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October 22, 2013

Ms. Mary Jo Kunkle
Michigan Public Service Commission
6545 Mercantile Way
P. O. Box 30221
Lansing, MI 48909

RE: MPSC Case No. U-17302

Dear Ms. Kunkle:

The following is attached for paperless electronic filing:

**Initial Brief of the Michigan Environmental Council**

**E-Service List**

Sincerely,

Digitally signed by
Christopher M. Bzdok
Date: 2013.10.22
16:02:14 -04'00'

Christopher M. Bzdok
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xc: ALJ Theresa A. Staley (by email and first class mail)
Parties to Case No. U-17302
James Clift, MEC (james@environmentalcouncil.org)

STATE OF MICHIGAN

MICHIGAN PUBLIC SERVICE COMMISSION

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|---|---|
| In the matter, on the Commission's own motion, regarding the regulatory reviews, revisions, determinations and/or approvals necessary for the DTE ELECTRIC COMPANY (f/k/a The Detroit Edison Company) to fully comply with Public Acts 286 and 295 of 2008. | Case No. U-17302<br><br>ALJ Theresa A. Staley |

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# INITIAL BRIEF OF THE MICHIGAN ENVIRONMENTAL COUNCIL

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October 22, 2013

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## I. INTRODUCTION

This case involves a proposal by the DTE Electric Company ("DTE Electric" or "Company") to amend its Renewable Energy Plan ("REP"). Under 2008 PA 295 ("PA 295"), DTE Electric is required to obtain approval of its REP from the Michigan Public Service Commission ("MPSC" or "Commission") every two years.

In general, DTE has proposed to reduce its renewable surcharges significantly. For residential customers, the proposed reduction is from three dollars per month to 43 cents per month. That represents a big move in the right direction. However, it is not big enough – given how much money DTE has already pre-collected from ratepayers for its REP, and given how far costs for renewable energy have already come down. By contrast with DTE, Consumers Energy is currently proposing to reduce its renewable energy surcharges to zero.[1]

DTE plans to continue collecting significant surcharges by building into its plan a number of flawed assumptions. These flawed assumptions have the cumulative effect of making the Company's proposed renewable energy surcharges higher than necessary. In addition, the Company's REP includes a number of built-in cost contingencies that obviate the need to end the plan period in 2029 with a regulatory liability balance of $25 million.

The Michigan Environmental Council ("MEC") submits this initial brief to address a variety of issues arising from the Company's application in this case. First, MEC requests that the Commission reverse a decision by the Administrative Law Judge ("ALJ") to deny MEC's motion to strike portions of the Company's testimony concerning the capacity factors of wind generating facilities. Because this expert testimony is without factual foundation in the record, it should not be considered by the Commission in reviewing the merits of DTE Electric's proposed REP amendments.

[1] Case No. U-17301, Consumers Energy supplemental filing of July 29, 2013.

MEC also urges the Commission to require the use of Commission-approved transfer prices and renewable energy depreciation rates – at the time they are approved in Case Nos. U-16656 and U-16991 – rather than the unfounded transfer prices and depreciation rates currently serving as important components of the Company's REP.

MEC also requests that the Commission require DTE Electric to use a much lower projection of self-build wind generation costs in its REP, and that it reject the Company's inflated estimates of wind generation curtailment expense. Finally, MEC seeks the Commission's careful review of various exaggerated or overly-conservative estimates upon which DTE Electric's proposed REP is based. In light of these estimates, and the substantial regulatory liability balance already accrued, and the protection that already exists in the statute against DTE accruing a regulatory asset, the Commission should require the Company to end the plan in 2029 with a balance of $0.

Once these changes have been ordered – or the Commission denies biennial approval unless DTE agrees to the changes – MEC urges the Commission to set new surcharges, in this case or in the pending reconciliation. MEC suggests 5 cents per month for residential customers.

## II. APPEAL

### A. The Commission Should Reverse the ALJ and Grant MEC's Motion to Strike DTE Electric's Expert Testimony on Wind Capacity Factors, Due to the Company's Refusal to Put the Reports on Which the Testimony Was Based into Evidence

Before cross examination was conducted in this case, MEC moved to strike certain portions of the expert testimony of DTE Electric witness Charles Conlen. Specifically, MEC moved to strike Mr. Conlen's testimony regarding an assumed wind generation capacity factor, observing that the only factual support for that testimony – as acknowledged by the Company and by Mr. Conlen – is not in evidence. Because the ALJ's denial of MEC's

motion to strike was in error, MEC respectfully urges the Commission to reverse the ALJ's decision and to strike the evidence from the record.[2]

### 1. Rules of Evidence on Foundation for Expert Testimony

MEC's motion to strike is based on the well-established rule that the factual basis for expert witness testimony must be placed in evidence by the party propounding that testimony.[3] Rule 703 of the Michigan Rules of Evidence provides, in relevant part, that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence."[4] As the Michigan Supreme Court recently explained in *People v Fackelman*, "[t]his rule permits 'an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony.'"[5] In *Fackelman*, where the facts and data in a particular report "were essential to the testifying expert' opinions, they were required to have been admitted into evidence under MRE 703."[6] The failure of the party propounding such testimony to ensure the "essential" report's proper admission, according to the Supreme Court, was an evidentiary error.[7]

Consistent with MRE 703 and Supreme Court precedent, the Commission recently rejected an argument by the DTE Electric Company that the factual bases for its experts'

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[2] See Rule 337(5) of the Michigan Public Service Commission ("MPSC") Rules of Practice and Procedure, Mich Admin Code R 460.17337(5).

[3] See MRE 703; *People v Fackelman*, 489 Mich 515, 534; 802 NW2d 552 (2011); December 20, 2011 Order, Michigan Public Service Commission Case No. U-16582, 16.

[4] MRE 703.

[5] 489 Mich at 534, quoting staff comment to the 2003 amendment of MRE 703, 468 Mich xcv, xcvi.

[6] *Fackelman*, 489 Mich at 534.

[7] *Id.* at 539-40.

opinion need not be in the record in MPSC proceedings.[8] In Case No. U-16582, DTE sponsored expert testimony in support of its request to reduce the Company's transfer price schedule.[9] This expert testimony was based on two reports, however, that the Company refused to offer into evidence.[10] Rather than offer the reports on the record, as the party propounding testimony based on them, DTE suggested in that case that the other parties pay a fee to the reports' owners in order to obtain them.[11] Although MEC moved to strike the Company's testimony, as in this case, the ALJ denied MEC's motion.[12]

The Commission reversed, concluding that DTE Electric's failure to provide the reports at issue was "wholly inadequate":

> The Commission agrees with the MEC that neither the Staff nor the intervenors have the burden to establish a foundation for the company's expert testimony . . . . Without the forecast information underlying the proposed transfer price schedule, the other parties were denied the opportunity to test the company's evidence, a clear violation of their right to due process.[13]

### 2. MRE 703 Bars DTE from Offering Testimony Based on Reports Not in Evidence

In this case, it is undisputed that DTE Electric witness Charles Conlen testified that the Company's REP is based on "a number of critical assumptions,"[14] that each critical assumption "can drive outcome variations while implementing the Company's amended

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[8] December 20, 2011 Order, MPSC Case No. U-16582 at 16.

[9] *Id.* at 14-15.

[10] *Id.*

[11] *Id.* at 15.

[12] *Id.* at 2, 14.

[13] *Id.* at 16.

[14] Direct Testimony of DTE Electric Witness Charles C. Conlen ("Conlen Direct"), 2 Tr 75, 78. Mr. Conlen has also referred to these critical assumptions as "key plan assumptions." Conlen Direct at 2 Tr 79.

