STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of **CONSUMERS ENERGY COMPANY** for authority to increase its rates for the generation and distribution of electricity and for other relief.	)))))	Case No. U-21870

At the November 6, 2025 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Daniel C. Scripps, Chair
Hon. Katherine L. Peretick, Commissioner
Hon. Shaquila Myers, Commissioner

ORDER

On June 2, 2025, Consumers Energy Company (Consumers) filed an application in this case requesting authority to increase its retail rates for the generation and distribution of electricity by approximately $436 million, plus an additional $24.3 million for a distribution deferral by way of a 12-month surcharge. Consumers also requested other forms of regulatory relief including miscellaneous accounting authority. The company is currently providing service pursuant to base rates established by the March 21, 2025 order in Case No. U-21585, in addition to various other approved costs through tariffs on file with the Commission, including power supply cost recovery factors, renewable energy plan surcharges, energy waste reduction surcharges, demand response surcharges, distribution deferral surcharges, investment recovery mechanism surcharges, and securitization bond charges. Application, pp. 1-2.

On June 5, 2025, Administrative Law Judge Jonathan F. Thoits (ALJ) adopted a protective order for use in the matter.

On July 2, 2025, the ALJ conducted a prehearing conference at which the ALJ either acknowledged or granted intervention in the case to the following parties: the Michigan Department of Attorney General (Attorney General); the Association of Businesses Advocating Tariff Equity; Michigan Environmental Council, Citizens Utility Board of Michigan (CUB), Sierra Club, and Natural Resources Defense Council, Inc. (collectively, MNSC); the Environmental Law and Policy Center; The Ecology Center, Inc.; Union of Concerned Scientists; Vote Solar; Great Lakes Renewable Energy Association, Inc.; Hemlock Semiconductor Operations LLC; Solar Technology LLC; Urban Core Collective; Walmart Inc.; Michigan Electric Transmission Company, LLC; Energy Michigan; Michigan Energy Innovation Business Council; Institute For Energy Innovation; Advanced Energy United; the Foundry Association of Michigan; The Kroger Co.; and Michigan Cable Telecommunications Association, Inc. Consumers and the Commission Staff (Staff) also participated in the proceeding. During the proceeding, the ALJ also notified the parties that "with respect to any witnesses who are going to opine on return on equity, or ROE, that those witnesses are going to be directed [in the forthcoming scheduling memo] to include testimony and supporting exhibits regarding the long-term forecast of the average returns for the broader stock market," with the ALJ noting that "[t]he staff and interveners can do that in their direct testimony, and the company can do that in rebuttal testimony." 1 Tr 24.

On July 8, 2025, the ALJ issued the corresponding scheduling memo reflecting the ROE provision mentioned above, along with a schedule for the case in accordance with the 10-month timeframe set forth in MCL 460.6a(5) (July 8 scheduling memo). In pertinent part relative to this order, the scheduling memo stated:

> **Return On Equity.** Any party submitting testimony regarding the authorized return on equity (ROE) requested by the utility in this case shall submit direct or rebuttal testimony and any supporting exhibits which set forth a) the average expected long-term return on equity for the broader stock market, and b) the average ROE authorized for regulated utilities in the United States for the last five years.

July 8 scheduling memo, p. 2 (emphasis in original) (pagination based on natural order).

On August 20, 2025, the Staff filed a motion to amend the July 8 scheduling memo, specifically requesting that the ROE provision be removed (Staff's motion).

On August 22, 2025, the Attorney General filed a response in support of the Staff's motion (Attorney General's response).

On September 4, 2025, the ALJ issued a ruling denying the Staff's motion but indicating that the July 8 scheduling memo would nevertheless be amended for clarification purposes (September 4 ruling).

On September 5, 2025, the ALJ issued the amended scheduling memo (September 5 amended scheduling memo) stating, in relevant part:

> **Return On Equity (Amended).** Any party submitting testimony regarding the authorized return on equity (ROE) requested by the utility in this case shall submit direct or rebuttal testimony and any supporting exhibits which set forth a) the reported forecasted return on equity for the United States stock market, and b) the reported average ROE authorized for regulated utilities in the United States for the last two or more years. The requested returns and authorized ROEs shall be those as reported in public resources or resources otherwise available to the party. The party may but is not requested to undertake its own calculation or compilation of the requested information. If the party is unable to locate the requested information, the party's ROE testimony shall include a statement that the witness has in good faith attempted to locate the requested information in public resources or resources available to the party.

