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February 13, 2018

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

RE: Case No. U-18491 – In the Matter of the Application of Consumers Energy Company to Reset Avoided Capacity Costs.

Dear Ms. Kale:

Included in this electronic file, in the above captioned case, is **Consumers Energy Company's Response to Objections to Consumers Energy Company's Request for *Ex Parte* Approval of Application to Reset Avoided Capacity Costs.** This is a paperless filing and is therefore being filed only in a PDF format.

Sincerely,

RWB

Digitally signed by
Robert W. Beach
Date: 2018.02.13
17:06:54 -05'00'

Robert W. Beach

cc: Entities per Attachment 1 to Proof of Service

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of CONSUMERS ENERGY COMPANY to Reset Avoided Capacity Costs	))))	Case No. U-18491

CONSUMERS ENERGY COMPANY'S RESPONSE TO OBJECTIONS TO CONSUMERS ENERGY COMPANY'S REQUEST FOR *EX PARTE* APPROVAL OF APPLICATION TO RESET AVOIDED CAPACITY COSTS

On December 20, 2017, Consumers Energy Company ("Consumers Energy" or the "Company") filed an Application with the Michigan Public Service Commission ("MPSC" or the "Commission") which sought an *ex parte* finding that: (i) the Company has no capacity need over the next 10 years; and (ii) the Company's avoided capacity cost shall be reset at the Midcontinent Independent System Operator, Inc. ("MISO") Planning Resource Auction ("PRA") rate for all new Public Utility Regulatory Policies Act of 1978 ("PURPA") Qualifying Facility ("QF") offers to sell capacity to the Company and its customers. Because the approvals requested will not result in an increase to the rates or costs paid by customers, *ex parte* approval is reasonable, prudent, and in the best interest of the Company's customers.

On January 16, 2018, Cypress Creek Renewables, LLC ("Cypress Creek") filed a Petition for Leave to Intervene and Objection to Consumers Energy Company's Request for *Ex Parte* Approval ("Cypress Creek's Petition"). On January 19, 2018, Geronimo Energy ("Geronimo") also filed a Petition for Leave to Intervene in this proceeding ("Geronimo's Petition"). In Geronimo's Petition, Geronimo indicated that it "objects to Consumers Energy's request for *ex parte* treatment in this proceeding, for the reasons set forth in the [January 5, 2018] Comments

filed separately by Geronimo Energy in this proceeding."[1] Geronimo's Petition, page 1. The Independent Power Producers Coalition of Michigan ("IPPC") also filed a Petition for Leave to Intervene on January 19, 2018 ("IPPC's Petition").[2] In that filing, IPPC indicated that it "objects to Consumers Energy Company's request for *ex parte* treatment in this proceeding." IPPC's Petition, page 1. Finally, on January 22, 2018, the Environmental Law & Policy Center ("ELPC") filed its Petition to Intervene, Motion for a Contested Case Proceeding, and Objection to Ex Parte Approval ("ELPC's Petition"). The Commission should refuse to grant the requests of Cypress Creek, Geronimo, IPPC, and ELPC as *ex parte* approval of the Company's capacity position is appropriate.

I. RESPONSE TO CYPRESS CREEK

Cypress Creek objects to the Company's request for *ex parte* relief in this matter because, according to Cypress Creek, federal and state law requires that it be given the opportunity to participate in a proceeding to determine Consumers Energy's avoided costs. Cypress Creek's Petition, page 7. Cypress Creek's argument is misplaced and should be rejected by the Commission.

Contrary to Cypress Creek's claim, the Company is not proposing to set new avoided costs in this proceeding. The setting of the Company's avoided costs is ongoing in another proceeding, Case No. U-18090. In this proceeding, the Company is providing the Commission with its capacity position over a 10-year planning horizon, which will have the effect of reducing the capacity component of the avoided cost rate structure once the Commission has finalized its avoided cost review.

[1] On January 5, 2018, Geronimo filed "Comments of Geronimo Energy in Response to Consumers Energy Company's Motion to Stay Capacity Purchase Obligation." This filing was not a legal pleading and was instead signed by Betsy Engelking, Vice President, Policy and Strategy.
[2] Geronimo and IPPC are represented by the same legal counsel.