REP,"[15] and that one of these assumptions is that any future wind farm in DTE Electric's renewable energy portfolio will have "an average 40% capacity factor."[16] It is also undisputed that Mr. Conlen stated in discovery that two specific reports authored by a company known as WindLogics "were used as a basis for the Company's capacity factor assumptions."[17] Further, it is undisputed that the Company has identified no other factual basis for its capacity factor assumptions, and that the WindLogics reports at issue were not placed in evidence by the Company. Simply stated, the sole factual basis for one of nine critical assumptions underlying Mr. Conlen's expert testimony in this case is not in evidence. The company has built its case for an REP amendment on a foundation of non-record evidence, and, as a result, MEC's motion to strike Mr. Conlen's testimony regarding capacity factor assumptions is supported by overwhelming precedent from both the Commission and Michigan Supreme Court.

In responding to MEC's motion to strike, DTE Electric incorrectly argued that MRE 703 does not require the admission of the WindLogics reports in this case. Despite the clear requirements of MRE 703, the Company suggests that it should be relieved from these requirements under Rule 325 of the Commission's Rules of Practice and Procedure.

Rule 325 provides that

> [t]he rules of evidence as applied in nonjury civil cases in circuit court shall be followed as far as practicable, but the commission may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.[18]

To be clear, this rule requires the Commission and its ALJs to follow Michigan's rules of evidence for nonjury civil proceedings, and allows a departure from those rules only if it

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[15] *Id.* at 2 Tr 83.

[16] *Id.* at 2 Tr 80.

[17] Exhibit MEC-18; see also Exhibit MEC-17.

[18] Mich Admin Code R 460.17325.

would be "impracticable" to follow them and the otherwise inadmissible evidence is "of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs."

The first problem with the Company's reliance on Rule 325 is that no reason has been given for why it is impracticable to follow MRE 703 in this case. The Company asserts that it is not practicable to put the WindLogics reports into the record, in other words, because it is bound by a confidentiality provision in its agreement with WindLogics. But this is an overstatement, because the agreement at issue clearly contemplates that the disclosure of otherwise confidential information may be required by courts or regulatory authorities.[19]

At oral argument on MEC's motion to strike, for example, DTE Electric's attorney stated that "[i]f the regulator demanded that we provide this, we would then exercise those provisions and then make an attempt to accommodate the regulatory agency."[20] This argument incorrectly assumes that this sort of evidence must be compelled on a case-by-case basis rather than by the general operation of basic rules of evidence. To the contrary, the Commission has recognized that "there is no absolute privilege for trade secrets and similar confidential information,"[21] and that "the party seeking to preclude disclosure of allegedly confidential information has the burden of establishing the necessity and the reasonableness of the proposed restrictions . . . ."[22] The Commission has also recognized that the appropriate means of preventing widespread disclosure of confidential information is not to keep it out of the record in MPSC proceedings altogether, but to enter it under the

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[19] See 2 Tr 40-41.

[20] 2 Tr 48.

[21] *Re The Detroit Edison Company*, April 29, 1997 Order Granting in Part and Denying Part Application for Leave to Appeal, MPSC Case No. U-11175, 3 (quoting Fed Open Mkt Comm v
Merrill, 443 US 340, 362 (1979)).

[22] *Re The Detroit Edison Company* at 4.

terms of a protective order.[23] The Company was required as a matter of evidentiary procedure to "exercise those provisions" in its confidentiality agreement with WindLogics, and to "attempt to accommodate the regulatory agency," in submitting its initial filing.

There is no precedent for the Company's argument that a critical piece of evidence in support of its case can simply be kept out of the record altogether because the Company agreed to obtain it under some form of confidentiality agreement. That is as it should be because the policy consequences of the Company's argument would threaten the ability of intervening parties to fully vet utilities' evidentiary presentations in a wide range of cases. If the Commission were to accept DTE Electric's argument that a confidentiality agreement between the Company and a supplier of critical information makes it "impracticable" for that information to be placed on the record, for purposes of Rule 325, what is to stop utilities in the future from simply entering into confidentiality agreements with all suppliers of critical information? Such an outcome would not comport with MRE 703, Rule 325, or Commission precedent concerning evidence; it would not comport with the general requirement that the Commission ensure utilities satisfy their statutory burden of proof in proceedings that implicate rate changes; and, as the Commission separately recognized in Case No. U-16582, it would implicate substantial due process concerns for intervenors.[24]

At bottom, the confidentiality provision in DTE Electric's agreement with WindLogics is a self-imposed hardship that should not be borne by other parties to this case. It is up to the Company to prove that its amended REP is just and reasonable, and otherwise complies with Michigan law and Commission precedent. The Company cannot and should not be allowed to equate the need for extra work, extra time, or extra expenditures on its part with "impracticability" as that word is used in Rule 325.

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[23] *Id.* at 3.

[24] December 20, 2011 Order, MPSC Case No. U-16582, 16.

The second problem with Company's reliance on Rule 325 is that Mr. Conlen's unsupported capacity factor assumptions are not, by any stretch, a type of evidence "commonly relied upon by reasonably prudent persons in the conduct of their affairs." The evidence that MEC seeks to exclude in this case is the factually unsupported expert testimony of Mr. Conlen. The question here is not whether the allegedly confidential WindLogics reports are evidence "of a type commonly relied upon by reasonably prudent person," but whether the same can be said of Mr. Conlen's capacity factor assumptions.

In other words, would a reasonably prudent person rely on an estimate of wind capacity factors when the person making such estimate calls it a "critical assumption" underlying a multi-million dollar deal, and when that person has no supporting factual evidence for the estimate? The Company has argued that Mr. Conlen's "critical assumption" should be viewed by the Commission as a "fact," and that the Commission should simply weigh the probative value of that fact.[25] But this argument ignores the clear language of MRE 703, which states that expert testimony is admissible only if it is based exclusively on factual evidence introduced into the record by means other than the expert's own hearsay testimony.[26] The only factual support for Mr. Conlen's capacity factor assumption, by the Company's own admission, is the two WindLogics reports. And neither is in the record. Without an opportunity to review the WindLogics reports, no reasonably prudent person would rely on the critical assumption Mr. Conlen derived from them. As a result, this assumption should have been stricken by the ALJ, and it should now be stricken by the Commission.

Although Rule 325 can fairly be read as intending to allow for the admission of more evidence in Commission proceedings than would normally be allowed or required in other civil cases – i.e., complicated technical reports and other data normally relied upon by

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[25] See 2 Tr 44.

[26] See staff comment to the 2003 amendment of MRE 703, 468 Mich xcv, xcvi (quoted in *Fackelman*, 489 Mich at 534).

regulatory authorities like the Commission – DTE Electric seeks to read the rule as allowing the Commission to base its decision on less evidence than would normally be required for satisfaction of evidentiary and due process standards. Such a reading of Rule 325 should be rejected by the Commission in this case, because that rule was not intended to obviate the general requirement that expert testimony have a factual foundation in the record.

It is also important that, after considering the same arguments made by DTE Electric in Case No. U-16582, the Commission rejected them all. Still, the Company has argued in this case that the facts of Case No. U-16582 were different, and therefore that the Commission's order in the earlier case should not control the outcome in this case. First, the Company has suggested that while the capacity and LMP price forecasts at issue in Case No. U-16582 were available for purchase by intervenors, the WindLogics reports at issue in this case cannot be purchased by third parties at all. This is a red herring, however, because whether or not the reports could be purchased by MEC is entirely irrelevant to the evidentiary requirement that they be in evidence. Once again, the Company is improperly seeking to levy the consequences of a self-imposed hardship on other parties. The Commission clearly stated in Case No. U-16582 that "neither the Staff nor the intervenors have the burden to establish a foundation for the company's expert testimony." This requirement is not any less real for the fact that intervenors cannot go buy the information themselves.

Second, DTE has suggested that the capacity factor assumption used in this case is somehow less important to the overall validity of its proposed REP amendments than the capacity and LMP price forecasts were to the Company's application in Case No. U-16582.[27] This argument ignores the fact that Mr. Conlen himself refers to his capacity factor estimate as a "critical assumption" underlying the Company's proposed REP amendments, and it is otherwise without any factual or legal basis. There is no sliding

[27] See 2 Tr 43-44.

scale in MRE 703 or in Rule 325, by which allegedly less important expert testimony can be admitted without a proper factual foundation.

