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October 24, 2017

Ms. Kavita Kale
Executive Secretary
Michigan Public Service Commission
7109 W. Saginaw Highway
P.O. Box 30221
Lansing, Michigan 48909

Re: MPSC Case No. U-18248

Dear Ms. Kale:

Attached for electronic filing in the above-referenced matter, please find the Reply Brief on behalf of Energy Michigan, Inc. Thank you for your assistance in this matter.

Sincerely yours,

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Enclosures
c. ALJ
All parties of record.

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's own motion, to open a docket to implement the provisions of Section 6w of 2016 PA 341 for **DTE ELECTRIC COMPANY'S** service territory.	))))))	**Case No. U-18248**

REPLY BRIEF
OF
ENERGY MICHIGAN, INC.

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Contents

REPLY BRIEF OF ENERGY MICHIGAN, INC.

I. INTRODUCTION

This Reply Brief is filed on behalf of Energy Michigan, Inc. ("Energy Michigan") by its attorneys, Varnum LLP. Failure to address any issues or positions raised by other parties should not be taken as agreement with those issues or positions. To the extent that arguments raised by the parties in their Initial Briefs were addressed by Energy Michigan in its Initial Brief, those arguments are not duplicated here, but readers are referred to Energy Michigan's Initial Brief.

II. ARGUMENT

A. DTE's and Staff's Proposal for a Perpetual SRM is Bad Policy and Conflicts with Statutory Requirements

In their Initial Briefs, DTE Electric Company ("DTE") and the Michigan Public Service Commission ("MPSC" or "Commission") Staff ("Staff") argue respectively that the State Reliability Mechanism ("SRM") be "implemented indefinitely and the associated capacity charge in place for 30 years," and that "the SRM should be effective in perpetuity." DTE Initial Brief, p. 13; Staff Initial Brief, p. 7. DTE argues that cost causation principles demand that customers who are "cost causers" be saddled with a capacity charge for the "typical operating life of the capacity." DTE Initial Brief, p. 14. By "life of the capacity" DTE apparently means the life of the generating plant. For the important distinction between the physical generating plant and the capacity that is the subject of Section 6w and of this proceeding, see the discussion below. That DTE conflates these two distinct concepts is only one of the faults in its argument.

DTE says that "the cost causer is any customer choice or bundled service customer that will be served by utility capacity." DTE Initial Brief, p. 14. DTE also says that it expects to have "enough resources either owned or under contract to provide the generation capacity for all its current bundled service customers on a Planning Reserve Margin Requirement ("PRMR")

basis." DTE Initial Brief, p. 14. However, "[t]he same is not true for choice customers." *Id.* Under the logic of DTE's proposal, any customer taking capacity service from DTE at the time it makes an investment in a new generation source for capacity must continue to pay for that new capacity whether or not it remains a customer of DTE for the typical operating life of that generation source. Based on the cost causation principles DTE is advocating, however, it would similarly apply that customers who are not receiving DTE capacity service at that time, but who may later come to take service from DTE, should not pay for that capacity, as its costs have already been fully allocated among the "cost causers" and to allow additional recovery from new customers would be to allow the utility to over-recover.

An illustration may help to highlight the difficulties with DTE's proposal. Imagine that in 2020 Customer A is on DTE's fully bundled service, and Customers B and C are on DTE's electric choice tariff, and that same year DTE incurs costs to obtain additional generation, which costs are spread out over all capacity customers of DTE. In 2021, Customer B's AES cannot demonstrate sufficient capacity, so Customer B must obtain capacity service from DTE, paying the capacity charge. But at that same time Customer A moves from DTE's fully bundled service to electric choice. If Customer A carries any charge with her for DTE's capacity investment, then the utility will be over-recovering, as Customer B, under DTE's proposal, would now be paying the same capacity charge as Customer A and the utility would not have incurred costs to provide capacity for both simultaneously. Therefore, it is plain that customers moving from utility service to AES service should not carry a capacity charge with them under these circumstances.

