to avoid unnecessary costs, and numerous other strategies that have nothing to do with bleeding all of the short-term profit out of the business and then running away.

The ALJ holds out the regulatory model as if it is something that all private industries should aspire to. But, the regulatory model exists to try to artificially emulate the incentives that drive competitive private businesses – not the other way around. Competitive business markets incent cost optimization as a matter of business survival. Because certain types of businesses, like public utilities, operate monopolistically, the state substitutes regulatory oversight in place of competition to scour the business activities of public utilities and ensure that they have the proper incentive to root out the inefficiencies that private businesses already have a natural incentive to pursue. The ALJ turns the entire rationale for the regulatory paradigm on its head.

In response to discovery from the Attorney General, Company witness Blumenstock observed that "Confluence Hydro will be structured exclusively around river hydroelectric generating resources." Exhibit AG-21, page 1. He further explained "[t]hat focus allows Confluence Hydro to optimize such aspects of their business as supply chain procurement, engineering services, and equipment manufacturing support, and it allows them to leverage expertise from their other river hydro generation." Exhibit AG-21, page 1. Mr. Blumenstock also explained that Confluence's cost structure and long-term risk tolerance are necessarily different than Consumers Energy's due to factors such as "size of workforce, regulatory oversight, allowance for return on equity, assumption of inflation, and supply chain arrangements" (pertaining to cost structure) and "risk transfer to contractors, standards for investment, and standards for maintenance practices" (pertaining to risk tolerance). 3 TR 118; Exhibit AG-21, page 1. This means that Confluence will have some cost minimization opportunities that may not be available to Consumers Energy, which would allow Confluence to profitably perform the same work at the hydro plants. Confluence also has opportunities to enhance the revenue they receive under the PPA above the conservative levels assumed in their modeling due to the existence of more available capacity from the units than Confluence assumed for modeling purposes and [Begin Confidential] [redacted] [End Confidential] 3 TR 125; Confidential Exhibit AG-23, page 1.

Furthermore, the transaction documents in this case are structured to ensure that Confluence has proper incentives to make the investments needed for the safe operation of the plants for the long term. The PPA price is greater than Confluence would likely be able to get from another buyer in the market during the 30-year term, which means Confluence will need to be committed to its relationship with Consumers Energy. See Confidential Exhibit A-2. The Purchase and Sale Agreement ("PSA") contractually obligates Confluence to indemnify Consumers Energy from nearly all liabilities associated with the plants, including environmental liabilities. Confidential Exhibit A-1. To ensure that it doesn't incur significant financial losses from that contractual obligation, Confluence will need to have the revenue from the PPA. That also means that Confluence will need to keep the plants licensed and keep the dams operational and producing as much power as possible. That means they'll need to satisfy FERC's regulatory requirements for dam safety. The PPA revenue will be sufficient to cover Confluence's dam safety investments. The PPA also effectively bars piecemeal sale of the dams [Begin Confidential] [redacted] [End Confidential]. See Confidential Exhibit A-2, pages 49-50. Maintaining the FERC license also effectively bars significant adverse modifications of recreational access or sale of project lands, which the license requires the dam owner to preserve. The record evidence shows that there is no merit to the ALJ's dim view of the incentives Confluence would experience as a result of the proposed transaction due to its status as a private dam owner.

Similarly to the ALJ's discussion of private ownership, in his discussion of the limited-liability business structure that Confluence intends to employ, the ALJ embraces MHRC's scare-tactic claims that Confluence will be "judgment-proof" as a result of its planned business structure. The ALJ claims that "since LLCs are separate and distinct legal entities [(an attribute that inheres in the LLC business form)], and since each LLC owns a separate dam, any judgment arising from an accident at a particular dam would reach only the assets of that specific LLC [(another attribute that inheres in the LLC business form)], (which may be minimal or non-existent) and not necessarily the assets of HSE, Confluence, or Confluence's other subsidiary LLCs." PFD, page 202. The ALJ then argues that this "judgment proof" status necessarily means that the entity "may lack incentives to invest in operation safety measures because the risk and reward incentives become misaligned." PFD, page 202. According to the ALJ these "judgement proof" businesses would "bear little or no financial exposure for the consequences of unsafe practices" and hence have "reduced motivation to make investments that would mitigate those risks." PFD, page 202. Again, these claims are fraught with misunderstanding and unwarranted assumptions about the nature of competitive private business. They also ignore the existence of legal remedies that may be available to parties impacted by an LLC that operates in the manner described by the ALJ.

First, the ALJ's claims about the "incentives" of a business using a limited-liability business structure are just a rehash of the claims the ALJ embraced about the "incentives" that supposedly infect private businesses generally, and they represent an incomplete story (at best) or an outright wrong story (at worst) about the actual incentives businesses experience for the same reasons. Even if a limited-liability-structured business enjoyed a status that could be regarded as "judgement proof," it still has incentives not to lose its original investment and to continue operating profitably for its investors in perpetuity. Defunct and bankruptcy-liquidated businesses make no money for their former owners.

Second, it is not a foregone conclusion, as the ALJ implies, that an intentionally undercapitalized LLC would "bear little or no financial exposure for the consequences of unsafe practices." Michigan law recognizes a court's authority to "pierce the corporate veil" when a bad actor abuses the corporate form "in an attempt to avoid legal obligations." *Rymal v Baergen*, 262 Mich App 274, 293; 686 NW2d 241 (2004). A plaintiff wishing to persuade the court to "pierce the corporate veil" must show that (i) the corporate entity was "a mere instrumentality of another individual or entity," (ii) the corporate entity was "used to commit a wrong or fraud," and (iii) the plaintiff has suffered "an unjust injury or loss." *RDM Holdings, LTD v Continental Plastics Co*, 281 Mich App 678, 715; 762 NW2d 529 (2008). "Factors used by courts to determine the propriety of piercing the corporate veil include: (1) *whether the corporation is undercapitalized*, (2) whether separate books are kept, (3) whether there are separate finances for the corporation, (4) *whether the corporation is used for fraud or illegality*, (5) whether corporate formalities have been followed, and (6) *whether the corporation is a sham*." *Glenn v TPI Petroleum, Inc*, 305 Mich App 698, 716; 854 NW2d 509 (2014) (emphasis added). Michigan courts have expressly held that the rules governing piercing the corporate veil are equally applicable in determining whether to pierce the veil of a limited liability company. *Florence Cement Co v Vettraino*, 292 Mich App 461, 468–69; 807 NW2d 917 (2011). If Confluence (or, for that matter, Confluence's parent company, Hull Street Energy) were to manage the ownership and operation of the dams in the bad-faith manner hypothesized by the ALJ, it is possible that an injured party could seek relief for that injury from better capitalized businesses further up the Hull Street Energy enterprise if the individual LLC's capital dried up before full satisfaction of a judgment.

The ALJ joined parties like MHRC and DNR in invoking the example of Boyce Hydro LLC and its affiliated companies and trusts (collectively "Boyce Hydro"). Boyce Hydro's bad conduct led to the failure of the Edenville and Sanford Dams in Gladwin and Midland Counties, which the ALJ termed "instructive." PFD, page 203. The ALJ deemed that Boyce Hydro was "judgement proof" and concluded that "Confluence's proposed corporate structure does present the significant risks outlined above [referring to his discussion of "judgement proof-ness"]." PFD, pages 203-204. However, Company witness Blumenstock testified about material differences between Boyce Hydro and its owner Lee Mueller compared to Confluence. Mr. Blumenstock testified that "Boyce Hydro was ultimately owned by a single absentee owner, Lee Mueller and his wife, whose primary source of capital was a family trust." 3 TR 110. He explained that Mr. Mueller was "notoriously unresponsive to FERC warnings about the investments required to safely maintain the dams and was ultimately found to have knowingly withheld information about the vulnerabilities of the Edenville dam from regulators." 3 TR 110, citing Exhibit A-42. In contrast, Mr. Blumenstock testified:

> Confluence Hydro is ultimately owned by Hull Street Energy, a private equity firm with a specialization in capitalizing projects in the power sector as it decarbonizes. Hull Street Energy is comprised of a professional staff of investment and power industry professionals, and the firm has a long track record of responsible investing and management of energy sector projects. In 2025, Hull Street Energy closed its Hull Street Energy Partners III, L.P. Fund, which raised approximately $2.2 billion of new investment capital to finance energy projects in North America. [3 TR 110-111.]

There is no meaningful similarity between Boyce Hydro and Confluence. 3 TR 111.

The ALJ also joined MHRC in quibbling about the exact meaning of the term "judgement proof" and whether Boyce Hydro could fairly be characterized as "judgment proof." PFD, page 203. That question is of little material consequence in this case. The term "judgment proof" is not a legal term of art; it's a slang term. From a technical point of view, no person is "judgment proof," since a court of competent jurisdiction can always render a judgment in the person's case (as the U.S. District Court for the Eastern District of Michigan did in Boyce Hydro's and Lee Mueller's case; see Exhibit A-42). To the extent, the term is being used as a colloquial way to say that the person is uncollectible due to insolvency, bankruptcy, or some other reason, the term is more rhetorical than informative. As the concept relates to the comparison between Boyce Hydro and Confluence, it is not really important *whether* Boyce Hydro was "judgment proof" as the ALJ uses the term. The comparison turns on *why* Boyce Hydro was "judgment proof." That's where the comparison fails.

Boyce Hydro was uncollectible ("judgment proof" if the ALJ prefers) because there was <u>no deep source of capitalization</u> all the way up to the top level of the limited-liability business structure. As Mr. Blumenstock pointed out, the ultimate source of the capitalization for the entire enterprise was a family trust (actually three family trusts[4]). 3 TR 110. Eventually, every entity up the chain of the entire Boyce Hydro enterprise filed bankruptcy. See *Michigan Dep't of Environment, Great Lakes, & Energy v Mueller*, unpublished Order Resolving Motion for Default Judgment by the United States District Court for the Western District of Michigan, issued November 27, 2023 (Docket No. 1:20-CV-528) (accessed at 2023 WL 9848689). So, with Boyce Hydro, <u>the entire enterprise was uncollectible</u>. Even if the State of Michigan considered seeking court action to pierce the corporate veil, it would have been fruitless – there was no higher parent entity in the enterprise that was solvent.

However, the situation with Confluence and its parent Hull Street Energy is materially different. Hull Street Energy is not thinly capitalized. It is well capitalized across its entire

[4] See *In re Boyce Hydro, LLC*, Unpublished Opinion Regarding Liquidating Trustee's Motion to Enforce Order Confirming Plan Against the State of Michigan; The Department of Environment, Great Lakes, and Energy; and the Department of Natural Resources by the United States Bankruptcy Court for the Eastern District of Michigan, issued October 8, 2021 (Docket No. 20-21214-DOB) (accessed at 2021 WL 4715263, at 3).

enterprise. Hull Street Energy is a sophisticated private equity firm that has significant experience owning, operating, and investing capital in power generation assets across North America, including river hydro generation. 3 TR 40. It raises capital by soliciting institutional investors through various funds, including its recently closed third institutional fund, Hull Street Energy Partners III, L.P., which raised approximately $2.2 billion to invest in North American power sectors. 3 TR 307. It does not rely on a legacy family trust to fund its operations. [Begin Confidential] [redacted] [End Confidential] Confidential Exhibit A-1, page 603.