To add insult to injury, Mr. Conlen in his rebuttal testimony characterized MEC's capacity factor evidence as "deeply flawed" in comparison to the "capacity factor forecasts used to develop the Company's REP," which are "based on probabilistic assessments of availability and other loss factors."[28] The alleged superiority of DTE Electric's capacity factor forecasts cannot be evaluated unless they are in evidence. Not only did Mr. Conlen rely on those reports as the sole basis for his direct testimony and exhibits about capacity factors, but he then sought to discredit MEC's evidence by comparing it with the reports that are not in evidence and which DTE has denied other parties access to. This simply confirms that the reports are critical to the Company's case and that their absence from record should result in Mr. Conlen's derivative assumptions being stricken.

Finally, DTE Electric has suggested that the nature of renewable energy proceedings is such that the Commission should look the other way with respect to the evidentiary basis for the capacity factor assumption at issue:

> Our entire premise is we're operating in a case that's under a very quick timeline based upon the statutory requirements of these plans, and the Commission is going to read the record in this case. The Commission has reviewed historical plans and will likely continue to review plans from us and other utilities as time goes on; we don't think there's any prejudice to including this minimal amount of language in here.[29]

MEC rejects the Company's suggestion that its motion to strike involves a "minimal amount of language" that would not prejudice the Commission or other parties for not having a factual foundation in the record. DTE Electric has itself said that its capacity factor estimate is a "critical assumption" that "can drive outcome variations while

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[28] See Rebuttal Testimony of DTE Electric witness Charles C. Conlen ("Conlen Rebuttal"), 2 Tr 114.

[29] 2 Tr 48.

implementing the Company's amended REP."[30] And as MEC witness George Sansoucy demonstrated in various exhibits, seemingly minor changes to individual assumptions underlying the Company's REP can have a significant impact on renewable energy surcharges passed along to ratepayers. This is especially important for residential ratepayers, who, as Mr. Conlen acknowledged during cross examination, pay for a disproportionate share of DTE Electric's surcharge revenue.[31] The Commission should not ignore the importance of capacity factor assumptions in its review of this case, and instead should strike the Company's testimony for a lack of proper foundation.

After considering MEC's motion to strike, and both parties' arguments, the ALJ denied the motion. Although the ALJ denied the motion, however, she clearly agreed that DTE Electric had not complied with the rules of evidence and the Commission's rules in this case:

> From an evidentiary perspective, if this 40-percent capacity factor assumption is a number that is solely derived from those WindLogics forecasts, and those WindLogics forecasts have not been provided to MEC, I agree with MEC that the Company has not provided a foundation for using it; and maybe not necessarily for the same reasons as [in Case No. U-16582], but it provides the same problem that we had in the other case, which is some documents which are the basis for numbers and opinions are, the basis is being either withheld or not available to MEC and the other parties to review so that they know whether that number is actually a reasonable number to rely on. . . . . I am going to deny the motion to strike right now, but I am going to place on the record that this particular issue does concern me, and that, you know, it may be something that the Commission does want to explore the underlying documentation for. Again, I am primarily denying this not because I believe MEC is in error in its argument,

[30] Conlen Direct at 2 Tr 75, 83.

[31] Residential customers pay for two-thirds of DTE Electric's surcharge revenue but use only a third of the renewable energy generated by the Company. See Cross Examination of DTE Electric witness Charles C. Conlen ("Conlen Cross"), 2 Tr 140.

> because frankly, I think that they have presented a very substantial case to strike this evidence . . . .[32]

Despite agreeing with MEC's "substantial case to strike this evidence," the ALJ denied MEC's motion because:

> then my other problem becomes, do I send a matter to the Commission without any kind of assumption and not give them the chance to say, we don't know where the basis is for this 40 percent, either give it to us or we won't use it; and I tend to err on the side of providing the Commission with the information it needs.[33]

Neither MRE 703 nor Rule 325 allows for the type of discretion the ALJ exercised. Indeed, the 2003 amendment to the rule specifically eliminated any discretion, stating that the factual basis for an expert's opinion shall be in evidence.[34] It was not the ALJ's responsibility to ensure that a complete record be transmitted to the Commission – it was DTE's responsibility to provide a factual foundation for its expert testimony. To the extent Mr. Conlen's testimony about capacity factors must be stricken from the record, the consequences should fall to DTE Electric. In sum, MEC respectfully urges the Commission to strike Mr. Conlen's unsupported testimony concerning capacity factors.[35]

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[32] 2 Tr 50-51 (emphasis added).

[33] 2 Tr 50.

[34] See *Fackelman*, 489 Mich at 595, n 81 (Young, C.J., dissenting).

[35] MEC's original motion sought to strike lines 6-16 on page 23 of Mr. Conlen's direct testimony, and lines 9-24 on page 13 of Mr. Conlen's rebuttal testimony. MEC later amended this request, at oral argument on its motion, to include lines 8-10 on page 23 of Mr. Conlen's direct testimony and lines 20-22 on page 13 of his rebuttal testimony. See 2 Tr 33-34.

## III. ARGUMENT

### A. Transfer Prices

One of the "critical assumptions" underlying DTE Electric's proposed REP amendments in this case involves transfer prices.[36] MEC witness George Sansoucy explained in his direct testimony that:

> Transfer prices represent the projected cost of obtaining energy from traditional, non-renewable sources in Michigan in any given year. Transfer prices are important because they correlate directly with renewable energy surcharges. All other things being equal, higher transfer prices mean that the so-called "incremental cost of compliance" with PA 295 is lower, and therefore that renewable energy surcharges are lower. Lower transfer prices mean that the incremental cost of compliance, and therefore renewable energy surcharges, are higher.[37]

When Consumers Energy applied the Staff's transfer prices from Case No. U-16655 into its REP in Case No. U-17301, that reduced its residential surcharges from 13 cents to zero.[38]

#### 1. Transfer Price Assumptions in this Case

With respect to transfer prices, the Company's application in this case makes three assumptions.[39] First, the Company assumes that transfer prices previously approved by the Commission will continue to apply to renewable energy projects that were already in place at the time those transfer prices were approved. Second, the Company assumes that the transfer prices proposed by the Commission Staff in 2013, and adopted by the

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[36] Conlen Direct at 2 Tr 78.

[37] Direct Testimony of MEC witness George E. Sansoucy, P.E. ("Sansoucy Direct"), 2 Tr 294.

[38] Conlen cross, 2 Tr 153.

[39] See Wojtowicz Direct at 2 Tr 189; see also *id.* at 2 Tr 295-96.

Company in this filing, will be approved by the Commission and will apply to any future renewable energy projects. MEC does not take issue with either of these assumptions.[40]

MEC disagrees with DTE Electric's third assumption, however. Specifically, the Company assumes that the transfer price schedule it proposed in its 2011 renewable cost reconciliation proceeding, Case No. U-16656, will apply to the Echo Wind Park and to the Tuscola Wind II and Pheasant Run projects.[41] The transfer prices proposed by DTE Electric in Case No. U-16656 differed from the transfer prices proposed by the Commission Staff, and supported by MEC, in that case.[42] The Commission has not yet issued an order in Case No. U-16656, and therefore it has not yet approved of either the Staff's or the Company's proposed transfer prices in that case.[43]

MEC's position in this case is simple: DTE Electric's amended REP should be required to use whatever transfer prices are ultimately approved by the Commission in Case No. U-16656 for the Echo, Tuscola II, and Pheasant Run projects.[44] MEC does not seek here to reargue the merits of the transfer price proposals at issue in Case No. U-16656. Instead, MEC argues that the Company should not be allowed to amend its REP on the basis of a transfer price proposal that is still pending Commission review in a past case. This is especially true because, in the parallel renewable cost reconciliation

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[40] Although the second assumption is somewhat speculative, MEC supports the transfer prices proposed by the Staff in 2013, and therefore supports this assumption.