September 5 amended scheduling memo, p. 2 (emphasis in original) (pagination based on natural order).

On September 18, 2025, the Staff filed an application for leave to appeal the ALJ's denial of its motion with the Commission, along with a brief in support, pursuant to Mich Admin Code, R 792.10433(1) (Rule 433(1)), requesting immediate limited relief from enforcement of the contested ROE provision (Staff's application for leave to appeal and Staff's brief in support, respectively).

On October 2, 2025, Consumers filed a response in support of the Staff's application for leave to appeal (Consumers' response).

On October 13, 2025, MNSC filed a motion for leave to respond to the Staff's application for leave to appeal, along with a brief in support and its response in opposition also attached (MNSC's motion, MNSC's brief in support, and MNSC's response, respectively).

The Commission Staff's Application for Leave to Appeal and Brief in Support

In its application for leave to appeal, the Staff asserts that the September 5 amended scheduling memo continues to improperly compel the presentation of substantive evidence at the expense of the Staff's due process rights and that, even if appropriate, the amended ROE provision is no less confusing or unworkable. While the Staff does not question a presiding officer's authority to call and question witnesses pursuant to Michigan Rules of Evidence (MRE) 614, the Staff does dispute a presiding officer's authority to demand substantive prefiled testimony in the manner in which the September 5 amended scheduling memo describes. The Staff, in this regard, requests that its application for leave to appeal be granted and that the Commission remove the requirement for parties to produce the substantive ROE evidence directed by the ALJ in this case. Staff's application for leave to appeal, pp. 2-4.

In its brief in support, the Staff begins by stating that:

> [a]s indicated in its motion before the ALJ, Staff appreciate that in order to timely and effectively render a Proposal for Decision (PFD), the Administrative Law Judges (ALJs) in Michigan Public Service Commission (MPSC) cases must exercise discretion where necessary to organize their dockets. However, the fact remains that Staff also has an obligation to present the results of their analysis in a manner they[ ] and their counsel deem appropriate. Where a presiding officer conflates their role as evidence gatekeeper with limitless ability to not only question witnesses, but also to compel the substance of prefiled testimony and analysis over the parties' objection, Staff has no other option but to seek relief from the Commission.

Staff's brief in support, p. 1. The Staff, in this vein, maintains that the ALJ's ROE provision could be construed to force a position on a contested issue and states that:

> [w]hile Staff worked to prepare testimony in compliance with the novel directive, it became clear that to follow the directive was not only difficult because the request was subject to varying interpretations, but it would also require Staff to conduct additional analysis and an [sic] adopt a method of analysis by forcing the use of a specified comparison that it may not have otherwise deemed relevant or necessary.

Id., p. 2. The Staff states that it thus sought relief with the ALJ, opposing such a requirement in a scheduling memo because it improperly deprived the Staff of its due process rights in several ways, and while the ALJ acknowledged his original request was unclear and ultimately amended the ROE provision, the Staff argues that the provision remains mandatory and unclear, arguably even more so now. The Staff further recalls the ALJ's ruling denying its motion and disputes that MRE 614 or any of the statutes relied upon by the ALJ can be stretched to extend authority to a presiding officer to direct a party to prefile testimony in this manner. The Staff thus now seeks review by the Commission, pursuant to Rule 433, to determine whether the requirement is appropriate before it is enforced to the Staff's detriment. *Id*., p. 3.

Regarding authority for its appeal, the Staff cites Rule 433 and provides two reasons why immediate interlocutory relief is necessary and appropriate from the Commission before the ALJ issues his PFD, in terms of preventing substantial harm to the Staff and the public at large pursuant to Rule 433(2)(b):

> First, compelling prefiled testimony with a specific analysis, if allowed once, establishes significant negative [precedent] moving forward. It removes the ability for counsel to object to that line of questions and circumvents a witnesses' [sic] ability to respond with a lack of personal knowledge, which is a protection required under MRE 614. Second, compliance with this substantive evidence provision forces a party to supply ROE analysis and comparisons that could be used against that party's own position in this case, as well as future rate cases.