In its May 31, 2017 Order in MPSC Case No. U-18090, the Commission found that "the utility's obligation to purchase capacity from QFs" does not persist "if no additional capacity need is forecasted." MPSC Case No. U-18090, May 31, 2017 Order, page 19. The Commission further found that "if no capacity is needed during the 10-year planning horizon, then Consumers shall make a filing so indicating, and the avoided cost for capacity shall be reset to the MISO PRA." *Id*. In its December 20, 2018 Order in Case No. U-18090, the Commission stayed the effectiveness of the Company's avoided cost rates pending the finalization of the Company's avoided costs during the rehearing process. However, no party has filed a petition for rehearing challenging the Commission's finding with respect to the Company's avoided capacity rate when the Company has no capacity need. Therefore, based on the Commission's May 31, 2017 Order in Case No. U-18090, it is clear that the Company's avoided capacity rate will be the MISO PRA rate when the Company has no capacity need. The Company's request in this proceeding does not seek to challenge the Commission's findings with respect to the Company's avoided capacity rate structure. Instead, the Company seeks a determination from the Commission that the Company has no capacity need and therefore, its avoided capacity rate should be adjusted to the MISO PRA rate as approved in Case No. U-18090.

Based on the fact that the Company is not seeking to re-litigate its avoided costs, there is no support for Cypress Creek's claim that it is entitled under federal and state law to participate in this proceeding. There is also no support for Cypress Creek's claim that *ex parte* approval of the Company's request violates MCL 460.6v. Cypress Creek claims that MCL 460.6v requires the Commission "to conduct a contested case proceeding to reevaluate avoided cost rates for PURPA QFs at least once every five years" but that is exactly what the Commission has already done in Case No. U-18090. See Cypress Creek's Petition, page 7. In that case, the Commission

is undertaking an extensive review of the Company's avoided costs, as part of a contested case proceeding, which included participation by numerous interested parties. As part of that contested case proceeding, the Commission determined the Company's avoided capacity costs, and made additional findings specific to the Company's avoided capacity cost rate when the Company has no capacity need. Since the Company's avoided capacity costs have previously been considered as part of a contested case proceeding there is no need for a fully contested case here. If Cypress Creek wishes to take issue with the Company's avoided capacity costs, the appropriate place to pursue such a position would have been in Case No. U-18090.

As an alternative, Cypress Creek argues on page 9 of its Petition that, even if the Commission does not find that a contested case is required by statute, the Commission should still commence a contested case because "Consumers' own application rests on witness testimony and exhibits." This argument fails to establish any grounds for a contested case proceeding. As an initial matter, there is no prohibition against including testimony and exhibits with an *ex parte* request for relief and the inclusion of testimony and exhibits does not create an obligation on the part of the Commission to commence a contested case proceeding. It is also not uncommon in practice before the Commission to include testimony and exhibits in such filings. Company witness Thomas P. Clark's testimony and exhibits, which accompanied the Company's Application in this matter, were filed with a sworn affidavit that was signed by Mr. Clark. Since Mr. Clark has provided sworn testimony and exhibits, it is proper for the Commission to rely on that testimony and exhibits in approving the Company's request in this proceeding.

In addition to the above, it should be noted that the law does not require contested case proceedings where the utility is not seeking to increase the cost of services. MCL 460.6a(1) states in part:

> "A gas utility, electric utility, or steam utility shall not increase its rates and charges or alter, change, or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, without first receiving commission approval as provided in this section."

The "as provided in this section" language encompasses the notice and hearing requirements discussed later in MCL 460.6a(1). Thus, the Commission may grant approvals that do not "increase the cost of services" to utility customers without notice and hearing. See, e.g., *Attorney General v Mich Pub Serv Comm*, 227 Mich App 148; 575 NW2d 302 (1997); and MPSC Case No. U-15805, July 27, 2010 Order, pages 5-6. The Company is not seeking to increase customer costs in this proceeding. In fact, the Company is seeking to reduce customer costs pursuant to the avoided capacity construct previously approved by the Commission in Case No. U-18090. Therefore, the Commission has the legal authority to approve the Company's request in this proceeding on an *ex parte* basis.