[41] Conlen Direct at 2 Tr 79; Sansoucy Direct at 296.

[42] See Conlen Direct at 2 Tr 104.

[43] The parties in Case No. U-16656 are still awaiting a proposal for decision from the ALJ.

[44] Mr. Conlen states in his direct testimony that "[a]ny changes resulting from" a final Commission order in Case No. U-16656 "will be reflected accordingly in subsequent REP filings." 2 Tr 76 (emphasis added). MEC's position is that the Commission's approval of the Company's amended REP in this case should be conditioned on the Company's agreement to incorporate such changes immediately upon an order in Case No. U-16656, rather than waiting until a final order in some as-yet unfiled case, which could be years from now.

proceeding of Consumers Energy Company, Case No. U-16655, the Commission ultimately approved of the Staff's proposed transfer price schedule.[45] Should the Commission take a consistent approach in Case No. U-16656, the transfer prices proposed by the Company in that case will not be approved, and should not therefore serve as a basis for the proposed REP amendments in this case.

In the Company's view, it is "gross speculation" to think that the Commission's order in Case No. U-16656 will be consistent with its order in Case No. U-16655, and it is "purely speculative" to think even that the Commission will not entirely approve of the transfer prices proposed by the Company in Case No. U-16656.[46] It is frankly more speculative for the Company to assume that the Commission will depart 180 degrees from its order in the Consumers case and instead approve of DTE Electric's proposed transfer prices in U-16656. Because there is at least a sound basis for thinking that the Commission will modify the transfer prices proposed by the Company in that case to some degree, MEC agrees with the Commission Staff in this case that the Commission should order the Company in this case to immediately amend its REP – as it applies to the Echo, Tuscola II, and Pheasant Run projects – upon the Commission's approval of transfer prices in Case No. U-16656.

### 2. Effect of Adopting Staff's Transfer Prices on the Surcharges

Ensuring that the Company's amended REP is based upon proper transfer prices for the Echo, Tuscola II, and Pheasant Run projects is important because, as MEC witness George Sansoucy demonstrated in his testimony and exhibits, a change in the Company's proposed transfer price schedule for those projects will have a substantial impact on the size of the renewable energy surcharges collected by DTE Electric. Using the transfer

[45] Sansoucy Direct at 2 Tr 296.

[46] Conlen Rebuttal at 2 Tr 103-04.

prices proposed by the Staff in Case No. U-16656 for those projects, rather than the Company's proposed transfer prices, would reduce the Company's incremental cost of compliance with PA 295 by more than $21 million between now and the end of 2017.[47] The same change would increase the Company's plan-ending regulatory liability balance from $25 million to $46 million, assuming that its proposed renewable energy surcharge schedule were not adjusted.[48]

In order to keep the Company's plan-ending regulatory liability at $25 million, as DTE Electric has proposed, using the Staff's proposed transfer prices in Case No. U-16656 would require a 10% reduction in the Company's renewable energy surcharges for all ratepayer classes.[49] And if the Company's plan-ending regulatory liability balance was spent down to $0, using the Staff's proposed transfer prices would require a 20% reduction in renewable energy surcharges.[50] In sum, the Company's assumption regarding transfer prices for the Echo, Tuscola II, and Pheasant Run projects is speculative, but it has a significant impact on the REP amendments proposed in this case. For both of those reasons, MEC respectfully requests that the Commission order DTE Electric to base its REP amendments on whatever transfer prices are ultimately approved in Case No. U-16656.

### B. Depreciation

Another important assumption underlying the Company's proposed REP amendments in this case involves the proper depreciation rate for renewable energy

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[47] Sansoucy Direct at 2 Tr 298; Exhibit MEC-3.

[48] Sansoucy Direct at 2 Tr 300; Exhibit MEC-3.

[49] Sansoucy Direct at 2 Tr 301; Exhibit MEC-3.

[50] Sansoucy Direct at 2 Tr 301; Exhibit MEC-3.

assets.[51] Specifically, the Company's filing assumes the use of renewable energy depreciation rates adopted temporarily by the Commission in Case No. U-16582 – namely, 4.24% for wind and 5.26% for solar.[52] And as Mr. Sansoucy testified, however, the Company's application neglects to say that

> the Commission's order in Case No. U-16582 characterized these depreciation rates as "doubtful at best," and ordered that they be adopted strictly "for interim use pending the results of a depreciation case focused on depreciation rates for renewable generation plant components." The Commission's order went on to say that DTE Electric "will then be expected to adjust its depreciation estimates to conform to the results of the depreciation case in its next biennial review." The depreciation case referenced in the Commission order is Case No. U-16991, and the next biennial review is the current case, U-17302.[53]

### 1. Pending Renewable Energy Depreciation Case

The Company's application makes no mention of the fact that new renewable energy depreciation rates are likely to be established soon by the Commission in Case No. U-16991. In fact, the ALJ in Case No. U-16991 recently issued a Proposal for Decision that recommends the adoption of much lower depreciation rates than DTE processes: 3.88% or 3.08% for wind and 4.94% for solar.

As in the case of transfer prices, MEC does not seek to reargue the merits of renewable energy depreciation in this case, but merely to ask the Commission to order the Company to incorporate into its REP the depreciation rates that the Commission ultimately adopts in Case No. U-16991. This is especially important in the context of depreciation rates, because the Commission's order in Case No. U-16582 expressly directed DTE Electric to include the new depreciation rates established in Case No. U-16991 in its next

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[51] See Direct Testimony of DTE Electric witness Mark A. Carpenter ("Carpenter Direct"), 2 Tr 226-27.

[52] *Id.* at 2 Tr 227.

[53] Sansoucy Direct at 2 Tr 303.

biennial review proceeding, which is this case.[54] And like changes to the Company's transfer price schedule, changes to the depreciation rates underlying DTE Electric's REP will have a substantial impact on the way that REP affects ratepayers.

In his direct testimony, Mr. Sansoucy explained that:

> Exhibit A-16 shows that depreciation expense is a major factor in the Company's REP revenue requirement. Indeed, Exhibit A-7 shows that annual book depreciation by far the most significant component of the Company's projected incremental cost of compliance, which in turn dictates DTE Electric's renewable energy surcharge schedule. By reducing annual book depreciation, lower wind energy depreciation rates would directly reduce the Company's REP revenue requirement and incremental cost of compliance, and it would directly reduce the amount of surcharge revenue needed to offset or recover those incremental costs. In sum, lower depreciation rates for wind assets would significantly reduce the renewable energy surcharges proposed by the Company in this case.[55]

Mr. Sansoucy's direct testimony quantified these changes using hypothetical depreciation rates.[56]

### 2. Effect of Adopting the PFD's Recommended Depreciation Rates in Case No. U-16991 on the Surcharges

Following the issuance of a PFD in Case No. U-16991, Mr. Sansoucy filed supplemental direct testimony, in which he quantified these changes based on the higher of two wind depreciation rates recommended in the alternative by the ALJ in that case. With respect to Case No. U-16991, Mr. Sansoucy explained in his supplemental testimony that

> Using the PFD's first recommended wind depreciation rate of 3.88% would reduce DTE Electric's annual book depreciation for all renewable assets by $2.9 million in 2014 alone . If DTE Electric were to use the second recommended depreciation rate of 3.08%, the Company's 2014 renewable energy book

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[54] See December 20, 2011 Order, MPSC Case No. U-16582 at 17.

[55] Sansoucy Direct at 2 Tr 305.

[56] *Id.* at 2 Tr 305-06.

