

**STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION**

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In the matter, on the Commission's own )  
motion, to commence a collaborative to )  
consider issues related to implementation of )      Case No. U-20898  
effective new technologies and business )  
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**COMMENTS OF THE  
MICHIGAN ENERGY INNOVATION BUSINESS COUNCIL  
AND  
ADVANCED ENERGY UNITED**

February 17, 2023

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**Introduction**

The Michigan Energy Innovation Business Council (“Michigan EIBC”) and Advanced Energy United (“United”; collectively “Michigan EIBC/United”) appreciate the opportunity to file comments in Docket No. U-20898 in response to the additional questions the Commission posed in its January 19, 2023 Order (the “January 19 Order”) regarding the development of alternative business and ownership models. Michigan EIBC/United have actively provided comments and legal testimony on these issues to the Commission in multiple dockets over the last several years, including in this docket on September 26, 2022. We provide responses below to the Commission’s questions from its January 19, Order.

**Responses to Questions**

- 1. Does the current legal framework prohibit third parties from (or allow for) directly charging customers on a volumetric basis for BTM DERs? What if the charge is nonvolumetric?***

The current legal framework allows for third parties to directly charge customers on either a volumetric or non-volumetric basis, since these arrangements operate entirely outside of the utility regulatory framework. They are examples, rather, of self-service power.

Section 10a(4) of Public Act 141 of 2000 (as subsequently amended), MCL 460.10a(4), recognizes and preserves the rights of customers to obtain self-service power (including self-service power provided by third-parties) which it defines as:

- (a) Electricity generated and consumed at an industrial site or contiguous industrial site or single commercial establishment or single residence without the use of an electric utility's transmission and distribution system.

(b) Electricity generated primarily by the use of by-product fuels, including waste water solids, which electricity is consumed as part of a contiguous facility, with the use of an electric utility's transmission and distribution system, but only if the point or points of receipt of the power within the facility are not greater than 3 miles distant from the point of generation.

[ . . . ]

(d) A commercial or industrial facility or single residence that meets the requirements of subdivision (a) or (b) meets this definition **whether or not the generation facility is owned by an entity different from the owner of the commercial or industrial site or single residence.**

MCL 460.10a(4)(a)-(b), (d) (emphasis added).

This explicit recognition of customers' rights to obtain and use self-service power, originally added to Michigan public utility law in 2000, speaks to the existence of a preexisting common law right to generate and consume electricity generated on one's own property. In other words, the statute did not *create* a right to self-generation; rather, it explicitly noted that Public Act 141 did not "prohibit or limit the [preexisting] right of a person to obtain self-service power." MCL 460.10a(4).

According to the Michigan Court of Appeals,

The general concept of "property" comprises various rights—a "bundle of sticks," as it is often called—which is usually understood to include "[t]he exclusive right of possessing, enjoying, and disposing of a thing." Black's Law Dictionary (6th ed., 1990), p. 1216.

*Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 57 (1999). The court also cited a treatise which lists the following as incidents of ownership of property:

- (1) the right to exclusive possession;
- (2) the right to personal use and enjoyment;
- (3) **the right to manage use by others;**
- (4) **the right to the income from use by others;**
- (5) the right to the capital value, including alienation, consumption, waste, or destruction;
- (6) the right to security (that is, immunity from expropriation);
- (7) the power of transmissibility by gift, devise, or descent;
- (8) the lack of any term on these rights;
- (9) the duty to refrain from using the object in ways that harm others;
- (10) the liability to execution for repayment of debts; and
- (11) residual rights on the reversion of lapsed ownership rights held by others.

*Id.* at 58 n. 7 (emphasis added); see also *Eastbrook Homes, Inc v Treasury Dep't*, 296 Mich App 336, 348 ("Important rights flowing from property ownership include the right to exclusive

possession, the right to personal use and enjoyment, **the right to manage its use by others, and the right to income derived from the property**” (emphasis added)).

