ENVIRONMENTAL LAW & POLICY CENTER
Protecting the Midwest's Environment and Natural Heritage

June 19, 2018

Ms. Kavita Kale
Michigan Public Service Commission
7109 W. Saginaw Hwy.
P. O. Box 30221
Lansing, MI 48909

RE: MPSC Case No. U-18419

Dear Ms. Kale:

The following is attached for paperless electronic filing:

> The Environmental Law and Policy Center, The Ecology Center, The Solar Energy Industries Association, The Union of Concerned Scientists, and Vote Solar's Response to Michigan Environmental Council, Natural Resources Defense Council, and Sierra Club's Petition for Rehearing
>
> Proof of Service

Sincerely,

Margrethe Kearney
Environmental Law & Policy Center
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STATE OF MICHIGAN
MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application of **DTE ELECTRIC COMPANY** for approval of Certificates of Necessity pursuant to MCL 460.6s, as amended, in connection with the addition of a natural gas combined cycle generating facility to its generation fleet and for related accounting and ratemaking authorizations.	))))))))	Case No. U-18419

RESPONSE TO MICHIGAN ENVIRONMENTAL COUNCIL, NATURAL RESOURCES DEFENSE COUNCIL, AND SIERRA CLUB'S PETITION FOR REHEARING

ON BEHALF OF

THE ENVIRONMENTAL LAW AND POLICY CENTER, THE ECOLOGY CENTER, THE SOLAR ENERGY INDUSTRIES ASSOCIATION, THE UNION OF CONCERNED SCIENTISTS, AND VOTE SOLAR

On May 29, 2018, pursuant to Rule 437 of the Michigan Public Service Commission's (the "Commission") Rules of Practice and Procedure, Michigan Environmental Council ("MEC"), Natural Resources Defense Council ("NRDC"), and Sierra Club ("SC") (collectively, "MEC-NRDC-SC") petitioned the Commission for a rehearing of its April 27, 2018 Opinion and Order ("April 27 Order") ("Petition for Rehearing"). The Petition for Rehearing raises claims of error in the April 27 Order, citing to findings of fact and conclusions of law that are clearly erroneous. This Response addresses three of those errors in particular: (1) the April 27 Order incorrectly applies the burden of proof; (2) the April 27 Order condones DTE's blatant violation of PURPA in developing its IRP; and (3) the April 27 Order improperly relies on extra-record

evidence.[1]

I. RESPONSE TO PETITION FOR REHEARING

A. The Petition for Rehearing Correctly Identifies the Erroneous Application of the Burden of Proof, Which Resulted In an Improper Decision

The April 27 Order fails to clearly identify the applicable burden of proof, but it is clear from the Order's conclusion that it incorrectly placed the burden on Staff and Intervenors to prove that there is a more reasonable and prudent alternative to DTE's proposed $1 billion gas plant. In prior Certificate of Necessity (CON) cases, the Commission has concluded that a CON applicant bears the burden of proving its case by the preponderance of the evidence. *See, e.g.*, *In the Matter of the Application of UPPER MICHIGAN ENERGY RESOURCES CORPORATION for approval of a Certificate of Necessity pursuant to MCL 460.6s for Two Reciprocating Internal Combustion Engine Electric Generation Facilities Located in the Upper Peninsula of Michigan, Approval of Certificate(s) of Public Convenience And Necessity, approval of a Special Contract with Tilden Mining Company L.C. and related accounting and ratemaking authorizations*, Case No. U-18224, Order at 14-15 (Oct. 25, 2017); *In the matter of the application of Indiana Michigan Power Company for a certificate of necessity pursuant to MCL 460.6s*, Case No. U-17026, Order at 33 (Jan. 28, 2013). MCL 460.6s(4) requires DTE to prove, by a preponderance of the evidence, that its proposed natural gas plant "represents the most reasonable and prudent means of meeting the power need relative to other resource options for meeting power demand …." MCL 460.6s(4)(d). Yet the Petition for Rehearing identifies multiple instances in which the Commission erred as a matter of law by shifting the burden of proof to Intervenors. As the Petition for Rehearing details, rather than requiring DTE to prove by a preponderance of the evidence that its proposed natural gas plant is the most reasonable and

[1] This Response's failure to address each of the issues raised in the Petition for Rehearing should not be read to indicate disagreement with any of those other issues.

prudent alternative, the Commission improperly shifts the burden to Intervenors to present a more reasonable and prudent alternative. Not only is this burden shifting inappropriate, it resulted in an incorrect decision.

Intervenors presented modeling results from multiple alternative scenarios not to suggest that one of those alternatives was the "most reasonable and prudent," but rather to demonstrate that DTE failed to meet its burden because it used improper modeling assumptions and, in the case of storage resources, failed entirely to model available resources. *See* ELPC Initial Brief at 1-2; ELPC Reply Brief at 16, 17-18. Rather than evaluating how Intervenors testimony undermined DTE's ability to prove by a preponderance of the evidence that its proposed gas plant is the most reasonable and prudent alternative, the April 27 Order shifted the burden of proof to Intervenors to show that the multiple scenarios modeled by Intervenors were themselves the most reasonable and prudent alternative. "In the end, the need is too near term and the stakes for customers are too high for me to consider any alternate path contained in this record to be a more reasonable and prudent option than the one presented by DTE Electric." Eubanks Concurrence at 6.

The April 27 Order does not evaluate whether the evidence presented by Intervenors demonstrates that DTE did not meet its burden of proof; instead, it requires Intervenors to demonstrate that they have set forth a more reasonable and prudent alternative.