Now in 2023, Customer B returns to capacity service under the electric choice tariff because its AES has demonstrated sufficient capacity, but Customer C's AES has failed to

demonstrate adequate capacity and so Customer C pays a capacity charge. If Customer B also continues to pay and DTE for its past use of DTE's capacity service, but the utility has made no further capacity generation plant investments, then the utility will be over-recovering. Thus, under the customer "cost causer" logic of DTE's proposal, as customers move from utility service to choice service, some will carry a capacity charge with them, and some will not, and this charge must be tracked for 30 years regardless of who the customer's supplier is and may or may not disappear if that customer is effectively replaced by a subsequent customer. In short, trying to extend charges for the life of the plant, rather than for the life of the capacity demonstration period, is unwieldy and unworkable and is likely to only result in over-recovery by the utility and unnecessary costs being imposed on customers.

Staff asserts that an SRM set in perpetuity is warranted, in part, because the "Legislature did not provide an expiration date or a sunset clause on the SRM itself, but delegated the authority to the commission to decide whether to set one." Staff Initial Brief, p. 7. What Staff's recommendation ignores is that if the Commission were to set an SRM that must remain in place in perpetuity, it would be tying the hands of future Commissions. This is unlawful. The Commission cannot bind future Commissions by creating a permanent SRM, nor one that requires legislative action to undo. See, *In the matter of the application of Midland Cogeneration Venture Limited Partnership for approval of capacity charges contained in a power purchase agreement with Consumers Power Company*, Case No. 8871, March 30, 1989, p. 5 ("we cannot bind future commissions and will not bind ourselves to prejudge the matter"); see also, *In the matter of the application of Consumers Power Company for authority to change its method of accounting for the electric fuel and purchased and net interchange adjustment clause revenues*, Case No, U-5609, May 1, 1978, pp. 7-8.

Furthermore, DTE's and Staff's arguments in support of this unlawful proposal do not, in fact, provide any substantial basis for such an action. DTE argues that an indefinitely long implementation of the SRM is necessary to provide "long-term certainty regarding for future capacity needs." DTE Initial Brief, p. 13. Staff cites its witness, Mr. Eric Stocking, in arguing that, "Staff maintains that the SRM provides the commission with a tool to ensure the long-term reliability of the electric grid in Michigan." Staff Initial Brief, p. 7, citing 3 Tr 236. However, while the SRM provides a tool to the Commission for addressing reliability issues, it is not the only tool in the toolbox. As the saying goes, if all you have on hand is a hammer, then everything is treated like a nail. Likewise, it is not good policy for the Commission to predetermine for the indefinite future that it – and future Commissions – will address all reliability issues using the same tool.

For some years now, even in the absence of an SRM, the Commission has been engaging in an annual review of grid reliability issues. This should continue, and during the course of this process the Commission can determine on an annual basis whether or not it needs to implement an SRM for the applicable year, that is, four years out, or whether some other tool would better meet the current situation, or even whether no particular action needs to be taken by the State. The approach advocated by Energy Michigan, unlike that advocated for by the utility and Staff, ensures that the Commission has maximum flexibility to address the situation into the future using different tools as circumstances arise or change.

B. DTE's Argument That U-17032 Should Serve as Precedent is Unavailing

DTE argues that the SRM proceedings under Section 6w, initiated by the requirements of PA 341 which first became effective in April 2017, are not cases of first impression. DTE argues that the Indiana Michigan Power Company ("I&M") case no. U-17032 from 2012 should

be relied on to guide the Commission's decision-making in this docket. There are two major facts that this argument disregards.