> depreciation would fall by $9.3 million. These reductions in book depreciation would grow larger as the Company adds additional wind resources to its portfolio, and they would then level off at increased annual savings in renewable asset book depreciation of approximately $4 million in the case of the first recommended rate, and $12.5 million in the case of the second recommended rate.[57]

Using the higher of the PFD's alternative recommended wind depreciation rates, Mr. Sansoucy then calculated additional impacts of such a change. If the Company's REP amendments assumed a wind depreciation rate of 3.88%, and made no changes to its proposed renewable energy surcharges, DTE Electric's plan-ending regulatory liability balance would rise from $25 million to $47.5 million.[58] In order to keep the plan-ending regulatory liability balance at $25 million, renewable energy surcharges would have to be reduced by 9.5% for all ratepayer classes.[59] And if the plan-ending regulatory liability balance were lowered to $0, as Mr. Sansoucy recommended elsewhere in his testimony, DTE Electric's renewable energy surcharges could be lowered by 20%.[60] Importantly, these impacts are related solely to the potential lowering of wind depreciation rates, and do not consider other changes to the Company's proposed REP amendments such as new transfer prices or even new depreciation rates for solar assets.

Because the Commission has previously ordered that new depreciation rates be incorporated into the REP amendments proposed by DTE Electric in this case, and because new rates are likely to have a significant impact on the Company's incremental cost of compliance and surcharges, the Commission should condition any approval of the Company's filing in this case on the immediate incorporation of new renewable energy depreciation rates at the time they are established by the Commission.

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[57] Revised Supplemental Testimony of MEC witness George E. Sansoucy ("Sansoucy Supplemental"), 2 Tr 339.

[58] *Id.* at 2 Tr 339; Exhibit MEC-27.

[59] Sansoucy Supplemental at 2 Tr 339; Exhibit MEC-27.

[60] Sansoucy Supplemental at 2 Tr 339; Exhibit MEC-27.

### C. Wind Curtailment Expense

#### 1. Background on Wind Curtailment Expense

DTE Electric's Exhibit A-7 presents the "expense elements" of the REP's Incremental Cost of Compliance. One of these expense elements is wind curtailment expense. DTE incurs wind curtailment expense when MISO curtails wind generation from projects with which DTE has a Power Purchase Agreement.[61] The PPAs require DTE to pay the suppliers for energy that could have been generated in the absence of economic dispatch curtailments by MISO.[62] (DTE does not have to pay suppliers when MISO curtails them for reliability reasons.[63])

In Exhibit A-7, DTE projects wind curtailment expense to be $2.1 million in 2013, $3 million in 2014, and $3.1 million for each of the fifteen years following. Wind curtailment is thus a significant expense. DTE's projects it will pass on to customers a total of $51.6 million in wind curtailment over the remaining life of the plan. Starting in 2015, when the amount levels off, wind curtailment would constitute over one-fifth of the total surcharge revenue DTE plans to collect each year.

Wind curtailment is also a new expense. There is no wind curtailment expense claimed in the "expense elements" exhibit from DTE's last REP biennial review.[64] Nor does Consumers Energy claim wind curtailment expense. In Consumers' wind PPAs, the risk of being curtailed falls on the supplier, not the customer.[65]

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[61] Wojtowicz direct, 2 Tr 193.

[62] *Id.*

[63] *Id*.

[64] See Exhibit A-5, Expense Elements of Incremental Cost of Compliance, Case U-16582, Detroit Edison's Application for Biennial Plan Approval.

[65] Wojtowicz cross, 2 Tr 213-14.

### 2. How DTE Projected Wind Curtailment Expense

DTE witness Angela Wojtowicz testified that "the Company's projection of wind curtailments is based on actual curtailments over a limited operating period."[66] She further noted that the projection is held flat starting in 2015 "due to inability to accurately project future transmission system constraints that may lead to economic curtailment."[67]

"Limited operating period" is an understatement. DTE's wind curtailment expense projection for the next seventeen years is based on the curtailments that occurred during a single month at one project.

The project was Gratiot and the month was April 2013.[68] Ms. Wojtowicz took the 921 MWh curtailed at Gratiot that month and divided by the total number of MWh that Gratiot could have produced if it had operated at full capacity during all of the hours in April (110.4 MW capacity times 720 hours).[69] The result was 0.011587, which she rounded up to 1.2%. She then projected that each PPA wind project in DTE's portfolio would experience an average annual curtailment of 1.2% of its possible MWh of generation for the year. She multiplied that number by each project's price per MWh, which resulted in $3.1 million in wind curtailment expense per year once all of the wind PPA capacity is installed in 2015.[70]

### 3. DTE's Projection for Wind Curtailment Expense is Contrary to Actual Data

MEC witness George Sansoucy criticized the 1.2% projection as unsupported and too high. He explained that DTE incurred $5,460 of wind curtailment expense in 2011,

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[66] Wojtowicz direct, 2 Tr 193.

[67] *Id*.

[68] Wojtowicz cross, 2 Tr 210-11.

[69] *Id* at 2 Tr 214.

[70] *Id*; see also, Exhibit MEC-39, discovery response MEC/DE-2.34.

none in 2012, and $226,451during the first half of 2013.[71] While the first six months of 2013 were higher than previous years, they were still only a tenth of what DTE projects for the year. Discovery showed that in July and August of 2013, DTE incurred about $6,000 in curtailment expense at Gratiot, none at Stoney Corners, and about $18,000 at Tuscola 1, bringing DTE's total curtailment expense to about $250,000 through eight months of this year – still a tiny fraction of what the company projected.[72]

Sansoucy also noted that DTE is on record predicting that MISO's implementation of a tariff for Dispatchable Intermittent Resources (DIR tariff) will reduce overall curtailment of wind resources. An energy forum comment jointly authored by the DTE and Consumers Energy states that "MISO expects the [DIR] tariff will improve operational efficiency by reducing the number of manual curtailments, minimizing over-curtailments (thus maximizing the use of low cost energy from wind generation), and selecting the most efficient resources to meet customer demand while recognizing reliability limits of the system."[73]

Because of the lack of data to support DTE's projection, Sansoucy recommended a reduction in wind curtailment expense of 90%, which is consistent with the level of expense incurred so far. In the alternative, he recommended that the expense be reduced from $3.1 million per year to $1 million per year.[74] Sansoucy noted that "while it may be reasonable to include $3 million in wind curtailment expense in the Company's REP if and when the Company is actually incurring $3 million in wind curtailment expense, or can

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[71] Sansoucy direct, 2 Tr 318, and Exhibit MEC-20.

[72] Discovery response MEC-DE-4.54, admitted on cross as Exhibit MEC-38.

[73] Exhibit MEC-21.

[74] Sansoucy direct, 2 Tr 321.

otherwise offer sufficient evidence of its estimates," it is not reasonable to charge customers $3 million per year for an expense that is coming in for $300,000 per year.[75]

#### 4. Effect on Surcharges of Reducing Wind Curtailment Expense

Sansoucy's Exhibit MEC-24 shows the effect of reducing wind curtailment expense to $310,000 in all years after 2013. Reducing wind curtailment expense to a number consistent with actual experience would reduce the incremental cost of compliance by about $3 million per year starting in 2014. Sheet 5 of the exhibit shows that this change alone would reduce surcharges by 20% if an end-of-plan reserve fund balance of $25 million is maintained. Sheet 6 shows that the recommended change in wind curtailment expense would reduce surcharges by more than 30% if the ending balance was reduced to $0.

#### 5. DTE Acknowledged That Its Projection for Wind Curtailment Expense Is Too High

In her rebuttal testimony, Angela Wojtowicz criticized Sansoucy's analysis on several grounds. First, she argued that projecting wind curtailment based on 1.2% of total capacity was reasonable because that was the amount of curtailment at the Gratiot project in April 2013, and April 2013 was the first month that all non-exempt wind farms were required to be registered under the MISO DIR tariff, making them eligible for economic curtailment.[76]

There are at least two problems with her argument, however. For one thing, while wind farms had to register for the DIR tariff by April 2013, two-thirds of them were

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[75] *Id*.

[76] Wojtowicz rebuttal, 2 Tr 197.

registered before that.[77] Ms. Wojtowicz registered the Gratiot project in December of 2012, making it eligible for DIR curtailment in January, February, and March.[78] The fact that the majority of MISO wind resources were eligible for economic curtailment before April 2013 – including Gratiot – calls into question DTE's decision to base its projection solely on that single month. Curtailment during the months preceding April 2013 never comes close to 1.2% of capacity.[79] February 2013 is the highest at 0.4%, one third of the projection.