Implicit within these rights is the right to generate power on one’s own property, whether through one’s own efforts or through the efforts of a third party operating on the property with the owner’s permission.<sup>1</sup> As an analogy, consider one’s right to plant one’s own garden and enjoy its produce (or hire a gardener to do so), to plant timber and cut it down for construction or heating or other purposes on the property (or hire an arborist, forester or logger to do so), or one’s right even to drill an oil or natural gas well for personal fossil energy production and use (or hire a contractor to do so).<sup>2</sup> As recognized by the Michigan Supreme Court:

The right to full and free use and enjoyment of one's property in a manner and for such purpose as the owner may choose, so long as it be not for the maintenance of a nuisance injurious to others, is one of which he may not be deprived by government without due process of law nor may his property be taken by government without just compensation. U.S. Const. Amends. 5 and 14; Mich. Const. 1908, art. 2, § 16, and art. 13, § 1. The owner's right to use is, however, subject to reasonable regulation, restriction and control by the state in the legitimate exercise of its police powers. The test of legitimacy is the existence of a real and substantial relationship between the exercise of those powers in a particular manner in a given case and public health, safety, morals or the general welfare.

*Mooney v Village of Orchard Lake*, 333 Mich 389, 392 (1952).

As an illustration of the above, the State of Michigan (and many municipalities) has made a determination, along the lines of *Mooney*’s “test of legitimacy” for “reasonable regulation, restriction and control by the state in the exercise of its police powers,” that the public health, safety and welfare requires “interconnection” of private “structures in which sanitary sewage originates” with available public sewer systems, see MCL 333.12752; MCL 333.12753 & MCL 333.12754, such that the preexisting common law right to “self-service sewerage” on one’s own property (*e.g.*, use of a privy) has largely been abrogated. No similar determination has been made with respect to self-service electrical power generation, however. To the contrary, MCL 460.10a(4) evidences the opposite. There is likewise no provision in Michigan law that requires property owners to interconnect with a public utility’s distribution system when available in a manner similar to the requirement imposed by MCL 333.12753 for sewer connections when a public sewer is available. The obligation in fact runs the other way—public utilities are required under MCL 460.556, if ordered by the Commission, to render “service . . . in any case in which it will be reasonable for such service to be ordered.” MCL 460.556. Similarly, there is no law that

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<sup>1</sup> The question of which rights inhere in estates in land lesser than a fee simple absolute interest would be governed by the law of waste and the law governing leasehold interests, among others, which are beyond the scope of these comments. For the sake of simplicity, these comments assume that since the holder of the fee title has the right to “dispose of” or “alienate” any rights inherent in fee title (see the fifth right in the list from note 7 in *Adams* above), a possessor of a lesser estate in land (*e.g.*, life estate, leasehold interest, etc.) may in principle possess the right to self-generation of power on the land in which they hold an interest.

<sup>2</sup> It is worth noting that each of these products, unlike electricity, can also be sold by the property owner to any unrelated third party in unregulated markets. However, the question of the circumstances (and rates) under which a property owner (or third party operating power generation equipment on the property) may sell electricity produced on the property for use elsewhere is beyond the scope of and irrelevant to the answer to the instant question.

Michigan EIBC/United are aware of that would require a customer to consume a particular minimum amount of electricity from the grid when and if that customer becomes interconnected with the grid.<sup>3</sup>

The Public Utility Regulatory Policies Act of 1978 (“PURPA”) and FERC’s regulations adopted thereunder further support a preexisting property right to self-generate. Among other rights PURPA gave small power production facilities and cogeneration facilities is the right to purchase, on a non-discriminatory basis, “(i) Supplementary power; (ii) Back-up power; (iii) Maintenance power; and (iv) Interruptible power.” 18 C.F.R. § 292.305(b)(1). Section 292.305(c) further prohibits certain assumptions from being made when setting rates for backup and maintenance power, specifically that rates

(1) Shall not be based upon an assumption (unless supported by factual data) that forced outages or other reductions in electric output by all qualifying facilities on an electric utility's system will occur simultaneously, or during the system peak, or both; and

(2) Shall take into account the extent to which scheduled outages of the qualifying facilities can be usefully coordinated with scheduled outages of the utility's facilities.