First, Case No. U-17032 proceeded under a tariff approved by the PJM Interconnection, L.L.C. ("PJM"), the Regional Transmission Operator ("RTO") in which I&M operates. DTE is a member of the Midcontinent Independent System Operator ("MISO") and subject to that RTO's market rules and tariffs. Furthermore, as DTE itself noted, the Federal Energy Regulatory Commission ("FERC") rejected a tariff that would have allowed Michigan to establish such a charge. See DTE Initial Brief, p. 1, and FERC Order Rejecting Tariff Filing, 158 FERC ¶ 61,128, dated February 2, 2017. Thus, the only authority for the Commission's action in this proceeding is Act 341, and this Act and its authorizing language did not exist in 2012 and 2013 when the U-17032 proceedings were underway. Thus, while it is true that the Commission established a capacity charge in U-17032, it did so under a completely different set of legally authorizing tariffs and requirements, namely those under the PJM tariff that allowed for the establishment of a "state compensation mechanism," and so this proceeding, brought under the requirements of PA 341, is in no way comparable.

A look at the outcome of U-17032 indicates why it should not be considered to be precedential nor persuasive for this proceeding. PA 341 explicitly recognizes the continued existence of the electric choice market in Michigan, and continues to allow room for competition in prices. This reality was recognized by Chairman Sally Talberg in her statement released at the time of the issuance of the September 15 Order in U-18197, when she said, "the Commission's implementation of the law will allow the electric choice programs to continue to be viable and ensure that all providers are contributing toward long-term reliability."[1] It is thus worth noting

[1] http://efile.mpsc.state.mi.us/efile/docs/18197/0126.pdf (emphasis added).

that if DTE's argument was accepted and the same methodology applied for DTE that was applied for I&M in U-17032, the goal of continued viability of the electric choice market in DTE's service territory would be abandoned. The outcome of the Commission's decision in U-17032 has proven the methodology there to be incompatible with a viable electric choice market.

During the U-17032 proceeding, and in its Petition for Rehearing following the Commission's Order on September 25, 2012, Energy Michigan pointed out that the utility's methodology that the Commission was applying was inconsistent with the continuance of the electric choice market in I&M's service territory. As the Commission noted in its January 31, 2013 Order denying Energy Michigan's Petition for Rehearing, "Energy Michigan posits that the capacity rates set in the September 25 order will produce large losses for OAD customers, and will force OAD customers to abandon choice service immediately." Nevertheless, the Commission approved the methodology proposed by I&M and the consequences have been plain to see, and have been detailed in the Commission's own reports on the Status of Electric Competition in Michigan. Thus, in its Status of Electric Competition Report for 2013 ("2013 Report"), the Commission noted that while I&M's program had been fully subscribed at 10% in June 2012, things quickly changed following the issuance of the Commission's September 25, 2012 Order:

> In September 2012, the Commission approved the creation of a state compensation mechanism for AES capacity in I&M's Michigan service territory in Case No. U-17032. Since April 2013, there has been no choice participation in I&M's territory.

2013 Report, p 7.[2] Nor has there been any choice participation in I&M's service territory since the Commission's approval of the method proposed by the utility in U-17032.[3] Duplicating the

[2] The 2013 Report is available here: http://www.michigan.gov/documents/mpsc/compreport2013_555286_7.pdf.

experience with I&M in DTE's service territory by applying the same methodology for DTE that was applied for I&M would not only be inconsistent with the language of Act 341, but it would also be inconsistent with the Act's goals, which included the preservation of the competitive market in Michigan.

C. DTE's 30-year Proposed Charge Duration is Unreasonable and Unlawful

DTE proposes that if a capacity charge is assessed, that it be in place for thirty years. DTE Initial Brief, pp. 13 ff. The steps DTE is asking the Commission to take to lock in a 30-year capacity charge lack any basis or support in the statute that must authorize anything the Commission decides to implement. Energy Michigan agrees with the concerns expressed by ABATE in their Initial Brief, that "DTE's [30-year] proposal is also highly anticompetitive and, despite the Company's assertion to the contrary, directly conflicts with MCL 460.6w." ABATE Initial Brief, p. 14. Similar concerns are expressed by the Attorney General, who noted that "[t]he plain language of the statute is clear that any year in which the AES can demonstrate capacity, no capacity charge should be assessed against its load. There is no exception for an AES failing in the past to meet its capacity obligations." Attorney General Initial Brief, p. 10 (emphasis added). Energy Michigan agrees with these and other parties who have pointed out that DTE's proposal would require the Commission to not only exceed its statutory authority, but even to contradict explicit statutory requirements contained in Act 341.