Not only has Cypress Creek failed to provide sufficient grounds for a contested case proceeding but Cypress Creek is also not an appropriate party for participation in this matter. Cypress Creek has no knowledge of the Company's capacity position. There is no doubt that it will maintain that the Company has a capacity need as Cypress Creek's Petition demonstrates that its interest in this matter is one of a competitive nature. In Case No. U-9138, the Commission clearly held that a competitive interest was not sufficient to confer standing. November 10, 1988 Opinion and Order, page 5. The Commission has repeatedly reinforced that standard in a number of cases since then. See, e.g., MPSC Case No. U-15628, February 3, 2009

Order; MPSC Case No. U-9852, September 25, 1991 Opinion and Order; MPSC Case No. U-9804, May 17, 1991 Order Granting Motion to Dismiss; MPSC Case No. U-9503, November 1, 1990 Order Granting Motion to Dismiss; and MPSC Case No. U-9515, November 1, 1990 Order Granting Motion to Dismiss. Furthermore, in Case No. U-9804, a pipeline company tried to persuade the Commission that it would suffer an injury in fact, in part, because the utility's proposal would deprive the pipeline company of "potential customers for at least two years." May 17, 1991 Order Granting Motion to Dismiss, page 10. The Commission found such speculation to be merely conjectural and stated that "those types of future competitive 'interests' do not constitute injury in fact." *Id*. Cypress Creek has expressed no direct interest in this proceeding other than its competitive interest to ensure payment of the higher avoided capacity rate.

If the Commission does initiate a contested case proceeding in this matter, which the Company does not agree is necessary, it would be unreasonable to allow a party with a competitive interest, like Cypress Creek, to participate. Cypress Creek's competitive interests are not aligned with the interests of the Company's customers who will ultimately pay the price for any capacity that the Company is required to purchase. Furthermore, since this proceeding determines the Company's capacity need, and not the Company's avoided costs which are being considered in Case No. U-18090, there is no unique perspective that Cypress Creek can provide which can justify permissive intervention.

II. RESPONSE TO GERONIMO

Geronimo's January 5, 2018 Comments oppose *ex parte* approval of the Company's request in this matter. Geronimo asserts that "what Consumers seeks to have the Commission do is to impair the rights of QFs, without allowing an opportunity for those QFs to participate fully

in this proceeding." Geronimo's January 5, 2018 Comments, page 4. Geronimo's claim is unsubstantiated and should be entirely rejected.

Geronimo fails to provide sufficient support for its claimed due process right in this proceeding. In fact, Geronimo's January 5, 2018 Comments, which it relies on to support its opposition of *ex parte* approval, is completely devoid of any legal support or analysis which could establish such a due process right. Michigan Courts have held that failure to brief an argument is tantamount to abandoning it. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) quoting *Mitcham v Detroit,* 355 Mich 182, 203; 94 NW2d 388 (1959). In *In re Application of Indiana Michigan Power Company*, the Court of Appeals held:

> "A party may not simply announce its position and then leave it to this Court to discover and rationalize the basis for its claims. *Wilson v. Taylor,* 457 Mich. 232, 243, 577 N.W.2d 100 (1998). Furthermore, a party may not give an issue cursory treatment with little or no citation of supporting authority. *Silver Creek Twp. v. Corso,* 246 Mich. App. 94, 99, 631 N.W.2d 346 (2001). Appellants' argument on this issue contains no specifics regarding what discovery matters they believe were improperly withheld, or what testimony proffered by their witness was improperly stricken from the record. Appellants do not explain how the PSC would have decided this matter differently had the discovery material and testimony been before it on the record. The lack of specifics in appellants' argument leads us to conclude that this issue has been abandoned. *Yee v. Shiawassee Co. Bd of Comm'r(s),* 251 Mich App 379, 406, 651 N.W.2d 756 (2002)." *In re Application of Indiana Michigan Power*, 275 Mich App 369, 376; 738 NW2d 289 (2007).

Since Geronimo has failed to support its argument, it is not appropriate to require the Company and the Commission to unravel the merits of its claim. Geronimo's claimed due process right in this proceeding should be rejected.

Furthermore, even if Geronimo claims that, as a QF, it has a due process right in the determination of the Company's avoided costs, which the Company does not agree, such an

argument fails to provide grounds for a contested case in this proceeding. This is because the Company is not seeking a reevaluation of its avoided costs in this proceeding. The Company is seeking Commission approval of the Company's capacity forecast which demonstrates that the Company has no capacity need for the next 10 years. If Geronimo wishes to challenge the Company's avoided capacity costs, or more specifically the avoided capacity rate when the Company has no capacity need, the appropriate place to make such a challenge, if at all, is in the avoided cost determination case, Case No. U-18090.