18 C.F.R. § 292.305(c)(1)–(2). Implicit within all of these rights and protections for Qualifying Facilities (“QFs”) under PURPA is that power produced by QFs will at least in some cases be consumed on the premises where it is generated, such that “supplementary” and “backup” power would be necessary. Bound up in the idea that the power provided by the QF might need to be “supplemented” is the necessary conclusion that at least some of the power produced by the QF at issue (and in certain cases additional power, provided by the local distribution utility) is consumed on site.

FERC, furthermore, in its Order 69 implementing its initial PURPA rules specifically noted the following “major obstacles” to a “cogenerator or small power producer seeking to establish interconnection operation with a utility”:

First, a utility was not generally required to purchase the electric output, at an appropriate rate. Secondly, some utilities charged discriminatorily high rates for back-up service to cogenerators and small power producers. Thirdly, a cogenerator or small power producer which provided electricity to a utility’s grid ran the risk of being considered an electric utility and thus being subjected to State and Federal regulation as an electric utility.

Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, 45 Fed. Reg. 12214, 12215 (February 25, 1980) (“Order 69”). Once again, the unstated assumption behind these “major obstacles” is that before

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<sup>3</sup> Of course, what price (if any) a customer ought fairly to pay for standby, station and/or backup power after interconnection with the grid must be determined, but that is a separate question from the more fundamental question of whether or not that customer has the right to generate their own power—or pay to have someone else generate power for their use—on their own property.

PURPA there were already some cogenerators and small power producers operating as self-service power generators, which in some cases were interconnected with the power grid and which, in order to be technically and economically feasible, required “certain types of service . . . to supplement or back up those facilities’ own generation.” *Id.*

It is also worth pointing out with respect to PURPA that the obligations (1) to purchase QF output, see 18 C.F.R. § 292.303(a), (2) to sell power to QFs, see 18 C.F.R. § 292.303(b), and (3) to interconnect and operate in parallel with QFs, see 18 C.F.R. § 303(c) & (e), are separate obligations, from which utilities are not released simultaneously or for the same reasons (or at all). See 18 C.F.R. § 292.309; 18 C.F.R. § 292.312. Thus, a QF need not even be in the business of selling its output onto the grid to have the right to purchase supplementary and backup power and to interconnect and operate in parallel with a utility, a fact that further supports an implied and preexisting right to self-generate and consume self-generation on one’s own property.

Ultimately, therefore, the following conclusions are clear from the above discussion:

- (1) The right to generate electricity for one’s own use on one’s own property—whether personally by the property owner or by that owner’s agent or contractor—is a property right that preexisted utility generation and continues outside of the utility regulatory construct;
- (2) MCL 460.10a(4) recognized that right, noting that nothing in Public Act 141 of 2000 (or its subsequent amendments) “prohibit[ed] or limit[ed]” that right;
- (3) Interconnection and parallel operation with a distribution utility does not destroy that right and does not require on-site generation be sold off site rather than used on site;
- (4) FERC and Commission regulation are only implicated insofar as a self-service generator seeks to make off-premises sales to the distribution utility or into the wholesale electricity market<sup>4</sup>; and
- (5) Because self-service power does not fall within the utility regulatory construct, commercial terms for the sale to a property owner of self-service power produced on site by a third-party agent or contractor of the property owner are not subject to the jurisdiction of the Commission under Michigan law.

Therefore, Michigan law does not prohibit third parties from directly charging customers on a volumetric or non-volumetric basis for BTM DERs, provided those customers are the host customers of such BTM DERs.