In order to evade collectability in the same way as Boyce Hydro, the Hull Street Energy enterprise would either have to (i) bankrupt one or more of the individual LLCs holding the dams and <u>hope</u> that their bad actions don't result in a claim to pierce the corporate veil or (ii) bankrupt the entire enterprise the way Boyce Hydro did. Given the magnitude of the Hull Street enterprise and the diversity of its holdings, the latter possibility is extremely unlikely just to evade responsibility for a handful of dams in Michigan. Which means the first possibility – i.e., the risk that Hull Street Energy could be subject to a claim for piecing the corporate veil – will always continue to provide Hull Street Energy and Confluence with another incentive to act responsibly in the ownership and operation of the 13 hydro plants that are the subject of this transaction. The

ALJ's analysis of the concept of "judgement proof-ness" and his comparison to Boyce Hydro are too superficial.

Finally, the ALJ largely ignores the public *benefits* of the limited-liability business structure in his analysis. The limited-liability business structure incents diverse individuals to pool capital resources to pursue socially beneficial projects that "would otherwise be too risky, could never be individually financed, and would never be completed." 3 TR 109-110. More importantly for the Commission's purposes in this case, the limited-liability business structure protects the other 12 dams from insolvency in the event of a catastrophic economic event impacting just one of the dams. In the unlikely event that a catastrophic event did occur at one of the dams, the separate limited-liability structure ensures that the liabilities associated with one dam cannot financially jeopardize all of the other 12 dams at the same time unless there was bad action by Confluence that would justify piercing the corporate veil. Absent this separate structure, a catastrophe at one dam could result in liability that would deplete the capital resources of the entire fleet, leaving no funds to ensure that Confluence could continue to make needed safety investments at the other 12 dams. That benefits the communities around each of the dams and the public at large.

Although the ALJ claims that his recommendation was not a general rejection of private ownership or the limited-liability business structure, the details of his analysis suggest otherwise. In any case, the ALJ's assumptions about the incentives and the risks tied to private ownership and the limited-liability business structure are without merit. Private ownership of dams and the limited-liability business structure are not inherently inconsistent with the public interest. Mr. Blumenstock testified that "of the 92,571 dams in the United States, 60,180 (roughly 65%) are owned by private, non-utility companies compared to just 1,670 (roughly 2%) owned by public utilities." 3 TR 111. He further testified that "events like those at the Edenville dam are rare across the United States." 3 TR 111. The PFD's references to two failed dams owned by private companies represent only about 0.00003% of all privately owned dams and only about 0.00002% of all dams in the United States. Likewise, Mr. Blumenstock explained that the "LLC structure is common in setting up subsidiaries in transactions like this." 3 TR 109 (citing Exhibit A-36). Relatedly, Mr. Blumenstock noted that "[e]very one of the companies on the Fortune 500 list is organized using some business structure that limits liability." 3 TR 110. The notion that these attributes generally incent businesses to behave as bad actors is unwarranted speculation and lacks any valid foundation in objective record evidence.

b. Confluence's Financial Capabilities and Business Case

(i.) The ALJ Again Applied an Unreasonable Standard to His Analysis of Confluence's Financial Capabilities and Business Case

With respect to Confluence's financial capabilities as the future owner of the dams, the ALJ concluded that "Confluence's financial ability to safely own and operate the dams appears questionable." PFD, page 196. The ALJ's analysis of Confluence's business case should not be adopted because it evaluates the wrong question.

MCL 460.6q(7) requires the Commission to "consider" whether "the proposed action would have an adverse impact on the provision of safe . . . energy service in this state." Similar to the erroneous approach that he took to the evaluation of the rate impacts from the transaction, the ALJ approaches this issue as though the statute requires an adverse presumption that the transaction will detrimentally affect safety absent some conclusive proof that it will not. However, the statute contains no such presumption. Again, the Commission must approach the issue reasonably. The issue under MCL 460.6q is whether the proposed transaction adversely affects rates, safety, or service to customers – not whether the buyer has proven a perfectly detailed or risk-free internal business model.

The ALJ once again demands a level of certainty about future events that is not required under MCL 460.6q and is not realistic in evaluating a long-term business decision. The Commission's task is not to determine whether every assumption embedded in Confluence's business model can be proven with mathematical precision. It is to determine whether the proposed transaction is reasonable based on the information reasonably available at the time the decision must be made. That same reasonableness-and-prudence framework that governs the Company's business case applies with equal force here. The ALJ's criticisms of Confluence's internal economics should therefore be viewed through the lens of whether they demonstrate a likely adverse impact on customers, not whether they identify areas where Confluence's proprietary planning could have been described in greater detail. Yet, the ALJ repeatedly shifts the focus from customer impacts to Confluence's private economics and then treats perceived uncertainty in Confluence's business case as if it were evidence that the transaction is adverse to customers. PFD, pages 191-197. That approach is not supported or required by the law.

That analytical shift matters because the ALJ does not identify any direct or objective evidence which supports the conclusion that the transaction *will* affirmatively harm customers. Instead, he identifies alleged weaknesses in the way Confluence has explained its own economics – such as asserted "structural cost differences" and "industry optimized practices" – and treats the absence of greater detail as a reason to doubt the transaction. See PFD, pages 191-197. But the absence of granular public detail is <u>not</u> evidence that Confluence will be unable to economically maintain and invest in the plants within the revenue provided by the PPA. The record shows that Confluence conducted extensive due diligence, reviewed Consumers Energy's cost data, and relied on internal and third-party expertise in evaluating the assets. Exhibit DNR-9, page 6. Confluence's parent company, Hull Street Energy, is a sophisticated owner and operator of energy projects all over North America. 3 TR 40. The unwarranted presumption that Hull Street Energy and Confluence have wildly miscalculated and contractually committed themselves to a deal that is not a "rational business decision" (see PFD, pages 191-192) just because they've chosen to keep their cards close to the vest is absurd on its face.

The bottom line is that MCL 460.6q does not require the Commission to reconstruct a private buyer's proprietary assumptions or verify each component of its internal model. The ALJ's reasoning improperly converts informational gaps into affirmative evidence of risk. The ALJ fails to appreciate that, as a competitive private business, Confluence may be reluctant to publicly disclose too many details about its profitability plan, which could have also impacted its decisions about what level of detail to memorialize in written records at all. It does not mean that Confluence lacks a well-considered plan.

(ii.) <u>The ALJ Incorrectly Focused on a Non-Existent Dilemma Regarding Confluence's Business Case</u>

In his critique of Confluence's financial capabilities, the ALJ focused most heavily on the supposed "dilemma" that Consumers Energy's estimates for its own costs to upgrade and relicense the hydro plants is substantially different than Confluence's estimate of costs to upgrade and relicense the units. PFD, page 191-195. No such "dilemma" exists.

As discussed in the previous section of these Exceptions, Confluence's cost structure is different than Consumers Energy's. Confluence's focus on hydro generation specifically will allow it to "optimize such aspects of their business as supply chain procurement, engineering services, and equipment manufacturing support, and . . . to leverage expertise from their other river hydro generation." Exhibit AG-21, page 1. Furthermore, Company witness Blumenstock explained that the capital costs included in Confluence's pro forma financial forecast for the first nine years of ownership – which were based on WSP's estimates – do not have Consumers Energy's overhead. 3 TR 121. That alone accounts for a significant portion of the difference in the estimates. Finally, Mr. Blumenstock observed that Confluence may be incorporating assumptions about the value of the facilities beyond the end of the 30-year PPA as part of its determination of the value proposition it gains from buying the plants. 3 TR 121. If every business could perform the same work at the same cost as every other business, there would be no competitive business markets. The underlying assumption behind this supposed "dilemma" does not match anyone's common experience of reality.

The ALJ offered a litany of criticisms of Mr. Blumenstock's testimony responding to the notion of a supposed "dilemma." None of the ALJ's criticisms are valid.

First, the ALJ criticized Mr. Blumenstock's efforts to "allay concerns" about the different cost projections claiming that it was "ultimately insufficient to dispel the underlying concerns." PFD, page 192. The ALJ dismissed Mr. Blumenstock's explanation of the impact of overheads on the cost difference by pointing to his own unwarranted earlier conclusions that the Company's overhead adders were "suspect." PFD, page 192. However, the Company has already detailed why the ALJ's analysis of the overheads was incorrect previously in these Exceptions. His extension of that critique to this issue is equally without merit. As a fallback, the ALJ argued that, even if Mr. Blumenstock's estimates of overheads were correct, Confluence must have some overheads too. PFD, page 192-193. The Company does not dispute that, but the ALJ has no valid basis to assume that Confluence hasn't already incorporated an estimate of its own overheads into the costs it used in its pro forma. It is not reasonable to assume that a sophisticated business would simply overlook its own overhead costs.

The ALJ also faulted Mr. Blumenstock for his admitted lack of specific knowledge about Confluence's cost structure. PFD, page 193. That criticism, too, is illogical. Consumers Energy and Confluence are not business partners engaged together in a common enterprise. Consumers Energy and Confluence are arms-length counterparties to a major industrial asset transaction. Consumers Energy has confidence in the business acumen and operational capabilities of Confluence and its parent, Hull Street Energy, because Consumers Energy conducted extensive due diligence to be sure that Confluence would be an appropriate buyer that could honor its commitments under the transaction. 3 TR 49-50, 182.13-182.16. But, it is preposterous to assume that a sophisticated business (Hull Street Energy/Confluence) would invite a counterparty (Consumers Energy) to review its full internal economic evaluation of the transaction. That would have put Confluence in a seriously disadvantaged negotiating position, where Consumers Energy could have pushed Confluence as close as possible to its break-even price. Nobody does business that way. To be clear, Consumers Energy does not know the specific economics of the deal from Confluence's perspective, but that information is not needed to make a sound business decision. The deal is a good one from Consumers Energy's point of view and will benefit Consumers Energy's customers. And, Hull Street's operational history shows that Confluence's parent company has a long track record of successful business operations with generation assets, which strongly indicates that the company has consistently made sound business decisions over a long time horizon. That is a strong positive indicator of its ability and likelihood to continue making sound business decisions in this new venture. Once again, the touchstone for deciding this case is reasonableness.

Regarding Mr. Blumenstock's observation that Confluence may see value in the plants beyond the end of the 30-year PPA term, the ALJ dismissed that observation on the ground that

MHRC witness Jester modeled "a full 50-year license horizon" and claims that it is "unclear what additional 'value' Mr. Blumenstock believes was omitted." PFD, page 193. That argument assumes that Mr. Jester's model was valid in the first place, which it was not.

First, Mr. Jester conducted his model on a disaggregated basis, which even the ALJ had previously agreed with the Company "can overlook economies of scale and shared fixed costs inherent in operating a fleet of dams." PFD, page 38; see also 3 TR 117. As a result, the cost assumptions in Mr. Jester's 50-year model are too high. Mr. Jester's modeling also assumes – incorrectly – that Consumers Energy's relicensing projections are universally applicable irrespective of who owns the plants and then uses those assumed costs to argue that Confluence's ownership would be uneconomic. Mr. Jester's analysis is entirely dependent on adopting Consumers Energy's projections as a fixed baseline, which it is not. Using Consumers Energy's projected costs does not demonstrate that the transaction is uneconomic to Confluence. It demonstrates only the unremarkable proposition that the result depends on which cost assumptions are used.