Similar to Cypress Creek, Geronimo is also not an appropriate party for participation in this matter if *ex parte* approval is not granted. Geronimo has no knowledge of the Company's capacity position, and it is clear that Geronimo will maintain that the Company has a capacity need. Geronimo seeks to participate in this proceeding because "it is a developer of renewable energy projects in Michigan." Geronimo's Petition, page 1. This makes Geronimo a direct competitor to Consumers Energy and the Commission has made clear that a competitive interest does not establish grounds for standing to intervene. See Case No. U-9138, November 10, 1988 Opinion and Order, page 5.

It should also be noted that the Commission has previously rejected Geronimo's attempts to participate in Commission proceedings based on its competitive interest. In Case No. U-16582, Geronimo petitioned to intervene in a DTE Electric Company proceeding, which was requesting approval of Power Purchase Agreements ("PPAs") with another developer. The Commission denied Geronimo's Petition to Intervene and found that: "Geronimo's alleged injury is speculative at best, and its interests are clearly those of a competitor." MPSC Case No. U-16582, May 17, 2013 Order, pages 5-6. Under the same reasoning, Geronimo's claim of standing in this case must fail.

Since Geronimo has expressed no direct interest in this proceeding other than its competitive interest, the Commission should reject Geronimo's attempts to participate in the determination of the Company's capacity position. Allowing Geronimo to participate in this proceeding is harmful to Consumers Energy's customers because, as a competitor, Geronimo has the objective to secure additional capacity sales to the Company, whether or not it is necessary to meet the needs of the Company's customers.

III. RESPONSE TO IPPC

At page 4 of IPPC's Petition, IPPC asserts that it opposes *ex parte* treatment of the Company's Application in this proceeding because the Company's "proposed actions will cause demonstrable harm to third parties." This argument is not supported by IPPC and also fails to provide grounds for a contested case proceeding.

As explained above, the Commission is within its authority to grant the Company's requested relief in this matter on an *ex parte* basis. This is because the Company is seeking to reduce customer costs pursuant to the avoided capacity construct determined in Case No. U-18090. The Company is not seeking to "increase the cost of services" to utility customers and therefore, the Commission has the legal authority to approve the Company's request in this proceeding on an *ex parte* basis. See, e.g., *Attorney General v Mich Pub Serv Comm*, 227 Mich App 148; 575 NW2d 302 (1997); and MPSC Case No. U-15805, July 27, 2010 Order, pages 5-6.

Furthermore, the Company is not seeking to "remove or reduce its obligations to buy capacity from IPPC members" that have existing PPAs with the Company, as IPPC suggests. In Case No. U-18090, the Commission required that "…existing QFs [such as the members of IPPC] with expiring contracts should have their contracts renewed at the full avoided cost rate, whether or not the company forecasts a capacity shortfall over the planning horizon." See MPSC

Case No. U-18090, May 31, 2017 Opinion and Order, page 18. The Company is not proposing treatment of these facilities in a manner different than what was ordered in Case No. U-18090. The capacity and energy supplied by these QFs is already taken into account in the Company's determinations about future capacity additions, as the Company specifically stated in its capacity demonstration filing. See MPSC Case No. U-18491, Direct Testimony of Company witness Thomas P. Clark, page 15 ("The Company has several PURPA-based PPAs in place with QFs that will terminate during the time period from 2018 to 2028. However, the Company has forecasted that these existing contracts will be replaced with new PURPA-based agreements at the rates established in Case No. U-18090. Obligations to contract are projected to remain throughout the 10-year planning period.") Thus, contrary to IPPC's assertion, this filing will not have an impact on the rights of any IPPC members with existing PPAs.

In footnote 2 on page 4 of IPPC's Petition, IPPC further asserts that IPPC member Tower Kleber is seeking to "sell additional hydro power to Consumers that is not currently under contract with the utility" and "[t]herefore, IPPC members will be harmed no matter what position Consumers is taking on the question of how existing capacity is to be treated." IPPC's arguments with respect to the Tower Kleber facility still fails to provide grounds for a contested case proceeding in this matter because: (i) Tower Kleber is not located within the Company's electric service territory or interconnected with the Company's distribution system and is therefore not a Consumers Energy customer; and (ii) as an independent power generator seeking to sell capacity to the Company's customers, Tower Kleber maintains the same competitive interest as Cypress Creek and Geronimo. As explained above, such a competitive interest fails to provide proper grounds for participation in this proceeding.