> Aside from the modeling results, the Commission finds that there are important feasibility and grid reliability questions that were not adequately addressed about the near-term viability of various alternatives presented including transmission with imported power, PPAs, and incremental renewable energy and demand-side options. April 27 Order at 118.

Intervenors presented numerous alternatives to DTE's proposal that initial modeling suggests would meet the identified need at lower cost. DTE's failure to explore these potentially lower-

cost alternatives demonstrates that DTE did not meet its burden of proof. Intervenors to this case are not obligated to complete DTE's filing. In stating that Intervenors did not adequately address open questions related to feasibility and reliability, the April 27 Order demonstrates clear error by improperly shifting the burden of proof onto Intervenors. It is a clear error that, despite all of the deficiencies in DTE's analysis identified in the April 27 Order, DTE was granted its CON because "[u]ltimately . . . no party proved that there was a more reasonable and prudent option to meet this essentially uncontested need for near-term investment in electric generation." Eubanks Concurrence at 2.

B. The Petition for Rehearing Correctly Identifies Legal Errors In the Commission's Interpretation of PURPA

It is a clear error to allow DTE to rely on an IRP that is in direct contravention of an applicable federal law. The Petition for Rehearing correctly identifies legal errors with respect to PURPA in the April 27 Order. The April 27 Order recognizes that DTE's statements to QFs that it has no capacity need while simultaneously seeking approval for a billion dollar gas plant undermine PURPA's intent.[2] However, the April 27 Order goes on to sanction this illegal behavior by approving the CON while noting that DTE will continue to have some capacity need even after the gas plant is built. The April 27 Order allows DTE to actively discourage PURPA development and refuse to model any PURPA contracts as available resources that could defer, displace or partially displace its proposed gas plant. The April 27 Order effectively condones discriminatory treatment of QFs and eviscerates PURPA's goal of allowing QF development to

[2] "Exhibit ELP-65 contains a notification from DTE Energy to potential QFs that the utility does not have a need for capacity over the next ten years. The Commission finds that it is inappropriate for DTE Electric to publish such a statement without a determination from the Commission that the utility, in fact, does not have a capacity need over the next 10 years. DTE Electric's actions are especially troubling given the utility's obligations under PURPA, the capacity need determinations by the Commission in DTE Electric's pending PURPA case, Case No. U-18091, and the information in this docket filed by the company identifying a near-term need incremental to the proposed gas plant." April 27 Order at 79; "The Commission agrees ELPC et al., Ann Arbor and EIBC, that DTE Electric did not provide strong support for its assumption that current PURPA contracts will not be renewed; the Commission finds this assumption to be inappropriate as a matter of policy . . ." April 27 Order at 78.

defer or displace large, capital-intensive, utility-owned capacity additions.

C. The Petition for Rehearing Correctly Raises Material Legal Errors Caused By Reliance on Extra-Record Evidence

The Petition for Rehearing identifies a multitude of instances in which the April 27 Order relies on non-record evidence to support its decisions on reliability, load growth forecast, energy efficiency resources, and demand response. *See* Petition for Rehearing at 21-30. Relying on this type of extra-record evidence deprives Staff and Intervenors of the ability to challenge the underlying assumptions and can result in incorrect decisions. Here, Consumers Energy's recent Integrated Resource Plan filing shows that extra-record evidence just as clearly demonstrates that smaller, more distributed generation and increased energy efficiency and demand response are reliable and responsible options that will reshape how energy is delivered to the State of Michigan. *See In the matter of the application of CONSUMERS ENERGY COMPANY for Approval of an Integrated Resource Plan under MCL 460.6t and for other relief*, Case No. U-20165, Exhibit A-36: Independent Review of 2018 Integrated Resource Plan (June 15, 2018); Andy Balaskovitz, *Michigan utility plans major shift from coal to solar in coming decades*, ENERGY NEWS NETWORK (June 13, 2018), https://energynews.us/2018/06/13/midwest/michigan-utility-plans-major-shift-from-coal-to-solar-in-coming-decades/ ("Building a natural gas plant would risk stranding the company's capital in a single asset, after which there would be "no turning back," said Consumers President and CEO Patti Poppe. Instead, the company plans to bet on solar, which can be built incrementally as needed."). The April 27 Order cites to no record evidence in support of the conclusion that "the need is too near term and the stakes for customers are too high" to require DTE to meet its burden of proof. April 27 Order at 134. With DTE's IRP filing due in March of 2019, it is improper to rely on an unsupported conclusion regarding the near term need and customer risk in making a billion dollar decision from which there will be no turning

back.

II. CONCLUSION

MEC-NRDC-SC's Petition for Rehearing raises several claims of error in the April 2017 Order, citing multiple errors of law and fact. As explained above, in approving DTE's requested CONs, the Commission incorrectly applied the burden of proof; condoned DTE's blatant violation of PURPA; and improperly relied on extra-record evidence, which has been disproven. As a result, ELPC, et. al., support MEC-NRDC-SC's conclusion that the Commission should grant rehearing.

Respectfully submitted,

Date: June 19, 2018

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing *The Environmental Law and Policy Center, The Ecology Center, The Solar Energy Industries Association, The Union of Concerned Scientists, and Vote Solar's Response to Michigan Environmental Council, Natural Resources Defense Council, and Sierra Club's Petition for Rehearing* was served by electronic mail upon the following Parties of Record, this 19th of June, 2018.

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