Consumers Energy developed its relicensing estimates because those estimates reflect what a regulated utility reasonably expects it would need to spend to continue owning and operating the hydro plants under its own cost structure, risk tolerance, workforce model, regulatory obligations, and planning standards. Those estimates are relevant to determine whether continued ownership by Consumers Energy is likely to be more expensive for customers than the sale. Those estimates do not establish that a differently situated private owner must incur the same costs in the same way. As discussed in the preceding section, Confluence's business is structured exclusively around river hydroelectric generating resources, allowing it to pursue efficiencies in supply-chain procurement, engineering services, equipment support, and operating practices that are not necessarily available to Consumers Energy. Exhibit AG-21, page 1. That distinction is critical. The fact that Consumers Energy's costs would be higher if it retained the hydro plants is one of the principal reasons the transaction benefits customers. The ALJ cannot simultaneously rely on Consumers Energy's higher cost structure to conclude that continued utility ownership is uneconomic and then use that same higher cost structure to conclude that Confluence cannot economically own the facilities. Doing so collapses the distinction between the regulated-utility scenario and the private-owner sale scenario and effectively assumes away the very efficiency rationale that supports the transaction.

Second, the ALJ contradicted himself about the post-PPA value when he criticized Mr. Blumenstock's testimony. He disparaged Mr. Blumenstock's simple observation that there may be value to Confluence beyond the PPA but then remarks that the existence of such continuing energy and capacity value is an "already apparent fact." PFD, page 193. The ALJ criticized the fact that Mr. Blumenstock was unable to quantify what that potential value might be, but that wasn't Mr. Blumenstock's point in the first place. He was only trying to offer some reasonable explanations about why the value proposition of the deal to Confluence might not be as simple as the opposing parties were trying to make it out to be. Again, there are valid reasons why Mr. Blumenstock does not have insider knowledge about Confluence's analysis of the economics of the transaction from their perspective. Nor, does MCL 460.6q require the Company to know that in order for the Commission to approve the transaction.

Next, the ALJ criticized Mr. Blumenstock's observation that Confluence may be able to "leverage expertise from their other river hydro generation" to create cost efficiencies in their business case. PFD, page 194. The ALJ argued that "Confluence is newly formed and has no other river hydro generation" and that Hull Street Energy "sold off almost all of its previously owned hydroelectric dams." PFD, page 194. It is difficult to characterize those arguments as anything other than obtuse. In case it is not apparent, the Confluence leadership team is composed of employees of Hull Street Energy. They carry with them the expertise they developed in hydropower projects working for Hull Street before Hull Street formed Confluence. That expertise includes the expertise gained during Hull Street Energy's ownership of 47 hydro assets over the past decade. See 3 TR 180.

The ALJ also questioned why Consumers Energy "could not or has not already optimized its hydroelectric division to reduce costs in the same way that Confluence ostensibly could." PFD, page 194. As Mr. Blumenstock pointed out in a discovery response to the Attorney General:

> [Consumers Energy and Confluence] are materially and significantly different. Consumers Energy owns and operates an electric and natural gas utility, which is one of the largest combination utilities in the United States. Confluence Hydro, in contrast, is not a public utility serving retail electric customers and does not own any natural gas utility assets. Consumers Energy owns significantly more electric generating plants than Confluence Hydro and owns fossil-fueled generating plants, whereas Confluence Hydro will be structured exclusively around river hydroelectric generating resources. [Exhibit AG-21, page 1.]

According to Mr. Blumenstock, it is that difference in focus that "allows Confluence Hydro to optimize such aspects of their business as supply chain procurement, engineering services, and equipment manufacturing support, and it allows them to leverage expertise from their other river hydro generation." Exhibit AG-21, page 1. He further explained:

> The Company challenges itself on performance and continuously pursues improvements consistent with safe, compliant, and reliable utility service. Performance goals are set within the Company's regulatory and customer-service obligations (e.g., dam safety and compliance, reliability, outage planning and execution, environmental stewardship, and public safety). While I expect Confluence Hydro to have similar performance goals, they may approach them differently than Consumers Energy due to different cost structures and risk tolerances. Fundamentally, Consumers Energy and Confluence Hydro are different companies, both

> excelling in the generation fleets they own and operate. [Exhibit AG-20, pages 1-2.]

Unlike Confluence (through its experience from Hull Street Energy), Consumers Energy does not own a 47-dam hydroelectric fleet nor is it able, like Confluence, to focus specifically and solely on hydropower generation. Consumers Energy must work with vendors that offer a broader range of goods and services. When this transaction closes, Confluence will own more dams than Consumers Energy has owned in at least the last 50 years.

Regarding Mr. Blumenstock's observation that Confluence may have the opportunity to leverage additional economies of scale by purchasing other hydro facilities, the ALJ rejected that as merely "speculative." That criticism strikes Consumers Energy as inconsistent given how warmly the ALJ embraced nearly every speculative claim offered by the opposing parties in this case.

Finally, the ALJ expressed concerns about [Begin Confidential] [redacted] [End Confidential] Nothing about that business profile supports the ALJ's conclusion that the transaction is presumptively economically unsound.

That conclusion is reinforced by the structure of the transaction documents. The PPA gives Confluence a long-term revenue stream that depends on continued ownership, licensure, operation, and output from the facilities. The PSA separately places broad liability and indemnity obligations on Confluence, including environmental liabilities. Confidential Exhibit A-1. As explained in the preceding section, those obligations give Confluence a direct financial reason to preserve the value of the PPA, keep the facilities licensed, satisfy FERC requirements, and avoid conduct that would jeopardize its ability to generate PPA revenue. The ALJ's analysis treats those obligations as if they were merely burdens on Confluence's finances. Properly understood, they are also incentives that align Confluence's financial interests with continued safe and reliable operation.

The ALJ credited Mr. Blumenstock's testimony that [Begin Confidential] [redacted] [End Confidential] as "somewhat more persuasive." PFD, page 195. However, the ALJ then claimed that [Begin Confidential] [redacted] [End Confidential] PFD, page 195. None of the ALJ's criticisms on these points have any merit.

[Begin Confidential] [redacted]

[redacted] [End Confidential] Confidential Exhibit A-32, page 2.

(iii.) **<u>The ALJ's Conclusions About Confluence's Financial Capability and Business Case Are Unwarranted and Should be Rejected</u>**

There is no basis to treat the cost differences between Consumers Energy and Confluence as inherently suspect. As discussed in the Company's exceptions to the ALJ's relicensing analysis, the hydro plants are aging assets that require continued investment, but estimates of future capital and O&M expense necessarily involve judgment. Consumers Energy's estimates were reasonable for purposes of evaluating the cost of continued utility ownership. But Confluence's different estimate reflects a different owner, a different business model, different procurement and contracting opportunities, and different risk-allocation choices. Those differences do not show that Confluence lacks financial capability. <u>They show why the transaction exists</u>.

The ALJ's contrary conclusion again rests on unsupported speculation rather than record evidence. The existence of future capital requirements does not prove that Confluence will be unable to finance them. It proves only that Confluence, like any infrastructure owner, will need to manage capital over time. That is not unique to Confluence. Consumers Energy would face the same need if it retained the plants, and customers would bear the resulting cost through rates. Under the transaction, Confluence assumes that investment and financing risk, while Consumers Energy's customers receive the benefit of a fixed contractual structure and avoid the larger and more uncertain cost exposure associated with continued utility ownership or decommissioning.

When viewed properly, the uncertainties identified by the ALJ are not risks imposed on customers. They are risks assumed by Confluence. The record shows that Confluence is undertaking capital investment obligations, operational risk over a 30-year contract, and long-term liability exposure associated with ownership. Those are the very risks that would otherwise remain with ratepayers under continued utility ownership. The ALJ inverts that reality by treating Confluence's assumption of those risks as a reason to reject the transaction.

This point is further supported by the proposed "Consumers Energy Hydro Safety Fund" (discussed in more detail later in these Exceptions). The Company does not agree that Confluence is likely to fail, abandon the facilities, or shift decommissioning costs to the public. But even if the Commission were concerned about the remote possibility of that outcome, the proposed Fund would provide an additional source of state-controlled financial security dedicated to the 13 hydro facilities. Consumers Energy's willingness to contribute all FCM revenue earned under the PPA to that Fund directly addresses the ALJ's concern that the public could become an uncompensated backstop. It does so without rewriting Confluence's business case, without eliminating the efficiencies that make the sale the lowest-cost option, and without converting speculation about possible future financial distress into a basis to reject the transaction today.

The Commission should reject that reasoning. The ALJ's conclusion rests on an incorrect legal standard, unsupported inferences, disputed assumptions, and speculative projections of future risk. None of those establishes that the transaction will adversely affect rates, service, or safety. The statute does not require the Commission to guarantee the success of a private investment. It requires the Commission to evaluate the reasonableness of the transaction even in the face of uncertainty about the future. On this record, the proposed transaction shifts risk away from customers and should be approved notwithstanding the ALJ's speculative concerns about Confluence's internal economics.

The so-called "Confluence Dilemma" should be rejected for the same reason. The ALJ's dilemma assumes that either Confluence's costs are materially lower than Consumers Energy's because Confluence will spend too little on safety, or Confluence's costs are not materially lower and its business case fails. That is a false choice. The record supports a third and more reasonable explanation: Confluence can have a different cost profile because it is a specialized private hydro owner with different procurement practices, contracting arrangements, workforce structure, risk tolerance, and operating incentives, while still remaining obligated and financially incented to satisfy FERC's dam-safety requirements and preserve the long-term value of the PPA. The Commission should reject the ALJ's unduly skeptical conclusions and find that the evidence instead supports the conclusion that Hull Street Energy's strong business record indicates that its subsidiary Confluence will be a financially capable owner of the dams.

c. <u>Confluence's Reputation and History</u>

The ALJ relies on the certain parties' innuendos about Hull Street Energy's short-term ownership history of previous dams as evidence that Confluence will not be committed to the future of these dams and that its future behavior will be inconsistent with the interests of the local communities and the State of Michigan. However, as the Company has indicated, the transaction at issue in this case is unlike prior transactions Hull Street Energy has been involved in. Hull Street Energy has a track record of safe dam operation. The PFD takes note of Hull Street Energy's safe operation of 47 dams but also indicates concern that Hull Street Energy owned many of the dams for under three years. See PFD, page 197. The PFD joins some of the other parties in characterizing Hull Street Energy as a company that "flips" dams and claims that long-term ownership of dams is not typical of a private equity fund. See PFD, page 198. The PFD ignores evidence that the transaction with Confluence was structured to specifically incent long-term ownership. Merely because Confluence is not explicitly prohibited from selling the dams by the transaction documents does not mean there's specific non-speculative evidence that it will.

The ALJ claims that "typical private equity business model and the time-limited duration of typical private equity funds suggests that owning the dams for a long-term, like the 30-year duration of the PPA, is not a common business strategy for private equity firms to pursue". PFD, page 199. Confluence is a limited liability company formed and dedicated to owning and operating 13 river hydros in Michigan and, through its subsidiaries, will employ residents of the dam communities who have years of experience working in the community and maintaining dams safely. The record demonstrates that Confluence has consistently represented its intention to be a long-term owner and operator of the hydro fleet. Confluence has directly stated its intent to "hold the Facilities for a longer-term" and has made similar public statements following the sale announcement while participating in community engagement meetings. 3 TR 48; Company's Initial Brief, page 53. The transaction was specifically structured to support long-term ownership through a 30-year PPA that provides the revenue stream necessary to fund ongoing operations, maintenance, relicensing activities, and capital investments. See Company's Initial Brief, pages 12-15.