Moreover, none of the months after April 2013 come close to 1.2% either. No data exist for Stoney Corners because that project was not yet claiming reimbursement of curtailment expense from DTE.[80] Tuscola 1 started claiming curtailment expense in May of 2013 but has never been higher than 0.22%.[81] And Gratiot has been claiming curtailment expense all along but has never again approached even 1%.[82] Ms. Wojtowicz ultimately acknowledged that DTE's experience with these wind projects does not support a curtailment projection of 1.2%:

> Q. Your projection assumes that at some point all of these projects are going to be averaging 1.2-percent curtailment annually, right?
>
> A. That's correct.
>
> Q. But you based your projection on an observation from what you believe to be the most, the highest level of curtailment month, correct?

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[77] Exhibit MEC-21, p 4; see also, Wojtowicz cross, 2 Tr 207.

[78] Wojtowicz cross, 2 Tr 208.

[79] See Exhibit MEC-20 for the first six months and Exhibit MEC-38 for July and August. The percent curtailed can be determined by dividing the MWh curtailed at Gratiot in a month by the product of Gratiot's 110.4 MW capacity times the hours in that month.

[80] Wojtowicz cross, 2 Tr 212-13.

[81] *See* Wojtowicz cross, 2 Tr 212-13 for date Tuscola began claiming curtailment expense; Exhibits MEC-20 and MEC-38 for curtailment amounts.

[82] See Exhibits MEC-20 and MEC-38.

> A. I based it on the data we had at the time we made the filing, and that data is substantiated by six months of MISO data that have since occurred.
>
> Q. It's not substantiated by six months of DTE project data, right, not even Gratiot?
>
> A. Well, the Heritage and the Tuscola, as I said, we weren't calculating it there, so it could be substantiated if we calculated it. I don't know.
>
> Q. It's not sustained by the data at Gratiot, is it?
>
> A. No, it's not.[83]

Ms. Wojtowicz also argues in her rebuttal testimony that curtailment expense will increase as the wind capacity DTE has under PPA increases between now and 2015.[84] That is true as to the amount of expense increasing as the amount of capacity increases. However, it is irrelevant to the percent of capacity being curtailed. If the projects are not averaging close to 1.2% of capacity being curtailed this year, there is no reason to think they will be averaging 1.2% of capacity in 2015, when there is some additional wind capacity under agreement. The absolute amount of curtailment expense should be higher, but the projection is also higher, so there is no reason to believe the actual curtailments will be closer to the projection.

Ms. Wojtowicz also argues in rebuttal that Sansoucy misread the exhibits showing manual curtailments being down as DIR curtailments were up.[85] That may or may not be true, but it does not rebut the fact that DTE went on record in the energy forum comment predicting that the DIR tariff would decrease overall curtailments. DTE's projection in this case remains at odds with those prior comments.

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[83] Wojtowicz cross, 2 Tr 217-18.

[84] Wojtowicz rebuttal, 2 Tr 197.

[85] *Id*.

Finally, Ms. Wojtowicz argued that wind curtailments have averaged 1.2% of capacity across all of MISO.[86] But that is irrelevant, because different MISO states have different wind regimes, different transmission systems, and different levels of wind farm penetration. On cross, Ms. Wojtowicz testified that higher installed wind generation capacity will be correlated with a higher frequency of wind curtailment.[87] A chart in one of the MISO presentations shows that the vast majority of wind curtailments in MISO have occurred in Iowa, the state with the highest installed wind capacity in MISO.[88] By contrast, wind curtailment from projects in Michigan barely register on the chart at all. DTE's energy forum comments even recognize the curtailment is a much bigger issue in the western plain states than it is in the rest of MISO:

> As wind penetration across MISO's multi-state footprint increased, resulting in more congestion on the transmission system, particularly in the western part of MISO (e.g., Dakotas and Iowa), operation and market inefficiencies increased.[89]

DTE's projection of wind curtailment expense significantly exceeds what the company is actually incurring at any of its PPA wind projects. The company acknowledges this. Reducing this admittedly inflated expense projection translates directly to surcharge relief for customers. The Commission should adopt MEC's recommended adjustment to this expense and the resulting 20% to 30% surcharge reduction.

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[86] *Id* at 197-98.

[87] 2 Tr 217.

[88] Exhibit MEC-23, p 10.

[89] Exhibit MEC-21, p 3.

### D. PPA vs. Self-Build

DTE Electric's proposed REP amendments assume that the Company will construct at least one more "utility owned" wind farm.[90] According to Mr. Sansoucy,

> It is important to understand that PA 295 creates a distinction between renewable energy that is purchased by a utility from third party developers under PPAs and renewable energy that is generated at utility-owned facilities. The statute requires that half of the energy procured by a utility for compliance with PA 295 come from PPAs, but it does not cap that amount. On the other hand, the statute caps the amount of energy that can be produced at utility-owned facilities at 50% of the energy required for compliance with PA 295.[91]

The distinction between utility-owned and PPA wind energy is important because there is a cost differential between the two. For example, lines 14 and 15 of Exhibit A-2 "clearly show that the Company's REP includes a higher revenue requirement associated with utility-owned renewable generation than with PPA purchases."[92]

As testified by Mr. Conlen, it is the Company's position that "on average, utility-owned projects will be more cost effective and beneficial to customers than projects contracted for under a long-term renewable energy contract structure."[93] But Mr. Conlen's statement in this regard is not well supported by factual evidence or data in the record and the Company has apparently not calculated the per-unit cost of utility-owned and PPA renewable energy under its REP.[94] In fact, Mr. Conlen also testified in this case that "[t]he Company acknowledges that there may be some third party developer-owned projects which could potentially deliver renewable energy at costs either at or below utility-owned

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[90] Exhibit A-5.

[91] Sansoucy Direct at 2 Tr 307.

[92] *Id.* at 2 Tr 308.

[93] Conlen Direct at 2 Tr 85.

[94] Sansoucy Direct at 2 Tr 308; Exhibit MEC-7.

projects due to unique project characteristics."[95] And the Company stated in discovery that it "forecasts the future Company-owned wind project at a Levelized cost of $81/megawatt hour ("MWh") with a commercial operation date in late 2015 and the future PPA at $53/MWh with a commercial operation date at the end on 2014."[96] This projection of future PPA costs may well be high, as Mr. Sansoucy testified, because two of the Company's most recent PPA contracts for wind energy have a maximum price of $49.25/MWh.[97]

Consistent with Mr. Sansoucy's testimony, MEC recommends that the Commission order DTE Electric to modify its proposed REP amendments to reflect a future self-build wind price of $53/MWh rather than $81/MWh. Indeed, PA 295 does not impose a cap on the amount of renewable energy that a utility must obtain by PPA contracts. As a result, DTE Electric should not be allowed to assume the construction of a future utility-owned wind project that is likely to be much more expensive than a future PPA of the same capacity. If future PPA prices rise, or if future self-build prices fall, the Company should of course be free to amend its REP to provide for a higher cost. For the time being, however, it is unreasonable for the Company to assume such a high cost for future wind energy needed to comply with PA 295, especially in the absence of greater evidence in the record that its assumption is likely to be correct.

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[95] Conlen Direct at 2 Tr 86.

[96] Exhibit MEC-8. In his rebuttal testimony, Mr. Conlen argued that the estimate of $53/MWh for a future PPA project assumed that the project would qualify for the federal Production Tax Credit, and that the estimate of $81/MWh for a future self-build project assumed the opposite. Mr. Conlen did not explain the basis for this inconsistent assumption regarding the PTC, or by how much PTC qualification lowered the estimate of future PPA prices. Nor did Mr. Conlen explain why the Company's estimate of $53/MWh for a future PPA project is higher than the actual price of DTE Electric's most recent PPA contracts.

[97] Sansoucy Direct at 2 Tr 309.