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<sup>4</sup> Of course, the Commission also has jurisdiction over the interconnection process. In such a case, however, the Commission is exercising jurisdiction over the distribution utility, not the customer seeking interconnection.

**2. Does the current legal framework allow or prohibit third-party ownership of a community solar or community solar plus storage project? Does the answer change if the participants own the solar panels that are used for the generation?**

Michigan law does not prohibit third-party ownership of a community solar or community solar plus storage project, regardless of whether the project is owned by participants or not.

As Michigan EIBC/United indicated in our September 26, 2022, comments in this docket, the community solar model proposed by Staff witness Baldwin in Case Nos. U-20836 and U-21224 (the most recent rate cases of DTE Electric Company and Consumers Energy Company, respectively) would be allowed by the current legal framework. There is nothing we are aware of in Michigan or federal law that would prohibit the Commission and an investor-owned utility subject to Commission jurisdiction from cooperating to provide this option to the utility's customers, regardless of whether it is owned by a third party or as a collective venture among the customers receiving the benefits from the project. As we stated in our prior comments with regard to Ms. Baldwin's proposal:

[The proposal] does not involve direct retail sales of power from a non-utility or from an alternative electric supplier in excess of the choice cap (see MCL 460.10a), and it does not involve non-utility ownership of distribution infrastructure or metering equipment (see MCL 460.10q(4)). Further, the subscriber payment structure (including if it were structured as a kWh-based subscription fee) would not represent payment for retail end-use energy. Rather it would be based on payment for certain rights associated with ownership of a share of a community solar project—chiefly, the right to receive financial benefits from the sale of energy and capacity from the project to the utility. At most, a kWh-based charge would serve merely as a proxy for the degree to which those rights [to financial benefits from the project] are subscribed to by the participating customer. The arrangement would be similar to any contractual arrangement whereby a person or entity might obtain interests in the profits of a commercial concern. Furthermore, the utility would purchase unsubscribed power at its avoided cost consistent with the Public Utility Regulatory Policies Act of 1978 (“PURPA”). Whether purchased from subscribers or directly from a subscriber organization, the utility would presumably obtain the rights to the wholesale MISO market value of the energy and capacity produced by the project. Finally, *the Commission would approve a tariff, consistent with its cost-of-service ratemaking authority under MCL 460.11, providing for outflow credits to all subscribing customers and distribution credits to subscribing customers to the degree that the community solar project demonstrably enables those customers to avoid driving distribution system costs.*

Comments of Michigan EIBC/United dated September 26, 2022, at 2–3 (emphasis added).

The premises underlying all of these conclusions remain the same if storage were added to such a community solar project, assuming that the energy inputs to the storage resources comply with FERC's “fuel use” minimum requirements (enabling it to remain a PURPA Qualifying Facility). See 18 C.F.R. § 292.204(b).

Furthermore, to elaborate on the emphasized language above, the Commission has discretion under its general ratemaking authority to approve any number of pilot and permanent programs involving utility expenditure and recovery of costs through rates, provided that it does not thereby effectively extend the scope of its regulatory authority.<sup>5</sup> For example, the Commission has, pursuant to its general ratemaking authority, approved such programs as residential and public EV-charging rebate pilot and permanent programs (which involve infrastructure owned by third parties), transit bus battery pilot programs, customer demand response tariff programs, and others. A community solar pilot of the type proposed by Staff witness Baldwin would be no different.

Thus, to reiterate the conclusion stated above, Michigan law does not prohibit third-party ownership of a community solar or community solar plus storage project, regardless of whether the project is owned by participants or not.

**3. *Would a third party offering volumetric sales directly to a customer from a BTM DER need to register as a utility?***

Michigan EIBC/United generally incorporate our answer to the first question above as our answer to this third question. Because BTM DERs, to the extent their electricity is provided to host customers, fall entirely outside the utility regulatory framework (and thus the Commission’s jurisdiction), there is no need and furthermore no legal basis for their registration as a utility, regardless of the basis on which such BTM DER sells electricity to its host customer (volumetric/non-volumetric).