Given the record and the commitments made by Confluence it is inappropriate to give more weight to the hypothetical divestment scenario than the objective evidence the record supports, [Begin Confidential] [redacted] [End Confidential] Furthermore, there is no basis for the ALJ's apparent presumption that a new owner would be irresponsible in the maintenance of the dams. The ALJ stacks speculation on speculation in order to support his unwarranted and overall skepticism of the deal.

In summary, Confluence's ability to own and maintain the dams long term is supported by more than its stated intent; it is supported by the structure of the transaction, the resources behind Confluence, and the continuity of experienced dam personnel. As the Company explained, the transaction was designed to place the facilities with "a safe, committed, and financially competent company," and the PPA provides the revenue stream necessary for Confluence to continue safe operations, maintenance, capital investment, and relicensing activities. Company's Initial Brief, pages 7, 12–15. Confluence will not be starting from scratch because the experienced Consumers Energy hydro employees who have safely operated and maintained the facilities will transition to Confluence, preserving the "technical expertise" and operational knowledge necessary to continue reliable dam operations. Company's Initial Brief, pages 52–53. Viewed together, Confluence's affiliation with Hull Street Energy, the long-term PPA, the employee transition, and Confluence's repeated commitment to long-term ownership provide record-based assurance that Confluence has both the incentive and practical capability to maintain and own the dams safely over the long term.

The PFD gives more weight to a hypothetical worst-case scenario than what the record reflects. Even if the PFD was correct that "the possibility of a future sale is significant," the PFD relies too heavily on the assumption that a sale of dams to a potential third buyer would ultimately be a net negative. PFD, page 201. Due to the hypothetical nature of that claim, there is no evidence on the record that shows a divestment of the dams by Confluence would necessarily be a net negative. Further, if Confluence's projected early-year cash flows present a challenge as the ALJ discussed, then those same economics make near-term divestment less likely. A prospective purchaser would face the same need for substantial upfront capital investment before the facilities produce positive net cash flow, which undermines the notion that Confluence would have a practical or economic incentive to quickly resell the assets. The Company's process intended to produce a long-term partner which it could entrust with its entire river hydro organization. The Company would not have selected Confluence if it feared divesture was a real concern, and the Company's employees would not be well situated post close of the deal. What the record reflects outside of hypothetical divestment scenarios is Confluence's intent to safely maintain and operate the dams for the foreseeable future, with Consumers Energy's guarantee of FCM revenue toward dam safety, concerns to the contrary should be alleviated. The Commission should not base its decision on unsubstantiated fear of a hypothetical future divestment.

2. Efficacy of FERC Regulatory Oversight

The PFD concludes that reliance on FERC as the primary post-sale regulator raises significant safety concerns because, in the ALJ's view, "FERC's existing regulatory paradigm has demonstrated limitations when applied to private owners, particularly those with constrained or uncertain financial capability." PFD, page 223. This contention does not adequately capture the reality that the transfer from the Company to Confluence will have no impact on safety regulation of the dams.

The PFD claims "the [FERC] transfer process is largely administrative in nature, transfers are rarely if ever denied, and the process does not impose a particularly deep scrutiny of a new buyer's financial capabilities." PFD, page 222. Consumers Energy does not agree that these claims are legitimate.

First, the ALJ's claim that the process is largely administrative is incorrect and ignores the scope of FERC's authority. FERC has the authority to – and does – make changes in licenses during the process of a transfer and the process is not purely administrative as the ALJ suggests. For the last five years, FERC has routinely added a new license condition to transferred licenses to require financial assurance measures, and has reinforced that dam safety remains unaffected once the transfer becomes effective. FERC, as recently as April 23, 2026, has taken steps to ensure new owners as part of a license transfer have a safety plan in place and provide financial assurances. In its April 23 order approving a transfer of licenses for projects P-1933-116 and P-1934-065 in California, FERC added the following provision to each license:

> Article 205. *Reservation of Authority to Require Financial Assurance Measures.* The Commission reserves the right to require future measures to ensure that the licensee maintains sufficient financial reserves to carry out the terms of the license and Commission orders pertaining thereto.

The Article arose from FERC staff confirming "the importance of the licensee maintaining sufficient financial reserves." April 23 order, page 4. It should also be noted in the same order the FERC is requiring that, "to ensure dam safety after the transfers are finalized [the new owner] … must submit a plan and schedule to restore the projects to full operation." April 23 order, page 5.

One of the dams was already in satisfactory condition but FERC still required a plan to improve certain aspects of the project. FERC took consideration of the status of the dam and took steps to ensure a remediation plan was in place. Thus, painting the FERC license transfer process as "largely administrative" is woefully inaccurate. It also refutes the contention of the ALJ that the process does not impose scrutiny of the new buyer's financial capability, because the language requires assurance of the buyer's financial capability. It is likely that FERC will add the same language during the license transfer to Confluence as it has to all license transfer orders issued in the past five years.

Second, the ALJ overemphasizes a hypothetical future transaction where the MPSC has no oversight of the transaction as well as FERC's alleged lack of interest in scrutinizing new owners and underemphasizes FERC's role as a safety regulator. See PFD, pages 221-222. FERC is the hydro-electric dam safety regulator in the United States and Michigan; the MPSC is not. FERC will have oversight of future transfers if any. Thus, there will be no impact to dam safety without MPSC oversight as that role belongs to FERC and not the MPSC.

Confluence will be subject to the same FERC license requirements that currently apply to the Company. See Company's Initial Brief, pages 49-52. FERC will independently review Confluence's technical expertise, safety programs, operational capabilities, and financial ability to maintain the facilities before approving the transfer. Company's Initial Brief, pages 51-52. FERC's authority extends beyond initial approval because the transferred licenses continue to impose ongoing requirements relating to dam safety and operation. Confluence will assume all legal responsibility for complying with those obligations. *Id*.

The ALJ's conclusion that FERC is limited in its ability to enforce dam safety is similarly flawed. The ALJ leans too heavily into hypothetical scenarios (i.e., a sale from Confluence where the MPSC has no say in the new owner). The safety question as addressed by the PFD centers around potential unlikely worst-case scenarios related to dam failure through its concern about Confluence's ability to invest in the dams. Given that Confluence's parent company has a consistent record of safe operation for all the dams it has owned, the most likely outcome is that Confluence will reflect the safety track record of its parent. That is, that Confluence is a subsidiary of Hull Street Energy, staffed by former Consumers Energy hydro employees with decades of experience working in the communities around the dams and with FERC, will continue to maintain licensed and safe dams. It is not reasonable to decide this case based on the presumption that FERC will not do its job. Instead, the Commission should presume that FERC will use its authority to regulate the dams to ensure their safety and that FERC's regulatory approach will evolve to address problems that have occurred at other dams in the past to make sure they do not recur in the future. There will be no diminishment of the dam safety regulatory oversight that exists today.

C. Exceptions to ALJ's Conclusions Regarding Public Policy and Interest

The ALJ noted that the public policy and interest portion mostly comes down to two competing perspectives. The Company excepts to the ALJ's recommended finding that the "evidence shows that the proposed transaction shifts end-of term decommissioning responsibility to Confluence without offering any meaningful protection against the very real risk that those costs will still ultimately fall on the public." PFD, pages 261-262. The Company has responded to considerations related to the business case and safety of the transaction, but the ALJ's public interest analysis is also incomplete. The ALJ claims "different parties have varying interests which may not be consistent with each other," but that improperly assigns an equivalence to the variable interests at play. PFD, page 259. The record shows that public interest weighs in favor of the dams remaining in place with the strongest support for a decommissioning scenario coming from a single-issue special interest group (MHRC) which is not reflective of broad public support for a decommissioning scenario. The ALJ relies too heavily on his own unwarranted conclusions about the safety question in evaluating the public interest question. This is especially true where the record reflects broad support in the affected communities for the continued existence of the dams and their impoundments.

The Public Sector Consultants ("PSC") analysis shows that public sentiment overall leans toward the preservation of the dams. See, generally, 3 TR 255-269. As the Company noted in its Initial Brief, "[t]he Company analyzed the options available for the dams working with third-party engineers and consultants as well as the communities around the dams and more broadly the residents of Michigan found that the most preferable option was for the dams to stay in place." Company's Initial Brief, page 60. Focusing on MHRC's interests as merely inconsistent with the Company's is inadequate because MHRC represents a singular interest group with narrow interests. The testimony provided by the townships and the analyses completed by PSC give a more robust view of where public interest and sentiment lies.

First, the ALJ should have weighed the interest of the local communities more heavily, as they represent the people most affected, those whose day-to-day life and property will be significantly impacted by outcome of the proceeding. The ALJ states that "the statutory directive to determine whether the transaction is inconsistent with public policy or public interest is necessarily broad in scope, and the individual interests of communities adjacent to the dams represent one component of that inquiry." PFD, page 240. The Company does not disagree that the statute requires a statewide perspective but disagrees with the ALJ's conclusion that the local communities are merely "one component of that [statewide] inquiry." Even approaching the question from a statewide perspective, it is clear that the primary statewide interests at stake are those of Consumers Energy's customers (as the decision impacts their electric service and rates) and those of the local communities whose lives and livelihood are tied to the dams. Other statewide interests, such as the interests of Michigan's citizens in the recreational opportunities associated with the rivers and the dams, are more remote and of less consequence. More weight should be given to community interest given their direct stake in the outcome of the case. While MHRC had witnesses give anecdotal testimony about their own individual preferences for the dams, the PSC analyses clearly show a majority interest in maintaining the dams. It should also be noted that those who would be impacted and endangered the most by hypothetically unsafe dam management are also some of the strongest supporters of maintaining the impoundments under Confluence's ownership. MHRC's focus is more narrowly defined to a specific use of the waters.

The local community intervenors explained that the affected impoundments are central to local identity, recreation, property values, tax base, tourism, and public services, and that their communities therefore support the transaction because it preserves the dams and lakes they create. Croton and Big Prairie Townships emphasized that "the vast majority of nearby residents want to keep Croton Dam, Hardy Dam, and the lakes as they are," and that any proposal resulting in destruction of Croton Pond and Hardy Pond through full decommissioning is a "nonstarter" for the Townships. Croton & Big Prairie Initial Brief, pages 2–3. Lake Allegan likewise emphasized that preserving the Calkins Bridge Dam is necessary because Lake Allegan is "a central and essential part of the community," serving as a "haven for nature and people" and supporting recreation, property values, tax revenues, local businesses, and groundwater resources. Lake Allegan Initial Brief, pages 4–5. These arguments emphasize the harmful impact decommissioning would have on the communities associated with the dams. Further by tying back to merely hypothetical and unsubstantiated safety concerns and financial concerns the ALJ again puts more emphasis on a hypothetical worst-case scenario than on the real and likely impact that will occur if the dams are decommissioned. See PFD, page 259.