### E. DTE's Proposal to End the REP in 2029 with a Minimum Balance of $25 Million as a Contingency Fund is Unreasonable

In this case, DTE Electric has proposed a minimum regulatory liability balance of $25 million.[98] Under the Company's proposal, it would have a $25 million regulatory liability balance upon expiration of the REP in 2029; this amount would then be "redistributed" to customers.[99]

As explained by Mr. Sansoucy,

> PA 295 authorizes the Commission to allow utilities to maintain a regulatory liability balance during the lives of their renewable energy plans, in an effort to avoid the creation of regulatory assets in the hands of those utilities. Essentially, a regulatory liability represents an amount that is owed by a utility to ratepayers, like a debt, and a regulatory asset represents an amount that is owed to a utility by ratepayers. The rationale behind allowing the accrual of a regulatory liability is that utilities' REPs require varying expenditures - including large capital expenditures - in different years.[100]

Mr. Conlen has testified that the Company views the purpose of its minimum regulatory liability balance as a way to mitigate "uncertainties" and "risks" regarding the assumptions underlying DTE Electric's REP.[101] In DTE Electric's view, the maintenance of a $25 million minimum regulatory liability balance allows the Company to protect itself against cost contingencies over the life of the REP.[102]

#### 1. DTE Has Already Accumulated an Excessive Balance

There are two reasons why DTE Electric's REP should be modified to include a plan-ending minimum regulatory liability balance of $0 instead of $25 million. First, as Mr.

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[98] Conlen Direct at 2 Tr 89.

[99] Conlen Cross at 2 Tr 143.

[100] Sansoucy Direct at 2 Tr 322.

[101] See Conlen Direct at 2 Tr 89; see also Exhibit MEC-25.

[102] See Exhibit MEC-25.

Sansoucy testified, the Commission has already allowed DTE Electric to accrue a significant regulatory liability balance, primarily funded by statutory maximum renewable energy surcharges in the first five years of the Company's REP.[103] Indeed, the Company projects in this case that it will end 2013 with a regulatory liability balance of $230 million.[104] After four years of projected reductions in this amount, the Company still expects to have a $100 million balance at the end of 2017.[105] This is at a point where all of the projects are built and all of the PPAs are entered into.

After that, the Company plans to increase this balance yet again, to $178 million in 2023.[106] Only then does the Company plan to spend this balance down to $25 million by the end of 2029.[107] Given that the majority of DTE Electric's major REP expenditures and cost-related uncertainties are likely to occur in earlier years of its plan – as it achieves compliance with PA 295's renewable portfolio standard by 2015 – it is unreasonable for the Company to maintain a $25 million minimum regulatory liability balance even in the last year of that plan. Indeed, the Company's regulatory liability balance is now so large, and is projected to remain very large for most of the plan, that the Commission can and should find that DTE Electric is adequately equipped for any cost contingencies it may face between now and 2029.

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[103] Sansoucy Direct at 2 Tr 323.

[104] *Id.*

[105] *Id.*

[106] *Id.* at 2 Tr 323-24.

[107] *Id.* at 2 Tr 324.

### 2. DTE Has Already Built Numerous Contingencies into its REP

The second reason why the Company's minimum regulatory liability balance should be adjusted to $0 is that DTE Electric's proposed REP amendments already include a number of other embedded contingencies.[108] These include the use of maximum prices for company-owned wind projects, a worst case assumption about production tax credits, and projections of wind capacity factors that are lower than actual experience.

#### a. Maximum Prices for Company-Owned Wind

For example, the Company's REP is based on several conservative assumptions concerning the cost of obtaining renewable energy. As Mr. Sansoucy testified, the Company's REP revenue requirement calculation is based on the assumption that its Tuscola I and Pheasant Run projects will all produce energy at the maximum price allowed under that contract.[109] The Company revenue requirement calculation also assumed that energy generated at its utility-owned Thumb and Echo wind farms will be generated at each project's maximum cost of $64/MWh and $56/MWh, respectively.[110]

#### b. Production Tax Credits

Another reason why the Company used these conservative renewable energy costs estimates is that DTE Electric assumes the federal Production Tax Credit ("PTC") for wind generating facilities will be phased out at the end of 2013.[111] But this is a very conservative – if not outright unreasonable – assumption. As Mr. Sansoucy testified,

> The federal PTC for wind energy generating facilities has faced expiration - and has been extended - several times in the past. This historic trend strongly suggests that the PTC will be extended once again for application to projects completed in 2014 and perhaps even in later years. Assuming the ultimate

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[108] See *id.* at 2 Tr 324.

[109] See *id.* at 2 Tr 310; see also Exhibit MEC-12.

[110] See *id.* at 2 Tr 311; see also Exhibit MEC-14.

[111] *Id.* at 2 Tr 311-12.

> expiration of the PTC at the end of 2013 is contrary to experience and, as a result, it unnecessarily drives up the Company's renewable energy cost projections.[112]

MEC does not recommend that the renewable energy cost estimates used in calculating the Company's REP revenue requirement be adjusted by the Commission, but instead that these conservative estimates be recognized as a level of contingency that is already built into the REP, rendering the additional $25 million contingency redundant.

**c. Wind Capacity Factors**

Another contingency built into DTE Electric's proposed REP amendments is an overly conservative estimate of wind energy capacity factors.[113] As Mr. Conlen stated in his direct testimony, the Company's REP assumes "an average 40% capacity factor" for wind farms in its renewable energy portfolio.[114] In Exhibit MEC-17, the Company states that its capacity factor estimate is actually 39%.[115] As an initial matter, the lack of factual foundation for Mr. Conlen's expert testimony has already been discussed at length. Whether the Commission strikes this testimony or not, this lack of foundation substantially undermines the probative value of the Company's capacity factor estimate.

Other evidence – actually in the record – demonstrates that the Company's capacity factor estimate is too low.[116] Exhibit MEC-17, for example, shows that DTE Electric projects the capacity factors of its Thumb and Echo wind farms to average 44.2% from 2014 to 2029, and that the capacity factor for the Pheasant Run II project is assumed to

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[112] *Id.*

[113] See *id.* at 2 Tr 313-16.

[114] Conlen Direct at 2 Tr 80.

[115] See also Sansoucy Direct at 2 Tr 314.

[116] A wind farm's "capacity factor" reflects how much energy the wind farm actually generated in comparison to the maximum amount of energy it could theoretically generate in a given time period. If a wind farm has a total monthly production capability of 100MWh, and it generates 50 MWh during a given month, that wind farm has a capacity factor of 50% during the month. See Conlen Cross at 2 Tr 117; see also Sansoucy Direct at 2 Tr 313.

be 39%.[117] The only DTE Electric wind farm that is estimated by the Company to have a lower capacity factor than 39% is Gratiot.[118] The actual, historic capacity factors for DTE Electric wind farms are also informative. As Mr. Sansoucy testified:

> I would observe that while the Company projects a 2013 capacity factor for that project of 28.3%, it has actually experienced a capacity factor of 31.2% through the first six months of the year. In fact, this actual experience is equal to the planned capacity factor announced by DTE Electric for Gratiot when the Commission approved the project. See Exhibit MEC-19. If the same proved true for the Thumb Wind Parks, actual capacity factors would be approximately 43% (as announced when those projects were approved) rather than 41.5% (as projected in this case). As a key component of the limited evidence available in this case, historic experience indicates that the Company's estimates of future capacity factors for existing projects are too low. This suggests, in turn, that a planned future wind build capacity factor of 39% is also too low.[119]

In rebuttal, Mr. Conlen criticized the use of historic capacity factor data in projecting future capacity factor data, calling Mr. Sansoucy's approach "deeply flawed."[120] Specifically, Mr. Conlen testified that Mr. Sansoucy's reliance on data from only the first six months of 2013 was "dubious" because of the way that "wind speed, variability, and other factors" might affect capacity factors over time.[121] Mr. Conlen further testified that "Exhibit A-28 depicts the average monthly capacity factors at all Company-owned wind parks since 2011 and demonstrates the variability in wind production."[122]

As demonstrated during cross-examination, however, it is the data in Mr. Conlen's Exhibit A-28 that is deeply flawed. Although Exhibit A-28 says that the Gratiot Wind Park

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[117] See also *id.*

[118] Exhibit MEC-17; see also *id.*

[119] Sansoucy Direct at 2 Tr 315.