The benefits that are to be gained by having the Commission adopt a flexible policy that enables it to respond with a variety of tools to any reliability concerns, which Energy Michigan discusses above, apply as well here. Again, the Attorney General describes the situation well:

[3] Current status of choice participation in I&M's service territory can be found here: https://www.indianamichiganpower.com/account/service/choice/CapacityTracking.aspx.

"Locking in a 30-year commitment would interfere with or at least complicate the Commission's ability to adjust to any statutory, regulatory or procedural changes in the future." Attorney General Initial Brief, p. 11. Energy Michigan shares these concerns and urges the Commission to reject DTE's proposal for a 30-year charge in favor of the single year charge discussed in Energy Michigan's Initial Brief.

D. The SRM Charge Should be Applied to the AES, not the Customer.

DTE assumes that the SRM charge should be applied to customers: "The remaining element needed to implement the capacity charge is to identify which customers will be subject to the capacity charges described in the previous sections of this brief, and under what terms and conditions of service." DTE Initial Brief, p. 28. As Energy Michigan discussed at some length in its Initial Brief, such an assumption is faulty, both because it conflicts with the plain language of the Act, and because it would fail to put the cost on (in DTE's words) the "cost causer."

As Energy Michigan pointed out in its Initial Brief, MCL 460.6w(6) states that, "[t]he capacity charge in the utility service territory must be paid for the portion of its load . . . ." See discussion at Energy Michigan Initial Brief, p. 29. It is significant to note that the language of the statutes says, "for the portion of its load" and not "by the portion of its load." The latter construction would plainly indicate payment by the customer (i.e., the "load"). Instead, the payment is by the AES, on behalf of (i.e., "for") the load. This understanding of the plain language of the statute is further reinforced in Section 6w(6) where it says: "Any electric provider that has previously demonstrated that it can meet all or a portion of its capacity obligations shall give notice to the commission by September 1 of the year 4 years before the beginning of the applicable planning year if it does not expect to meet that capacity obligation and instead expects to pay a capacity charge." This provision plainly specifies who is to "pay a

capacity charge" – namely "any electric provider" that gives notice that it does not expect to meet the capacity obligation. The plain grammar of this sentence demands that the "it" who "does not expect to meet" and so "instead expects to pay" is the electric provider that is the subject of the sentence. There is no plausible way to read this provision as requiring customer payment.

It is noteworthy that the word "customer" does not appear in PA 341's explanation of the implementation and application of the SRM charge anywhere in Section 6w (1) through (8). The words used are "alternative electric supplier," "alternative electric supplier load," "alternative electric load," and "load." The term "load" (which is not defined) commonly means the amount of power being absorbed in aggregate at any point in time – it does not mean a list of a million individual DTE customers, and it should likewise not mean a list of individual AES customers. What is clear from the plain statutory language is that the AES pays the SRM charge and that if a customer switches suppliers, the AES re-assigns its capacity to another provider:

> If an alternative electric supplier ceases to provide service for a portion or all of its load, it shall allow, at a cost no higher than the determined capacity charge, the assignment of any right to that capacity in the applicable planning year to whatever electric provider accepts that load.

MCL 460.6w(7) (emphasis added). An individual customer does not own the capacity, does not re-assign the capacity, and does not accept re-assignment of capacity. As Wolverine Power Marketing Cooperative, Inc. ("Wolverine") explained, "Customers, as the end users of electricity, are not required (or able) to: (1) provide information for a capacity demonstration, (2) serve their own load, or (3) own or control their own capacity "destiny" (as they cannot procure it and are at the mercy of the LSE); therefore, customers are not the appropriate party upon which to place a direct capacity charge. An LSE's failure to meet its own capacity obligations should not possibly result in an unavoidable direct capacity charge on customers." Wolverine

Initial Brief, at p. 6. For all of these reasons, as explained in its Initial Brief, Energy Michigan recommends that the Commission comply with the plain statutory direction to apply any SRM charge to the AES and not to individual customers.