Staff's brief in support, p. 4.

The Staff then recalls the scheduling memo from which relief is sought and the ALJ's rationale for denying the Staff's motion—"that the demand for substantive evidence through a scheduling memorandum results from his[ ] 'statutorily prescribed duty and obligation to make findings of fact and conclusions of law regarding the issue at [stake] in the case,'" along with the ALJ's reliance on MCL 24.203, MCL 24.276, MCL 24.281, MRE 614, and two unbinding federal criminal cases to support his position. *Id*., p. 5 (quoting September 4 ruling, p. 3). The Staff, in this regard, and as further discussed below:

> disputes that any of the authorities listed by the ALJ support the proposition that inherent in an ALJ's authority is the ability to compel prefilled [sic] testimony with analysis of the ALJ's choosing in an administrative proceeding before the MPSC, particularly in a scheduling memorandum. Staff continues to acknowledge that the ALJs have an important role in these proceedings that indeed involve a wide breadth of discretion, including the authority explicitly granted in MRE 614; but discretion is not absolute, and it cannot come at the price of impeding any party's due process rights.

Staff's brief in support, p. 7.

In further discussion, the Staff elaborates on its assertion that it violates the Staff's due process rights for an administrative law judge to order the creation and production of substantive evidence with analysis of the administrative law judge's choosing in a scheduling memo, expanding on why the statutes and rules of evidence relied upon by the ALJ in this case do not provide such authority and how ethical ramifications alone should have been sufficient to demonstrate that the ROE provision should have been removed by the ALJ. Notably, the Staff asserts that the ALJ's

September 4 ruling "mistakenly conflate[s]" the ALJ's role and "in so doing, create[s] an opening for increasingly burdensome and unworkable evidentiary demands through scheduling memorandums," concerns which the Staff states "are even more elevated" when "[v]iewed in the context of an already complicated 10-month rate making case." *Id*., p. 8. The Staff contends that Commission input on this is particularly timely because ROE is a contested issue in rate cases and mandating specific comparisons as requested by the ALJ "can be seen as forcing a stance on the appropriate comparison which Staff believes is an unjust invasion into their ability to present their expert conclusions in a manner[ ] it, and its counsel, deem most appropriate." *Id*. Per the Staff:

> There is a distinction between requesting clarifying questions by a judge during a trial, as allowed in MRE 614, and compelling prefiled expert witness testimony which implicitly steers the ship in the course of conducting its analysis beyond the appropriate use of MRE 614 and thus invading the role of the parties. This provision should not be included in this, or any other scheduling memorandum.

Id., pp. 8-9.[1] While the Staff agrees that ROE is a Commission-determined variable, it nevertheless asserts that if it were the Commission's intent to dictate the specific comparisons that parties must use on the issue, the Commission would have done so. Furthermore, per the Staff:

> There is no language in any of the statutes cited in the [September 4] ruling that could reasonably lead to the authority of an ALJ to dictate the methodology and analysis about which any expert can be compelled to testify. Moreover, the ALJ's position seems to presuppose that the record, as presented by the parties, would be deficient without the compelled comparisons. However, if this theory were accepted, it would suggest the compelled comparisons were necessary and that ROE determinations without them are somehow deficient. Countless previous Commission orders demonstrate that this is not so. See e.g. MPSC Case No. U-21585, 3/21/2025 Order, p 236–254.

Staff's brief in support, pp. 10-11.

[1] The Staff notes that this same ROE provision from the July 8 scheduling memo has also been added to a scheduling memo in the rate case for Northern States Power Company, a Wisconsin corporation, in Case No. U-21903. Staff's brief in support, p. 9, n. 3.