[120] See Conlen Rebuttal at 2 Tr 114-15.

[121] *Id.* at 2 Tr 114.

[122] *Id.* at 2 Tr 114-15.

had an average capacity factor of only 0.3% in 2011, for example, that "average" includes 10 months of a 0% capacity factor, in which the Gratiot Wind Park was not yet on-line.[123] The two months worth of actual capacity factor data in 2011, moreover, were months in which the Gratiot facility was in its "power ascension phase," which is an initial testing phase in which the turbines "start and stop in spurts."[124] Similarly, Exhibit A-28 presents 2012 capacity factor "averages" for the Company's Thumb Wind Parks, despite the fact that these "averages" include between 9 and 11 months of 0% capacity factors due to that Park's components not yet being operational.[125] And the numbers presented on this exhibit for the Minden component of the Thumb park, like the 2011 monthly numbers for Gratiot, represent a period in which the component was in a testing phase.[126] Also, the monthly "weighted average" fleetwide capacity factors listed on line 14 of Exhibit A-28 – unlike the annual averages for each park – did not include the 0% capacity factors for months in which a project was not yet operational.[127]

Ultimately, Mr. Conlen acknowledged during cross examination that the only data on Exhibit A-28 that provides an accurate and substantive picture of how wind speed and availability variations affect capacity factors is for the first six months of 2013.[128] For those months, Exhibit A-28 shows that three of the Company's four installed wind farms had capacity factors over 40%. Although Mr. Conlen testified in rebuttal that Mr. Sansoucy's reliance on these six months' worth of data was "dubious," it is clear that these six months of data are the only reliable data on DTE Electric wind farm capacity factors that the

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[123] Conlen Cross at 2 Tr 124.

[124] *Id.* at 2 Tr 122.

[125] *Id.* at 2 Tr 129-30.

[126] *Id.* at 2 Tr 128.

[127] *Id.* at 2 Tr 131.

[128] *Id.* at 2 Tr 135.

Company possesses. It is possible that the WindLogics reports provide additional insight into the basis for Mr. Conlen's assumption of a 40% capacity factor, but those reports are not in the record. In sum, the only evidence in the record suggests, as Mr. Sansoucy testified, that the capacity factor estimate underlying the Company's proposed REP amendments is too low.

As with the Company's overly conservative wind energy price projections, MEC is not asking that the Commission order DTE Electric to reformulate its REP amendments with a different capacity factor estimate. Instead, MEC is seeking the Commission's acknowledgment that DTE Electric's REP includes a number of overly conservative (and unsupported) assumptions that collectively serve as built-in REP cost contingencies. In addition to conservative wind energy price estimates and a conservative capacity factor assumption, MEC observes that other aspects of the Company's proposed REP – such as its assumption regarding a self-build wind project at $81/MWh, discussed above – further insulate DTE Electric from risks related to the costs of complying with PA 295.

### 3. The Statute Already Protects DTE from Accruing a Regulatory Asset, So It Is Unreasonable to Use Redundant Contingencies to Prevent a Regulatory Asset from Accruing

Finally, in his testimony about why DTE needed to exit the REP in 2029 with $25 million in the bank, it appears that Mr. Conlen misunderstood the Commission's role of safeguarding the reserve balance in renewable energy reconciliation proceedings. In his rebuttal, Conlen testified that the purpose of maintaining the $25 million balance through the end of the REP was to protect the Company against the risk of accruing a regulatory asset.[129] But the statute already protects DTE from that risk.

MCL 460.1049 governs renewable energy reconciliations. Sub-section (3) provides in part:

[129] Conlen rebuttal, 2 Tr 111-12.

> In its order, the commission shall do all of the following:
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> * * *
>
> (b) Adjust the revenue recovery mechanism for the incremental costs of compliance. The commission shall ensure that the retail rate impacts under this renewable cost reconciliation revenue recovery mechanism do not exceed the maximum retail rate impacts specified under section 45. The commission shall ensure that the recovery mechanism is projected to maintain a minimum balance of accumulated reserve so that a regulatory asset does not accrue.[130]

In other words, DTE's exaggerated cost projections are somehow not going be sufficient to cover plan expenses, the statute mandates that the Commission adjust the surcharges upward to prevent the balance from falling below zero until the plan period is complete. Asked about this statutory mandate in cross exam, Mr. Conlen was unaware of it:

> Q. ...[T]hat based on some amount of costs beyond what you're planning, the combination of surcharge revenue and PSCR recovery together would be insufficient to cover those costs, and that's the risk that a regulatory asset would accrue, right?
>
> A. That's correct.
>
> Q. O.K. Doesn't the statute protect you from that risk...by requiring the Commission to adjust surcharges upward, if necessary, to prevent a regulatory asset from accruing?
>
> A. I don't recall the – I don't recall PA 295 guaranteeing that we can increase the surcharge under that circumstance de facto.[131]

Mr. Conlen conceded that the existence of such a mandate could lead him to re-think his testimony:

> Q. [Y]ou're not aware of any protection in that Statutory Framework that mandates the Commission to raise surcharges to ensure that a regulatory asset does not accrue?
>
> A. I don't believe there's a mandate or a guarantee in PA 295.

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[130] MCL 460.1049(b) (emphasis added).

[131] Conlen cross, 2 Tr 156.

Q. If there was, would that change your testimony about risk?

A. Potentially.[132]

Because DTE has built a number of inflated cost projections and contingencies in its plan, and because its principal witness seems to have done so due to his lack of awareness that the statute protects the Company from running a negative balance on its REP, the Commission should order DTE Electric to end its REP with a regulatory liability balance of $0. While this minimum balance remains subject to revision in future REP plan cases, there is no basis for the Company's request to maintain a minimum regulatory liability balance of $25 million through 2029. Reducing the Company's minimum regulatory liability balance to $0 would substantially lower the Company's overall REP revenue requirement and, in turn, its renewable energy surcharges.

## IV. CONCLUSION

For the reasons discussed above, MEC respectfully requests that the Commission:

A. Reverse the ALJ's denial of MEC's motion to strike Mr. Conlen's testimony concerning the Company's wind generation capacity factor assumption;

B. Direct DTE Electric to incorporate into its REP and renewable energy surcharges the transfer prices approved by the Commission in Case No. U-16656, when approved;

C. Direct DTE Electric to incorporate into its REP and renewable energy surcharges the renewable energy depreciation rates approved by the Commission in Case No. U-16991, when approved;

[132] *Id* at 156-57.

D. Direct DTE Electric to reduce its renewable energy surcharges by at least an additional 20% to reflect a reduced annual wind curtailment expense of $310,000;

E. Order DTE Electric to incorporate into its REP and renewable energy surcharges a $0 minimum regulatory liability balance;

F. Direct the Company to implement any of these decisions not implemented in this case in its next available REP reconciliation case; and

G. Set residential surcharges at 5 cents per month..

Date: October 22, 2013

By: _____

OLSON, BZDOK & HOWARD, P.C.
Counsel for MEC

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STATE OF MICHIGAN

MICHIGAN PUBLIC SERVICE COMMISSION

| | |
|---|---|
| In the matter, on the Commission's own motion, regarding the regulatory reviews, revisions, determinations and/or approvals necessary for the DTE ELECTRIC COMPANY to fully comply with Public Acts 286 and 295 of 2008. | Case No. U-17302<br><br>ALJ Theresa A. Staley |

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## ELECTRONIC SERVICE LIST

On the date below, an electronic copy of **Initial Brief of the Michigan Environmental Council** was served on the following:

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The statements above are true to the best of my knowledge, information and belief.

Date: October 22, 2013

By: _____

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