Furthermore, because MCL 460.10q(4) expressly preserves the rights of self-service power providers to own, construct and operate distribution facilities and electric metering equipment, that section cannot be used as a basis for requiring utility registration of BTM DERs. In full, that section provides:

(4) Only investor-owned, cooperative, or municipal electric utilities shall own, construct, or operate electric distribution facilities or electric meter equipment used in the distribution of electricity in this state. ***This subsection does not prohibit a self-service power provider from owning, constructing, or operating electric distribution facilities or electric metering equipment for the sole purpose of providing or utilizing self-service power. This act does not affect the current rights, if any, of a nonutility to construct or operate a private distribution system on private property or private easements. This does not preclude crossing of public rights-of-way.***

MCL 460.10q(4) (emphasis added). To the extent, therefore, that a third-party-owned BTM DER constructs private “distribution facilities” on a host customer’s property or is metering power for sale to the host customer, such an activity would fall squarely into the safe harbor identified in the statute (which dovetails with the provisions of MCL 460.10a(4) discussed above in the answer to question one).<sup>6</sup>

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<sup>5</sup> On that issue, see Michigan EIBC/United Comments dated September 26, 2022 at 13–17.

<sup>6</sup> Meters used to measure power delivered from or onto the distribution utility’s grid do not fall within this safe harbor. Such meters are not customarily owned by third-party BTM DER owner/operators, however, making this point



In sum, there is neither a need nor a legal basis for requiring third-party BTM DERs to register as utilities.

**4. *Does utility ownership of BTM DERs offer adequate customer protections? Are the same or similar protections available to customers who purchase BTM DERs from third parties or customers utilizing BTM DERs owned by third parties?***

Michigan EIBC/United have long argued that utility ownership of BTM DERs is, as a general matter, statutorily prohibited. Michigan EIBC/United detailed arguments supporting this position in our September 26, 2022 comments in this docket, stating in part that:

Functioning competitive markets, by their nature, are not natural monopolies to which such regulation is suited, and extending regulation into such markets is an action that should not be taken lightly and that may not be taken absent clear legislative authority—as the courts have recognized.

Therefore, the Commission may not assert jurisdiction over a heretofore unregulated market without "clear and unmistakable" statutory authority. To the extent that the Commission were to purport to allow regulated utilities to extend their regulated business operations into the competitive BTM DER markets, the Commission would in effect create a market structure in which the rate-regulated monopoly utility would be able to outcompete non-rate regulated market participants to offer DERs such as distributed solar and/or energy storage products that are currently offered in the competitive market. Extending the utility monopoly into the BTM DER market under a program design that pits the regulated utility against competitive market providers is a recipe for undermining the competitive industry and is antithetical to the goals of encouraging non-utility investment in distributed resources.

BTM DERs, whether generators, solar panels, storage devices, or other technologies, are not and have not historically been included within the regulated utility business and have in fact been the locus of healthy competitive markets of varying levels of maturity in which many non-utility entities actively participate.

Comments of Michigan EIBC/United dated September 26, 2022 at 13-14.

Allowing utility ownership of BTM DERs raises multiple customer protection concerns, including unnecessarily putting ratepayer dollars at risk and reducing customer choice, and stymying the existing competitive market for BTM DER products and services. Competitive market implications are especially concerning given the multiple competitive advantages utilities have over competitive BTM DER providers, such as:

- The ability to earn a guaranteed rate of return on its investments;
- The ability to include the cost of DER systems in rate base and spread those costs among its ratepayers;
- Access to lower cost capital due to its status as a rate regulated utility;

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irrelevant to the answer to this question.