The ALJ's public-interest analysis also gives insufficient weight to the PSC's work and related public-engagement evidence. That record showed that the Company evaluated public sentiment not only in the affected dam communities, but also more broadly among Michigan residents, and that this engagement informed the Company's conclusion that the public interest favored keeping the dams in place. See Company's Initial Brief, pages 59–64.

The ALJ ultimately rests his public interest findings entirely on his unwarranted prior safety and financial capabilities findings. PFD, pages 259-262. The ALJ errs in focusing his conclusion related to public interest on the hypothetical end-of-term decommissioning responsibility. The ALJ uses the safety and financial commitments to gloss over the analysis required by the statute, which although statewide in perspective, should most heavily consider what the loss of the dams and their impoundments will do to the communities near the dams, what that means for residents of those communities, and more broadly residents of Michigan in the immediate timeline following decommissioning because they are the citizens of the state that will actually experience the impact of that decision most directly. The Commission should consider those impacts and decline to narrowly focus public policy and interest concerns on wildly speculative safety and decommissioning concerns that have no support in the objective evidence presented in this case.

D. Exceptions to ALJ's Recommendation Regarding Regulatory Accounting Requests

Consumers Energy projects a gain on the sale of the hydro plants of approximately \$21.3 million. 3 TR 227. Company witness Jason R. Coker proposed to defer the gain in a regulatory liability account for refund to customers. 3 TR 228. However, Mr. Coker also testified that "unforeseen events and timing" could cause the outcome of the transaction to result in a net loss. 3 TR 227. Therefore, he also proposed that the Commission permit the Company to record a regulatory asset to recover any potential loss at the time of closing should the Company's current estimate prove inaccurate. 3 TR 228. In its Initial Brief, Staff speculated that the Company could have gotten a higher purchase price for the hydro plants if it had not established the $1 sale price for the hydro plants at the outset of the RFP. Staff's Initial Brief, page 70. The PFD paraphrased Staff's position as follows: "the Company itself created conditions that made a loss on the sale a likely outcome, and it is therefore inappropriate for the Company to seek regulatory accounting treatment to recover that loss from ratepayers." PFD, page 150. Staff recommended that the Commission deny deferred accounting treatment for any net loss (but not a net gain), and the ALJ recommends adopting Staff's recommendation. PFD, page 151. The argument is nonsensical and the Commission should reject it.

First, it is simply false to say that the Company "created conditions that made a loss on the sale a likely outcome." The Company is projecting a gain on the sale. That was the condition the Company created. However, between the time of signing the sale agreement and the closing date could incur more costs at the hydro plants than currently expected or the sale could close sooner than expected allowing less depreciation to take place. Some adjustment in the final accounting is expected and normal. Therefore, the Company cannot entirely rule out a loss. But, the Company did not "create" a likelihood of a loss.

Second, there is no reason to believe Staff's speculation about getting a higher asset price for the dams is true, but even if it was, a higher sale price would have almost certainly required a more expensive PPA. The sale negotiations are effectively a zero-sum game where any demand or concession on the price of the assets would have resulted in a corresponding but opposite adjustment to the price of the PPA so that the transaction, as a whole, maintained equilibrium around each parties respective perception of the value proposition for the deal as a whole. Even if the Company set the asset price high enough to virtually guarantee avoidance of a loss, the buyer would have insisted on an increase in the PPA price to make up the difference. Either way, the same cost would have passed through in customer rates – just in a different form. Where a transaction is beneficial to customers compared to the alternatives, allowing the utility to recover its losses through deferred accounting treatment eliminates a potential disincentive for the utility to choose the most cost beneficial option. The Commission has clearly signaled that it understands this principle when it issued an order approving deferred accounting treatment for the expected loss on Consumers Energy's recent sale of its Riverside Storage Field. See MPSC Case No. U-21656, July 23, 2024 Order.

It makes no sense to financially penalize a utility for seeking and consummating transactions that benefit customers, though the transaction may cause the utility to incur an incidental amount of loss on the book value of the asset. Consumers Energy should not have to write off investments if the Company's actions in relation to the underlying assets are expected to save customers money. The Commission should reject the ALJ's recommendation and approve the deferred accounting treatment requested by the Company regardless of whether the final accounting for the transaction reflects a gain or a loss.

E. Exceptions to ALJ's Conclusions on Staff's and the Attorney General's Proposed Conditions for Approval

Generally speaking, the ALJ regarded the conditions for approval of the transaction proposed by Staff and the Attorney General as moot for two reasons: (i) first, the ALJ recommended that the Commission deny the transaction and (ii) Consumers Energy "preemptively rejected such measures." PFD, page 262. Nevertheless, the ALJ reviewed the proposed conditions for approval of the transaction and offered contingent recommendations for each in the event that the Commission should ultimately approve the transaction.

Regarding the second reason, the ALJ claimed that Consumers Energy's position was that "any new conditions 'are not appropriate' and Consumers and Confluence are 'not open to their consideration.'" PFD, page 262. The ALJ's paraphrase of the Company's position is not completely accurate and requires clarification. Consumers Energy is very concerned about any potential condition that would "change the core elements of the transaction." 3 TR 74. As Mr. Blumenstock testified, "conditions or adjustments to the transaction are not appropriate" because the transaction is the result of more than 18 months of negotiations between Consumers Energy and Confluence and represents "an extremely complicated transaction." 3 TR 74. Any conditions that "change the core elements of the transaction" would change one or both parties' view of the value of the transaction and potentially render the deal, as a whole, unacceptable.

However, Consumers Energy is willing to accept a condition – explained in more detail below – that does not alter the actual transaction between the parties. However, the conditions proposed by Staff and the Attorney General remain inappropriate and should be rejected for the reasons stated in the Company's previous briefing. See Consumers Energy's Initial Brief, pages 67-76. After discussing the condition Consumers Energy proposes, the Company responds to the ALJ's contingent recommendations regarding the conditions proposed by Staff and the Attorney General later in these Exceptions.

1. **<u>Consumers Energy's Proposed Hydro Safety Fund and Use of FCM Revenues</u>**

Certain parties to this case have gone to extensive lengths to paint a picture that imminent safety threats lurk around every corner of this transaction based on a myriad of hypothetical worst-case scenarios. The record in this case does not contain any evidence supporting the assumption that any of those hypothetical threats are real or probable – and certainly not that any such threats are imminent. But, Consumers Energy understands that uncertainty about even very remote possibilities can sometimes create a sense of discomfort about the decision to move forward with a transaction that changes the comfortable and longstanding status quo. Throughout this process, the Company has been listening and has concluded that there is more it can do to offer peace of mind about the long-term safety of this transaction for the communities around the dams as well as the citizens of the State of Michigan generally. While the Company is confident that it has found an experienced, capable, responsible, and safe new owner for these dams in Confluence and does not agree that the highly speculative safety concerns of certain parties and the ALJ will come to fruition, the Company is willing to "put its money where its mouth is" to help ensure that there are financial resources available to address those concerns should any of them ever come to pass.

Accordingly, Consumers Energy proposes that it would **accept** a Commission condition on approval of the sale that requires the Company to establish a "Consumers Energy Hydro Safety Fund," ("the Fund") to be controlled and administered by the State of Michigan. Under this proposal the Company would **agree** to contribute **all** of the FCM revenue that Consumers Energy earns under the PPA with Confluence over its 30-year term – estimated to be approximately $270 million (see 3 TR 1069) – to the Fund. In other words, Consumers Energy is prepared to forgo any profit that the Company is entitled to earn under the law in connection with the Confluence PPA to help ensure the long-term safety of the 13 hydro plants. Although the ALJ correctly found that the law prevents the Commission from unilaterally denying the FCM on the PPA or limiting the FCM to some amount less than the full contract payments made under the PPA, as proposed by certain parties (see PFD, page 145), the Company is free, at the Company's discretion, to waive its legal right to earn and keep that revenue from the FCM and is willing to do so in this case. This proposal is a concrete and meaningful response to address the speculative and unsupported safety concerns expressed by certain parties and by the ALJ in this case.

Consumers Energy is willing to establish a Fund by the closing date for this transaction, through collaboration with the State of Michigan,[5] that could be used exclusively for the 13 hydro plants being sold in this transaction for the following purposes:

- Dam Safety Improvements, such as:
  - Major dam safety capital improvements, including spillway upgrades and embankment stabilization;
  - Immediate repairs necessary to address identified safety risks; and
  - Risk-reduction measures required to meet evolving dam safety standards.
- Catastrophic Incident Response, such as:
  - Support for emergency response and recovery efforts;
  - Funding post-event remediation and restoration; and
  - Providing supplemental financial assurance beyond traditional insurance mechanisms.
- License Surrender or Decommissioning Activities, such as:
  - Supporting partial or full decommissioning activities;
  - Funding sediment management and site restoration work; and
  - Ensuring that obligations associated with license surrender are fully satisfied.

Consumers Energy proposes that the use of the Fund would be triggered by one of the following events: (i) a bankruptcy filing by the then-current owner of one or more of the 13 dams that are the subject of this transaction, (ii) FERC issuance of a letter initiating a License Termination Process for one or more of the 13 dams that are the subject of this transaction, or (iii) FERC

[5] However, Consumers Energy would retain the right to establish the final terms of the Fund, including the determination of a different Fund administrator, at its sole discretion consistent with the purposes proposed in these Exceptions if the State of Michigan either (i) fails to timely cooperate in negotiating the final terms of the Fund or (ii) cannot reach terms acceptable to Consumers Energy prior to Consumers Energy's and Confluence's closing date as set forth in the Purchase and Sale Agreement.

issuance of a dam safety Notice of Violation requiring the immediate draw down of one or more of the 13 dams that are the subject of this transaction.

The Fund would be controlled and administered by the State of Michigan. Consumers Energy would retain no control (and would not agree to retain any control) over the Fund. The State of Michigan would be free to designate an appropriate agency (such as the Dam Safety Unit of the Michigan Department of Environment, Great Lakes, and Energy ("EGLE"), DNR, or their successors) to administer the Fund, including any investment of the Fund principle, direction of any authorized distributions from the Fund, Fund accounting, etc. Consumers Energy would make deposits to the Fund annually over the 30-year term of the Confluence PPA. Each annual deposit would be equal to the total amount of recovered FCM revenue that Consumers Energy earned and received on its PPA with Confluence in the most recently completed calendar year.

In order to prevent any perverse incentive for the then-current owner or owners of the dams, the Fund would be structured to grant the agency administering the Fund full authority to impose conditions on any distributions from the Fund that involve direct investments in the 13 hydro plants or that enhance the value of the hydro plants to the then-current owners. Such conditions may include, but would not be limited to, requiring (i) written consent for the Fund's contractors, employees, or agents to access the sites and perform any necessary work or modifications, (ii) repayment agreements and related security agreements ensuring repayment of the distribution to the Fund with interest, (iii) transfer of an ownership interest in the impacted dam or dams to the Fund, (iv) Letters of Credit securing repayment of any distributions from the Fund, and (v) any conditions the administrator deems necessary to ensure that the benefits of the distribution inure to the affected local communities or the people of the State of Michigan and not to the then-current dam owner or owners. Any conditions proposed by the Fund administrator would be subject to

FERC's regulatory authority and approval if (i) the dams remain licensed by FERC at the time of the disbursement and (ii) the condition would have any impact on the terms of the FERC license for that dam. The Fund would be structured to specify that the then-current owner or owners of one or more of the hydro plants are not intended beneficiaries of the Fund and do not have any right to compel distributions from the Fund. All distributions would be at the sole discretion of the administrator.