Some might try to argue that the utility is not providing capacity service to the AES, nor selling capacity to the AES, but rather the utility is providing state reliability service to its ROA customer, and therefore that the charge must be on the customer. However, what this ignores is that it is the AES that has to acquire the capacity, not the customer; that it is the AES that has to demonstrate the capacity it has acquired, not the customer. Generally speaking, customers cannot go out and acquire capacity service, as they are not participants in wholesale energy markets. Nor should they be expected to, as they typically do not have the experience nor necessary authorizations to do so. Therefore, the responsibility is plainly on the AES, and that is where the charge must lie also.

E. All Projected Energy Market Sales Net of Projected Fuel Must Be Excluded from the SRM Charge

As quoted in DTE's, Staff's, and Energy Michigan's initial briefs, Section 6w(3)(b) requires the following subtraction:

> (b) For the applicable term of the capacity charge, subtract all non-capacity-related electric generation costs, including, but not limited to, costs previously set for recovery through net stranded cost recovery and securitization and the projected revenues, net of projected fuel costs from all of the following:
>
> (i) ***All*** energy market sales.
> (ii) Off-system energy sales.
> (iii) Ancillary services sales.
> (iv) Energy sales under unit-specific bilateral contracts.

MCL 460.6w(3)(b) (emphasis added). DTE, however, uses a definition of "all energy market sales" that does not follow the plain meaning of the statute, but rather subtracts DTE's bundled load from its generation:

> DTE Electric believes that the proper way to calculate the energy sales revenue net of projected fuel costs, first requires identification of the revenue associated with energy sales from the Company's generation resources, which is any excess generation sold into the MISO energy market after serving the Company's bundled load.

DTE Initial Brief, p. 27, footnote 20. Staff used a similar definition in their testimony and calculation of their recommended SRM charge.

DTE's definition of "energy market sales" to MISO has been obsolete for 12 years, since the beginning of the MISO Midwest Market in 2012, when MISO began dispatching all generation. As Mr. Zakem explained in his testimony for Energy Michigan, MISO charges for all withdrawals of energy from the grid, and pays for all injections of energy into the grid. Withdrawals (in the form of customer load) and injections (in the form of power plant generation) take place at different locations, and therefore are charged and paid at different prices. Therefore, the revenue from "all energy market sales" can mean only all of the payments that MISO makes for injections of energy into the grid. There is no netting of energy for load against energy from generation – they are two different transactions, and must be two different transactions since the prices are different. See discussion at 3 Tr 443-444. Just because MISO may give a net bottom line in dollars on an invoice does not mean or even imply that energy sales are netted against energy purchases, or that generation is netted against bundled load to determine the energy market "sale."

Therefore, the subtraction for "all energy market sales" that complies with the statute is as Energy Michigan has explained, quantified, and presented in its testimony and exhibits, and not the netting that DTE and Staff endorse.

III. CONCLUSIONS AND PRAYER FOR RELIEF

WHEREFORE, for the reasons set forth above, as well as in the Testimony and Exhibits filed by Energy Michigan in this proceeding, and in its Initial Brief, Energy Michigan respectfully requests that the Commission implement the SRM capacity charge in accordance with the requirements of Section 6w of Act 341 and the cost of service statute MCL 460.11 using the methods proposed by Energy Michigan.

Respectfully submitted,

Varnum LLP
Attorneys for Energy Michigan, Inc.

October 24, 2017

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STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's own motion, to open a docket to implement the provisions of Section 6w of 2016 PA 341for **DTE ELECTRIC COMPANY'S** service territory.	))))))	**Case No. U-18248**

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF INGHAM)

Kimberly J. Champagne, the undersigned, being first duly sworn, deposes and says that she is a Legal Secretary at Varnum LLP and that on the 24th day of October, 2017, she served a copy of the Reply Brief of Energy Michigan, as well as this Proof of Service upon those individuals listed on the attached Service List via email at their last known addresses.

Kimberly Champagne

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