- Preferential marketing opportunities through a captive customer base;
- Exclusive access to certain consumer data;
- Preferred and better informed interconnection opportunities; and
- Information on the system hosting capacity not available to the market (e.g. granular insights into circuit level information on ability to host DERs without infrastructure upgrades)

As such, Michigan EIBC/United largely reject the premise of this inquiry which is based on the presumption that utility ownership of BTM DERs is allowed. However, Michigan EIBC/United went on in our September 26, 2022 comments in this docket to note that,

To the extent that the Commission disagrees with Michigan EIBC/AEE’s understanding of current law to require the categorical exclusion of utility operations from locations behind the meter, however, it should nonetheless tread carefully and follow the prudent example of the New York Public Service Commission (“NYPSC”). The NYPSC imposed a general policy of utility exclusion from BTM DER markets but permitted certain focused and limited exceptions to that rule, which were intended to be facilitative of rather than competitive with the unregulated market.

Specifically, the NYPSC found that utility ownership may be permitted in the following circumstances:

1. Procurement of DERs has been solicited to meet a system need, and a utility has demonstrated that competitive alternatives proposed by non-utility parties are clearly inadequate or more costly than a traditional utility infrastructure alternative;
2. A project consists of energy storage integrated into distribution system architecture [referring to systems on utility property];
3. A project will enable low- or moderate-income residential customers to benefit from DERs where markets are not likely to satisfy the need; and
4. A project is being sponsored for demonstration purposes.<sup>7</sup>

Comments of Michigan EIBC/United dated September 26, 2022 at 16.

If, therefore, the Commission determines under certain limited circumstances that utility ownership of BTM DERs or initial utility ownership of BTM DERs with ultimate ownership transfer to a customer is allowed under certain specific circumstances, the Commission would then have the authority to establish regulations to provide customer protections. However, Michigan EIBC/United urge the Commission to reconsider the premise that it can, through broad utility

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<sup>7</sup> NYPSC. Docket No. 14-M-0101. Order Adopting a Regulatory Policy Framework and Implementation Plan. February 26, 2015. p. 70 (“REV Track 1 Order”). Available at <https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={0B599D87-445B-4197-9815-24C27623A6A0}>. The NYPSC later reaffirmed these principles. See NYPSC. Docket No. 18-E-0130. Order Establishing Energy Storage Goal and Deployment Policy. December 13, 2018. pp. 43–45. Available at <https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7BFDE2C318-277F-4701-B7D6-C70FCE0C6266%7D>.

regulations, always provide adequate customer protections, especially in circumstances where the utility business model is at odds with the customer interests that the Commission may seek to protect.

In the more common circumstance wherein utility ownership of BTM DERs is not statutorily allowed and, therefore, the BTM DER is owned by the customer or a third-party, the Commission does not have regulatory authority over that competitive, unregulated market. However, there are inherent customer protections provided by the competitive market including increased customer choice, market discipline through competitive pricing and service offerings, innovation in technology and services, and investment of private capital to provide public benefits without putting ratepayer dollars at risk. In addition, clear, well-established, long-standing customer protections exist in the private market. The Commission does not, and should not, have regulatory authority to ensure customer protections related to other devices BTM simply because they are electric in nature such as, for example, the installation and operation of home EV charging equipment, the installation and operation of new LED lighting, or the maintenance of a heat pump heating/cooling system. Instead, in a similar manner to BTM DERs owned by the customer or a third-party, customer protections is provided in these circumstances by the Attorney General. See, *e.g.*, the Michigan Consumer Protection Act, 1976 P.A. 331, as amended by 2022 P.A. 153, MCL 445.901, *et seq.*

Furthermore, in circumstances in which the legislature has deemed it appropriate to give the Commission regulatory authority over consumer protection in competitive markets, it has expressly provided for such authority. See, *e.g.*, MCL 460.10a(3).

In sum, Michigan EIBC/United reject the premise of utility-ownership of BTM DERs. In the case of customer or third-party owned BTM DERs, customer protections are provided, and will continue to be provided, by oversight from the Attorney General's office.