Finally, Consumers Energy proposes that the Fund would be structured to continue for the purposes described in this proposal until the last of the 13 hydro facilities that are the subject of this transaction has been decommissioned. Thereafter, the State of Michigan would be authorized to utilize any money remaining in the Fund for other dam safety initiatives consistent with EGLE's general regulatory authority and oversight over dams in the State of Michigan.

The ALJ expressed several "concerns" regarding the proposed PPA with Confluence and ultimately recommended rejecting the PPA along with the rest of the transaction. See PFD, pages 147-149. Although the ALJ correctly acknowledged that the law requires application of the FCM to the PPA if the PPA is approved (see PFD, page 145), essentially all of the ALJ's "concerns" with the PPA relate to his view about the FCM. Frankly, those are policy matters that the Legislature has already resolved. The Company submits that it was inappropriate for the ALJ to base his rationale for disapproving the PPA on his view of the policy implications of applying an FCM to the PPA where the Legislature has already determined – as a superseding policy matter – that it is appropriate (and even required) to apply an FCM to any PPA – including this PPA – that meets all of the statutory requirements.

With that said, the Company's proposed Fund renders all of the ALJ's arguments against approval of the PPA moot. Although the ALJ couches his "concerns" with the PPA as if it involves multiple different reasons for rejecting the PPA, it is in reality mostly the same reason repeated several different ways, none of which are valid under the Company's proposed Fund. The ALJ claimed that the FCM can risk "double dipping" on utility assets (PFD, page 147), but that cannot occur where the Company will not retain any of the FCM revenue for the Company's own use or profit.[6] The ALJ also speculates that it "seems highly unlikely that the Legislature intended for [the FCM] provision to be used to allow a utility to sell its own fully depreciated generation assets and profit from buying back energy from those assets at a premium, above-market price." PFD, page 148. However, in light of the Company's proposed Fund, Consumers Energy will not "profit from buying back energy" from the 13 hydro plants. Finally, the ALJ referred to the PPA as "economic alchemy" because – the ALJ claimed – the FCM "transmute[s] these struggling dams into a golden opportunity for Consumers [Energy] to earn a profit on the PPA while offloading future liabilities related to the dams." PFD, page 148. Again, there will be no profit for the Company under its proposed Fund.

Consumers Energy's proposed Fund also undermines the arguments of certain parties and the ALJ that the transaction "plac[es] substantial financial risk onto . . . taxpayers." PFD, page 149. Even if the parties' and the ALJ's dire worst-case scenario were to occur, the Fund provides a significant source of funding, which can be used to prevent or address the consequences of a catastrophic dam failure. It puts those funds directly into the hands of the State of Michigan so that the state can ensure the funds are used to protect Michigan's taxpayers.

[6] Furthermore, the entire premise of the ALJ's argument about supposed "double dipping" is invalid. The hydro plants require hundreds of millions of dollars in investments to remain viable generation resources. It is irrelevant that the Company's prior investments in the plants may have been fully depreciated or nearly so. The Company would earn a return on the new investments required at the plants if it kept them. But for the Company's agreement to establish the Fund, it would have been perfectly appropriate for the Company to earn some return on the PPA that funds the same new investments that are needed for the benefit of the Company's customers. Either way, the future of the dams represents new investments, not fully depreciated old investments. The ALJ's narrative is false.

Consumers Energy's proposed Fund provides added financial security to the entire transaction, directly addressing the safety concerns expressed by the ALJ. This is on top of numerous other safety safeguards in this transaction such as (i) the due diligence showing that Confluence is an experienced, financially capable, and technically capable dam owner with a solid track record for safety (see 3 TR 179-180), (ii) the fact that Consumers Energy's current hydro employees will go with the deal to ensure continuity of experience and safe operational history are not lost (see 3 TR 175), (iii) the fact that Consumers Energy has been a responsible owner of these dams for more than 100 years and sends them off to Confluence in good repair and in a condition suitable to many more years of safe operation (see 3 TR 108), and (iv) the numerous features of the PPA that provide Confluence with the financial incentive to hold and operate the plants safely for the long term (see Consumers Energy's Initial Brief, pages 10-13). To the extent the Commission had any lingering doubts about the transaction, the Company's proposed Fund should resolve those doubts and seal the deal. The Commission should approve the transaction subject to the condition proposed in this section of these Exceptions.

2. **Proposed Conditions Imposed Solely on Confluence or its Affiliates**

Consumers Energy and Confluence have a valid and binding contract for the purchase and sale of the 13 hydro plants, and an associated PPA, that the parties negotiated at arm's length over the course of approximately a year and a half. To reach that agreement, each party carefully reviewed the impact of each term of all the associated transaction documents and made concessions in some areas to secure favorable changes in other areas so that, on balance, the entire agreement would remain acceptable from that party's perspective. That iterative process continued until the give-and-take balancing of the competing interests of both parties found a place of equilibrium where the same final draft met all the needs and risk tolerances of Consumers Energy and

Confluence simultaneously. While it may not always be visible solely by perusing the finished agreements, both parties had to make meaningful compromises to get to a final deal. As just one example, Confluence ultimately agreed to significant reductions in the PPA price, which is the most important benefit of this transaction from Confluence's perspective, compared to its initial position in negotiations. See Exhibit S-2.0, page 1.

Consumers Energy cannot compel Confluence to agree to any modifications of these carefully crafted agreements. Furthermore, any modifications to the terms of the agreement could have a material impact on Confluence's perception of the value of the bargain struck. Confluence's obligations under the PSA to go purchase the plants is expressly conditioned on MPSC approval of the transaction, which the PSA defines as a final order issued by the Commission "(a) approving the transactions contemplated by this Agreement, including the Power Purchase Agreement, <u>on terms and conditions mutually acceptable to each of the Parties, in each Party's respective reasonable discretion</u>, including terms and conditions related to cost recovery and (b) <u>which does not contain terms, conditions or modifications unacceptable to each of the Parties in each Party's respective reasonable discretion</u>." Confidential Exhibit A-1, pages 19-20, 37 (emphasis added).

Consumers Energy submits that this transaction is a good deal for customers, for the local communities around the dams, and for the State of Michigan. There are already ample indications that Confluence will be a responsible dam owner and there are already sufficient incentives and safeguards built into the transaction. Those safeguards are now also supplemented by Consumers Energy's proposed "Consumers Energy Hydro Safety Fund." There is not a need for any further safeguards in the form of conditions that would require the parties to renegotiate and alter any of the terms of the existing agreements.

Staff and the Attorney General proposed several conditions that would solely impact Confluence. Both Staff and the Attorney General proposed that the Commission impose a condition requiring Hull Street Energy to issue a parent guarantee of some kind (though the specific terms of the proposed parent guarantees differ between Staff's and the Attorney General's proposals). 3 TR 318, 323, 856. Staff also proposed that the Commission impose a condition on Confluence to submit a Community Engagement Plan. 3 TR 858-859. The Attorney General proposed that the Commission impose a condition on Hull Street Energy to make additional equity commitments to Confluence. 3 TR 324.

Despite offering several very cogent reasons why the parent guarantee proposed by Staff and the Attorney General are unworkable and, in some respects, inconsistent with the law, the ALJ nevertheless ultimately recommended that, if the Commission approves the transaction it should "require a parent-level financial guarantee that addresses and mitigates the concerns identified above." PFD, page 277; see also PFD, page 288. In other words, the ALJ <u>did not</u> recommend that the Commission approve either Staff's or the Attorney General's proposed parent guarantees as proposed. Rather he recommended some modified version of a parent guarantee where the details would be left to the Commission to sort out how to address and mitigate the legitimate concerns with a parent guarantee expressed by the other parties and the ALJ himself. The ALJ offered no insight into how those very reasonable concerns should or could be mitigated. The ALJ also recommended that the Commission impose a requirement for a Community Engagement Plan if the transaction is approved. PFD, page 285. Finally, the ALJ did not specifically offer any recommendation regarding the Attorney General's proposed condition to require an additional equity commitment from Hull Street Energy; however, the ALJ discussed that issue in connection with the parent guarantees (see PFD, page 267), and he appears to have lumped that issue into his recommendation on that topic. Since he did not specifically recommend a condition requiring an additional equity commitment, Consumers Energy takes the ALJ to not be recommending such a condition in connection with an approval of the transaction.

Consumers Energy has no independent reason to oppose any conditions imposed solely on Confluence or its affiliates; however, the Company is deeply concerned about the impact of imposing such conditions on Confluence's willingness to go forward with the transaction. Regarding the parent guarantee in particular, Consumers Energy expressly raised the issue of a parent guarantee during negotiations with Confluence. See Exhibit AG-22, page 1. The parties were unable to reach agreement on such a provision as part of the negotiated transaction package. Exhibit AG-22, page 1. The Commission should understand that to mean that Confluence made other concessions in exchange for excluding a parent guarantee from the final deal. The absence of a parent guarantee is not an oversight – it is the result of arm's-length negotiations over an integrated set of contractual terms. The Commission cannot impose a parent guarantee after the fact without fundamentally altering the bargain struck by the parties. Consumers Energy believes this strongly indicates that Confluence would reject a condition imposing a parent guarantee, which would result in the Company's customers losing the benefits of this deal. The Commission should look to Confluence for direction on what conditions, if any, it would accept as part of the approval of the transaction. To the extent that Confluence indicates that a condition is not acceptable, the Commission should refrain from imposing such a condition.

3. Other Proposed Conditions

a. Environmental Liability and Regulatory Disallowance Agreement Cost Recovery Limitation Conditions

The Attorney General proposed two conditions for approval of the sale that ask the Commission to preemptively conclude that certain costs will not be recoverable in future rates.

Specifically, the Attorney General proposed that the Commission should impose a condition that, if Confluence or Hull Street Energy "fail to make payment on any environmental liabilities or other obligations, [Consumers Energy] will not be allowed to recover those costs from its customers." 3 TR 323. Similarly, the Attorney General proposed that the Commission should impose a condition that, if the Company is required to make any payments under PPA or the Regulatory Disallowance Agreement ("RDA") for the Economic Loss Payment, those payments will not be recoverable from customers. 3 TR 324.

The ALJ recommended that, if the Commission approves the transaction, it should impose both of those conditions. PFD, pages 283, 288. The reasons provided by the ALJ in support of those recommendations are not valid. Consumers Energy regards both conditions as unacceptable and would exercise its rights under MCL 460.6q(8) and (9) to reject those conditions and not go forward with the transaction. The Commission should reject the ALJ's recommendations.

With respect to environmental liability payments, the ALJ argued that "[o]ne of the ostensible benefits of the proposed transaction is that it ostensibly relieves Consumers [Energy] (and thus its ratepayers) of future liabilities, and this benefit would be rendered illusory if Confluence's failure to make payment on future environmental liabilities merely gets passed back to ratepayers." PFD, page 288. The problem with the ALJ's reasoning is that it lacks context or a critical legal analysis of the condition that the Attorney General proposed. The Attorney General's proposed condition would be triggered by *any* failure on the part of Confluence to "make payment on any environmental liabilities or other obligations," even if there was an arguably reasonable basis for it.