In summary, IPPC's Petition fails to establish that a contested case proceeding is necessary in this proceeding and also fails to establish a sufficient basis to support its participation in this matter should the Commission not grant *ex parte* approval.

III. RESPONSE TO ELPC

As was the case with Cypress Creek, Geronimo, and IPPC, ELPC does not present any compelling reasons for the Commission to avoid considering and granting the approvals the Company requested in this proceeding on an *ex parte* basis. ELPC's suggestion that the Company's filing is based on "flawed assumptions" is incorrect. ELPC's Petition, page 6. All assumptions included in the Company's capacity position have either previously received Commission approval or are included in pending cases requesting Commission approval. It is entirely unreasonable to suggest that the Company's preexisting, and already publically filed, plans for future capacity resources should be disregarded on account of QF capacity which might materialize in the future. Furthermore, ELPC's position fails to consider that the Commission has the legal authority, as discussed above, and the technical expertise to review and approve the Company's request for relief in this matter. Given the Commission's authority and technical expertise, there is no need for a contested case proceeding.

ELPC also suggests, on page 6 of its Petition, that a contested case is required pursuant to MCL 460.6v(3) "for any re-evaluation of Consumers' avoided cost rate." However, as discussed in response to Cypress Creek, the Company is not seeking a "re-evaluation" of its avoided costs rates in this matter. Those rates are the subject of the proceedings in Case No. U-18090. The purpose of this proceeding is to implement a provision of the Company's avoided capacity rate construct, as determined in Case No. U-18090. Since the Company is not seeking a

"re-evaluation" of its avoided cost rates in this proceeding, MCL 460.6v(3) does not apply and a contested case proceeding is not required.

ELPC is a participant in Case No. U-18090 which determined the avoided capacity rate structure that the Company seeks to implement in this case. ELPC should not be given an opportunity to participate in this matter for the purpose of challenging the Commission's determinations in Case No. U-18090. Moreover, ELPC's suggestion that it seeks to protect its members from incurring "higher costs" lacks merit because the Company is not proposing to raise customer costs in this proceeding. See ELPC's Petition, page 7. Instead, the Company is seeking to utilize the MISO PRA price as its avoided capacity cost for all future capacity purchase obligations, in accordance with the Commission's May 31, 2017 Order in MPSC Case No. U-18090, because the Company has no need to purchase capacity for the next 10 years.

IV. CONCLUSION

The approvals requested in this proceeding will not increase Consumers Energy's rates. The Company has submitted evidence in this proceeding which establishes that the Company has no capacity need for the next 10 years. In applying the avoided capacity rate structure approved by the Commission in Case No. U-18090, the Company requests that the Commission reset the Company's avoided capacity rate to the MISO PRA rate. Consumers Energy Company respectfully requests that the Michigan Public Service Commission deny the requests of Cypress Creek Renewables, LLC, Geronimo Energy, the Independent Power Producers Coalition of Michigan, and the Environmental Law & Policy Center for a hearing in this proceeding, and issue an *ex parte* order approving the relief requested in the Company's Application.

Respectfully submitted,

Dated: February 13, 2018 By: 
Digitally signed by Robert W. Beach
Date: 2018.02.13 17:07:14 -05'00'

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STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of CONSUMERS ENERGY COMPANY to Reset Avoided Capacity Costs	))))	Case No. U-18491

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS
COUNTY OF JACKSON)

Samantha J. O'Rourke, being first duly sworn, deposes and says that she is employed in the Legal Department of Consumers Energy Company; that on February 13, 2018, she served an electronic copy of the **Consumers Energy Company's Response to Objections to Consumers Energy Company's Request for *Ex Parte* Approval of Application to Reset Avoided Capacity Costs** upon the entities listed in Attachment 1 hereto, at the e-mail addresses listed therein.

Digitally signed by Samantha O'Rourke
Date: 2018.02.13 17:07:38 -05'00'

Samantha J. O'Rourke

Subscribed and sworn to before me this 13th day of February, 2018.

Digitally signed by Tara L. Hilliard
Date: 2018.02.13 17:08:16 -05'00'

Tara L. Hilliard, Notary Public
State of Michigan, County of Jackson
My Commission Expires: 09/12/20
Acting in the County of Jackson

ATTACHMENT 1 TO CASE NO. U-18491

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