First, the language of the Attorney General's proposed condition was not carefully drafted and the ALJ failed to critically analyze and consider the ramifications of approving it. The PSA includes both "Assumed Environmental Liabilities" and "Excluded Environmental Liabilities." See Confidential Exhibit A-1, pages 8-9, 13. As written, the proposed condition would require disallowances even for Confluence's failure to pay an "Excluded Environmental Liabilit[y]" – i.e., environmental liabilities that Confluence was never required to assume and that Consumers Energy properly bears under the terms of the PSA. That would be plainly unjust. Even if the environmental liability was one that Confluence was meant to assume under the PSA, what does the Attorney General's proposed condition mean when it bars cost recovery if Confluence "fails to pay" such an obligation? If Confluence failed to pay a legitimate liability assigned to it under the PSA, Consumers Energy would undoubtedly take legal action to enforce the PSA. But, if Consumers Energy is required to cover the costs of the environmental liability while litigation remains pending, would the condition prohibit Consumers Energy, for example, from accruing a regulatory asset to preserve the costs until litigation can resolve the issue? If there were a pre-determined bar on ever recovering the costs in rates, accounting rules could very well require the Company to write the costs off as a loss instead of holding them until the end of litigation in a regulatory asset. Neither the ALJ nor the Attorney General has considered these ramifications of the proposed condition.

Second, without knowing the circumstances of such a hypothetical future failure to make a payment on an environmental liability, it is not possible to genuinely evaluate whether the failure was appropriate. If, for example, (i) there was a good faith dispute about whether a particular environmental liability was an "Assumed" environmental liability or an "Excluded" environmental liability, (ii) Confluence refused to pay for the liability, and (iii) Consumers Energy had been compelled by some governmental authority to address the situation under legacy environmental laws in the absence of Confluence's action, the Company should be afforded an opportunity to make its case to the Commission for cost recovery in rates. Consumers Energy is not asking the Commission to guarantee cost recovery in this case, but the Commission should not prematurely foreclose the possibility either. If the Commission wishes to use the final order in this case to clearly state that future cost recovery of such costs is not guaranteed and would be subject to a reasonableness and prudence review, that would be reasonable. But the Commission should decline to impose a condition in this case that categorically denies future cost recovery without a contemporaneous record regarding the nature of the costs and whether they were reasonable and prudent.

With respect to payments under the RDA, the ALJ argued that the RDA would "put the Commission in an untenable situation because it can shift the financial risk of future disallowances onto ratepayers." PFD, page 283. He also argued that the risk of any future disallowance of the PPA should fall on Consumers Energy rather than customers "because the RDA arises from a negotiated arrangement that the Company played a central role in shaping." PFD, page 283. Those claims have no merit.

The RDA provides vital security to assure Confluence that it can trust the stream of income from the PPA, which is needed for Confluence to make the necessary investments in the hydro plants to relicense them and to take on the considerable liabilities associated with the hydro plants. Inclusion of the RDA was a non-negotiable requirement on the part of Confluence to complete the deal. It is an understandable term of the deal, but it is not a fair characterization to say that the Company "played a central role in shaping [it]." It was a necessary concession in order to complete a deal that will significantly benefit customers and the local communities around the dams.

Furthermore, it is not correct, as the ALJ claims, that the existence of the RDA puts the Commission in an "untenable position." The Commission is in possession of the complete PPA and has the present ability to evaluate whether the PPA, as a necessary term of the PSA, is reasonable in order to secure all of the benefits of the transaction for customers. Assuming that the Commission concludes that the PPA is reasonable to approve based on the same information that is available to Consumers Energy today, the Commission alone controls the future decision about whether to subsequently disallow any payments under the PPA for reasons that no one can currently foresee. But, even then, the Commission could disallow the PPA knowing that it is the Commission's discretion alone about whether to allow recovery of any resulting payments under the RDA in rates. The Commission could choose to disallow PPA payments *and* to disallow cost recovery of the resulting RDA payments at its own discretion. Like with the environmental liabilities costs discussed above, Consumers Energy is not asking the Commission to guarantee in this case that it affirmatively *will* be permitted to recover RDA payments in the future. The Company is only asking that the Commission decline to foreclose the possibility now, since the Commission alone controls that future and we cannot presently know what potentially justifiable circumstances might cause the Commission to disallow one or more PPA payments yet still determine it is reasonable for the Company to get cost recovery for the resulting RDA payments. It is simply premature to make that decision today without a contemporaneous record. In fact, Staff agreed with this position. In contrast to the Attorney General's recommended condition, which the ALJ unwisely embraced, Staff asked only that the Commission state that it does not guarantee payments made under RDA will be recoverable in utility rates. Staff's approach is fair, reasonable, and acceptable and should be adopted in place of the ALJ's recommendation.

b. <u>Excluded Liabilities Condition</u>

The Attorney General proposed that the Commission impose a condition on approval that, if Consumers Energy makes any payments to Confluence for Excluded Liabilities under the terms of the PSA, those payments should be subject to a reasonableness and prudence review. 3 TR 324.

The Company objected to that recommendation on the grounds that it is unnecessary. The law already subjects the Company to a reasonableness and prudence review for any costs that it wishes to recover through rates.

The ALJ recommended that, if the Commission approves the transaction, it should include the Attorney General's proposed condition related to the Excluded Liabilities in its order. PFD, page 289. The ALJ called it "curious" that the Company objects to a condition on the basis that the law already requires such a review. PFD, page 289. There is a valid legal reason for the Company's hesitancy. If an issue over the proposed condition ever arises, a court reviewing the condition may wonder why such seemingly unnecessary language was included in the Commission order. A court may liken the requirement of the condition to an administrative rule and apply the same rules of construction to the requirement as it would to other rules and statutes. Under those rules of construction, a court "cannot presume that [an administrative agency] would do a useless thing." *Averill v Dauterman*, 284 Mich App 18, 24; 772 NW2d 797 (2009). "Every clause and every word is presumed to have some force and meaning." *Wyandotte Sav Bank v Eveland*, 347 Mich 33, 44; 78 NW2d 612 (1956). Including a redundant condition as part of the order approving the sale creates the unnecessary risk that some reviewing court sometime in the future will conclude that the Commission must have meant to supplement the ordinary reasonableness and prudency review standard in some manner.

This is not a hill that Consumers Energy plans to die on. However, the condition simply states what is already legally true and, therefore, is unnecessary. The Commission should approve the transaction without this unnecessary condition.

c. <u>PPA Re-Approval Condition</u>

The Attorney General proposed that the Commission should include a condition on the approval of the transaction that would require that, "[i]f any of the 13 hydro facilities are sold to a non-affiliated party of HSE, or a party for which HSE has less than 50% ownership or control, the PPA will need to be approved again by the Commission to ascertain it is still appropriate." 3 TR 324. Although the ALJ concluded that the Attorney General's proposal was somewhat unclear and could be interpreted in two potential ways, the ALJ ultimately recommended that, if the Commission approves the transaction, it should adopt the Attorney General's PPA re-approval condition. PFD, page 292.

The ALJ appears to believe that Consumers Energy's objections to the Attorney General's proposed condition were based on the first potential interpretation of the Attorney General's language (i.e., that it called only for approval of the new PPA with the new owner) and agreed with the Company that the condition – read that way – is redundant and unnecessary. PFD, page 292. However, the ALJ interpreted the Attorney General's language the second way (i.e., that it called for re-approval of the original PPA – the PPA presented for approval here – between Confluence and Consumers Energy in the event of one or more of the dams being sold). PFD, page 292. Working from that interpretation, the ALJ stated that he agreed with the condition for the reasons stated by the Attorney General. PFD, page 292. The ALJ's reasoning is incorrect.

First, the Company never interpreted the Attorney General's proposal as the ALJ presented in his first interpretation. The Company's objections were directed to the second interpretation of the Attorney General's proposal, which seems to be the correct one. To that end, the Company repeats its objection as stated in its Initial Brief. Requiring the Commission to re-approve a PPA if any facility is sold to a non-affiliate (or if Hull Street Energy's ownership/control falls below 50%) – is both unnecessary and unworkable. 3 TR 126-127. Mr. Blumenstock testified that the condition would require renegotiation the parties will not undertake, and it is unnecessary because FERC will oversee any license transfer and ensure a safe operator. 3 TR 126. In addition, the condition is logistically problematic because Consumers Energy [Begin Confidential] [redacted] [End Confidential] – making the Attorney General's proposed condition impractical in operation. 3 TR 1019-1020. The point is that nothing about the sale of one or more of the plants changes the operation of the existing PPA [Begin Confidential] [redacted] [End Confidential]

The ALJ accepted the Attorney General's reasoning for proposing the condition, [Begin Confidential] [redacted] [End Confidential] but that is not a valid reason for re-approval. [Begin Confidential] [redacted]

[redacted] [End Confidential] There is no merit to the Attorney General's reasoning or, by extension, the ALJ's reasoning. The only effect of the proposed condition would be to introduce unnecessary doubt about the continuing viability of this PPA and to create an unnecessary re-review process for a PPA that the Commission can already fully review for reasonableness in this case. The ALJ's recommendation to adopt this condition should be rejected.

d. <u>PPA Risk-Reallocation Conditions</u>

The Attorney General proposed that the Commission impose two conditions on approval of the transaction requiring the parties (Confluence and Consumers Energy) to reallocate certain operational risks in a manner that is inconsistent with the terms of the transaction. Specifically, the Attorney General proposed – contrary to the parties' agreement – that Confluence should bear the risk of the Midcontinent Independent System Operator, Inc. ("MISO") (i) dispatching the plants under uneconomic conditions or (ii) during periods of negative Locational Marginal Pricing ("LMP"). 3 TR 324. The ALJ recommended that, if the Commission approves this transaction, it should adopt these conditions. PFD, page 294. In doing so, the ALJ acknowledged that the Attorney General's concerns "may not necessarily be pressing," but then concluded that "it is still true that Consumers and its ratepayers should not bear such risks." PFD, page 294. The ALJ offered no reason at all for that summary conclusion. The ALJ's recommendation should be rejected.

Company witness Blumenstock explained why the Attorney General's proposed conditions are unreasonable. According to Mr. Blumenstock, river hydro generation is not dispatched in response to energy market conditions because operations must adhere to run-of-river requirements aimed at keeping consistent water levels. 3 TR 127-128. He explained that MISO expects Confluence to operate to maintain those water levels, not “chasing” energy prices. 3 TR 127-128. Mr. Blumenstock was not describing why the issue is not “pressing.” He was describing the operational realities of hydroelectric generation in the market. It is understood that hydro plants will necessarily be dispatched at times and in ways that other types of generation units would not, including times that are not economic. That is just an ordinary cost of business to run this type of generation facility. Like any other ordinary cost of business, the owner of the plant should be compensated for it.

Mr. Blumenstock also testified that both conditions would require changes to the transaction that the parties are not willing to renegotiate. 3 TR 127-128. Like the proposed conditions that solely impact Confluence, the Commission cannot impose these conditions after the fact without fundamentally altering the bargain struck by the parties. Consumers Energy cannot compel Confluence to agree to any modifications of these carefully crafted agreements. Furthermore, any modifications to the terms of the agreement could have a material impact on Confluence’s perception of the value of the bargain struck. These conditions risk losing the entire deal (and all of its corresponding benefits to customers and the local communities) to avoid nominal costs under the PPA that would be expected in any other PPA with a hydro generator. The ALJ’s recommendation to include these conditions should be rejected.

e. **PPA Price-Adjustment Condition**

The Attorney General proposed that the Commission should impose a condition on the approval of the transaction that would prohibit any adjustment in the PPA price for any cost overruns pertaining to the construction of the Hardy and Rogers spillways or other projects. 3 TR 324. The ALJ recommended that, if the Commission approves the transaction, it should adopt this condition. PFD, page 296. Even though the ALJ recognized that [Begin Confidential] [redacted] [End Confidential] he argued that "[i]t is generally incongruous to sell the dams and still require ratepayers to potentially be on the hook for certain cost overruns associated with known work at the facilities." PFD, page 296. There is no merit to the ALJ's argument.

Ordinarily, a potential buyer of a facility like the hydro plants would demand that major capital projects necessary for the continued licensure and operation of the plants would be completed by the seller before the transaction closes. In this case, that was a significant part of the problem that caused the Company to seek a buyer in the first place. The Commission had already indicated that there was not support for Consumers Energy to invest the significant capital required (estimated at over $350 million for Hardy alone (3 TR 804)) and include those costs in rates. Confluence was willing to purchase the plants with the understanding that it would need to complete the necessary upgrades itself to relicense the plants in a few years. Furthermore, [Begin Confidential] [redacted] [End Confidential] Nevertheless, with any engineering project of this scope and complexity, there are always risks of cost overruns. Confluence negotiated the PPA price with the understanding that it was economic for them to perform the Hardy and Rogers upgrade work at specified costs, but overruns in those costs could be sufficient to change the economics of the deal. Where those kinds of cost risks exist in large corporate transactions, it is ordinary and customary to include price adjustment provisions that contemplate those kinds of contingencies. To ensure that there was cost discipline, [Begin Confidential] [redacted] [End Confidential] Confidential Exhibit A-2, pages 74-75.

Finally, the ALJ's claim that it is incongruous to sell the dams and still require customers to pay for any cost overruns on the Hardy and Rogers upgrades loses sight of the bigger picture of this case. The price adjustment provision is just part of the cost of being able to sell these plants, which is the lowest cost option for customers. There is nothing incongruous about having customers bear a nominal cost necessary to sell the plants in order to avoid the much more significant costs of decommissioning or relicensing the plants. In effect, customers would be buying down their future costs. Likewise, it would make little sense to financially penalize Consumers Energy for incurring costs needed to make the overall costs for customers lower. It make perfect sense to allow rate recovery for these costs, assuming they even occur at all.

Once again, the proposed condition would require changes to the transaction that the parties are not willing to renegotiate. Like the proposed conditions that solely impact Confluence, the Commission cannot impose these conditions after the fact without fundamentally altering the bargain struck by the parties. Consumers Energy cannot compel Confluence to agree to any modifications of these carefully crafted agreements. Furthermore, any modifications to the terms of the agreement could have a material impact on Confluence's perception of the value of the bargain struck. This condition risks losing the entire deal (and all of its corresponding benefits to customers and the local communities) to avoid a potentially modest and limited cost increase under the PPA. The ALJ's recommendation to include this condition should be rejected.

f. <u>Employee Retention and Incremental Employee Costs Condition</u>

The PFD recommended that, if the Commission approves the transaction, the Commission should adopt the Attorney General's condition excluding the Company's employee retention and incremental employee costs from the closing costs. This recommendation would effectively operate as a disallowance of those costs. The recommendation would not be beneficial to public interest in the State of Michigan. If the Commission approves the sale, the Commission should reject the PFD's alternate recommendation, that is to adopt the employee costs adjustments proposed by the Attorney General, as it is contrary to the ultimate goal of the transaction which is to preserve the dams and provide continuous safe operation of the dams over the next several decades. See PFD, page 300.

The transition of Consumers Energy employees is a necessary step to ensure continuity of community engagement, safe operation of the dams, and FERC compliance. The team transitioning to Confluence will provide decades of necessary experience to ensure the above needs are met. The experience provided is incalculably valuable. The people are an essential component of this transaction and the employees going to Confluence should be incented to ensure public interest is satisfied and the future safe operations of the dams. All the associated payments ensuring continuity of dam management by experienced professionals should be recoverable as reasonable and prudent expenses related to the transaction. The incremental employee costs are necessary to ensure that the dams are fully staffed at the time of transition due to certain current employees' rights under the union contract to bump into other positions at Consumers Energy.

Just like the price-adjustment costs discussed above, the employee retention and incremental employee costs are part of the cost of being able to sell these plants, which is the lowest cost option for customers. There is nothing inappropriate about having customers bear the reasonable employee costs necessary to sell the plants in order to avoid the much more significant costs of decommissioning or relicensing the plants. Again, it would make little sense to financially penalize Consumers Energy for incurring costs needed to make the overall costs for customers lower. It makes perfect sense to allow rate recovery for these costs.

The PFD's alternate recommendation is also internally inconsistent with its own recognition that the transfer of experienced employees mitigates concerns about Confluence's technical capability. See PFD, page 190. The Company explained that "the supplemental staffing costs are necessary to ensure an adequate-and safe-workforce is in place at the time of closing," and that the disputed employee costs are "reasonable and prudent expenses to ensure dam safety and operability." Company's Initial Brief, pages 56–57. The Commission should reject the PFD's alternate recommendation if the sale is approved because the costs are reasonable and prudent expenses being accrued to lead to the best outcome for the dams close of sale.

III. CONCLUSION

For the reasons set forth in Consumers Energy's testimony, exhibits, briefs, and these Exceptions, the Commission should find that the sale of the Company's hydro facilities to Confluence Hydro and the associated PPA will have a favorable impact on customer rates, maintain Consumers Energy's ability to provide safe, reliable, and adequate electric service to its customers, and that the transaction is reasonable and in the public interest. The Commission should reject any of the ALJ's conclusions to the contrary.

WHEREFORE, Consumers Energy Company requests that the Michigan Public Service Commission:

A. Approve the transaction between Consumers Energy and Confluence Hydro as proposed in the transaction documents, including the Purchase and Sales Agreement, the Power Purchase Agreement, and all other related agreements and attachments thereto;

B. Approve the Company's requested accounting treatment for the gain on the sale with offsets for expenses related to the transaction;

C. Affirm that the Power Purchase Agreement is eligible for a Financial Compensation Mechanism under the provisions of MCL 460.6t(15) and MCL 460.1028(8);

D. Approve the Company's proposed condition, which would require the Company to establish the "Consumers Energy Hydro Safety Fund," to be controlled and administered by the State of Michigan, as described in these Exceptions, and requiring Consumers Energy to pay all revenue derived from the PPA with Confluence during the 30-year term of the PPA into the Fund;

E. Reject all other conditions proposed by the opposing parties to this case; and

F. Grant such other and further authority and approvals as may be lawful and proper.

Respectfully submitted,

CONSUMERS ENERGY COMPANY

Dated: July 1, 2026

By: Bret Totoraitis

Bret A. Totoraitis (P72654)
Evan B. Keimach (P83418)
One Energy Plaza
Jackson, Michigan 49201
Attorneys for Consumers Energy Company
(517) 788-0835

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.	)))))))	Case No. U-21985

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS
COUNTY OF JACKSON)

Melissa K. Harris, being first duly sworn, deposes and says that she is employed in the Legal Department of Consumers Energy Company; that on July 1, 2026, she served an electronic copy of the **Redacted Version of Consumers Energy Company's Exceptions to the Proposal for Decision** upon the persons listed in Attachment 1 hereto, at the e-mail addresses listed therein.

Melissa K. Harris

Melissa K. Harris

Subscribed and sworn to before me this 1st day of July, 2026.

Crystal L. Chacon

Crystal L. Chacon, Notary Public
State of Michigan, County of Eaton
My Commission Expires: 05/25/30
Acting in the County of Jackson

ATTACHMENT 1 TO CASE NO. U-21985

Party	Email Address
Administrative Law Judge	
Hon. James M. Varchetti	varchettij@michigan.gov
Counsel for Consumers Energy Company	
Bret A. Totoraitis, Esq. Evan B. Keimach, Esq.	Bret.Totoraitis@cmsenergy.com Evan.Keimach@cmsenergy.com mpsc.filings@cmsenergy.com
Counsel for the Michigan Public Service Commission Staff	
*Amit T. Singh, Esq. *Daniel E. Sonneveldt, Esq. *Adam M. Cozort, Esq.	Singha9@michigan.gov sonneveldtd@michigan.gov cozortA1@michigan.gov
Counsel for Attorney General Dana Nessel	
*Celeste R. Gill, Esq. *Hadley Tuthill, Esq. *Michael Moody, Esq. *Amanda Churchill	gillc1@michigan.gov tuthillh@michigan.gov moodym@michigan.gov AG-ENRA-Spec-Lit@michigan.gov
Consultant for Attorney General	
*Sebastian Coppola	sebcoppola@corplytics.com
Counsel for the Association of Businesses Advocating Tariff Equity ("ABATE")	
*Stephen A. Campbell, Esq. *Michael J. Pattwell, Esq. Lauren Degnan	scampbell@clarkhill.com mpattwell@clarkhill.com ldegnan@clarkhill.com
Consultant for ABATE	
*James R. Dauphinais *Jessica A. York *Brian C. Andrews	jdauphinais@consultbai.com jyork@consultbai.com bandrews@consultbai.com
Counsel for Michigan Environmental Council	
*Christopher M. Bzdok, Esq. *Natasha Fowles	chris@tropospherelegal.com natasha@tropospherelegal.com
Counsel for Michigan Trout Unlimited, Michigan Steelhead and Salmon Fishermen's Association, the Great Lake Council of Fly Fishers International, Anglers of the Au Sable, and the Michigan Hydro Relicensing Coalition ("MHRC" or "Michigan Hydro Relicensing Coalition")	
*Daniel Abrams, Esq. *Katherine S. Duckworth, Esq.	dabrams@elpc.org kduckworth@elpc.org
Counsel for Michigan Department of Natural Resources	
*Nathan A. Gambill, Esq. *Hadley Tuthill, Esq.	gambilln@michigan.gov tuthillh@michigan.gov
Counsel for Lake Allegan Association, Inc.	
*Jennifer U. Heston, Esq.	jheston@potomaclaw.com
Counsel for Confluence Hydro, LLC	
*Timothy J. Lundgren, Esq. *Justin K. Ooms, Esq. *Laura A. Chappelle, Esq. *Haylee N. Skank, Esq.	tjlundgren@varnumlaw.com jkooms@varnumlaw.com lachappelle@varnumlaw.com hnskank@varnumlaw.com
Counsel for the Environmental Law & Policy Center	
Howard A. Learner, Esq. Bradley D. Klein, Esq.	hlearner@elpc.org bklein@elpc.org
Counsel for the Township of Croton	
*Michael J. Watza, Esq. *Nathan Inks, Esq. Clifford H. Bloom, Esq. *Tonya Voakes	mike@bloomsluggett.com nathan@bloomsluggett.com cliff@bloomsluggett.com tonya@bloomsluggett.com

* Receives Confidential Materials