Unlike the statutes cited by the ALJ in his September 4 ruling, the Staff contends that the ALJ's assertion of MRE 614 as a source of judicial inquiry on this issue is more squarely on point; however, the Michigan Supreme Court has made clear that this rule "is to be guarded very carefully and is not absolute," and, per the Staff, there is no "instance that Staff can find where this rule was used in an administrative proceeding to empower a presiding officer to demand specific substantive prefiled testimony with specific expert analysis," indeed even with the cases cited by the ALJ. *Id*., p. 11. In this regard, considering the two nonbinding federal criminal cases cited by the ALJ, the Staff sets forth several points for the Commission's consideration in weighing these cases:

> First, they are not binding on the Commission. Second, there is a clear distinction between allowing parties to present their evidence in a manner they deem appropriate, and then a judge seeking clarification from a live witness during a trial, versus demanding several witnesses present specific prefiled testimony and thus dictating the course of those parties' evidentiary presentations in a manner they may not have been inclined to include as part of their case. A further distinction exists in the fact that at trial a party may raise objection before the witnesses answers [sic]. Despite the requirement under MRE 614 that parties be given an opportunity to object to judicial inquiry, MRE 614(c), this is not available in this instance. It is unclear what mechanisms are available to object to a party's own testimony once filed. What is clear is that no such objection can be made before the party expends time and resources to prepare and file the compelled testimony.

Staff's brief in support, pp. 11-12 (footnote omitted). On the point about objecting to a party's own testimony once filed, the Staff asks whether "the expectation [is] for a party to offer testimony as ordered and then file a motion to strike their own testimony as irrelevant [or] [i]s a party expected to contradict itself in rebuttal?" *Id*., p. 12, n. 4. Per the Staff, however, "[n]either of these options seem logical or an efficient use of time." *Id*. The Staff then continues:

> Rather than judicial questioning of live witnesses, a more accurate comparison to the instant requirement using the cases cited in the ruling denying Staff's Motion[ ] would instead be a judge, prior to the trial, directing law enforcement to conduct a particular investigation the judge predetermined to be relevant, using investigative techniques the judge thought best, and presented in a manner the judge preferred.

> Given this more analogous example, the distinction between asking a witness clarification questions on the stand or even calling a witness to the stand at trial, versus compelling substantive testimony with an expert analysis of the judge's choosing is evident. And this distinction is paramount to the present analysis.

Id., p. 12. The Staff further states that Michigan appellate courts have made clear that it is not a court's place to make a party's case for them. *Id*., pp. 12-13. The Staff, in this regard, asserts that, if a party fails to present sufficient evidence to prove its ROE position, that failure is on the party and the judge's ruling should follow accordingly.

From there, the Staff then reviews comments accompanying MRE 614, which the Staff asserts are also instructive, and questions if it would it be permissible for an administrative law judge to demand substantive testimony on any issue if the ROE provision was found permissible under MRE 614 in this case. The Staff states that the Commission has interestingly considered the matter of specific testimony requirements before in Case No. U-8871 with regard to a portion of prefiled testimony that was initially struck by the administrative law judge assigned to the case but then later allowed, and subject to cross, by way of the record being reopened by the Commission to address what was deemed an inadequate record. The Staff, in this context, recalls the Commission's rationale in the September 22, 1988 order in that case denying applications for rehearing on the issue (September 22 order) and states that:

> [t]his case is interesting for a couple reasons. First, it illustrates that an ALJ's function [is] as a gatekeeper, and where a party seeks to introduce evidence, the ALJ can determine it is not admissible. Staff does not contest this authority, although this too has limits. Secondly, the Commission clearly indicated it was not directing a party on what it must file; but rather, given its authority to reopen the record, where the Commission deemed more information necessary, it allowed a party to present the evidence that the party wished to use to support its conclusions. The party crafted the substance of its testimony- it was not ordered to do so.

Staff's brief in support, pp. 15-16 (citing September 22 order, p. 3).

From there, the Staff breaks down the two relevant provisions of MRE 614 (MRE 614(a) which allows a judge to call a witness and MRE 614(b) the ability to question the witness), including cases addressing the same, to further support its position that neither provision can be stretched to compel prefiled testimony and to show that a judge's authority under MRE 614 is rather to resolve conflicting testimony and seek clarification—not to advocate for a party and pierce the veil of judicial impartiality that can lead to bias infecting a proceeding, offending due process and with parties having to object and requesting a judge to find his/her own conduct improper. *Id*., pp. 16-23.

While the Staff maintains its position on "the ethical ramifications of forcing an expert witness to offer specific testimony with judicially-compelled analysis under oath that the witness may not have otherwise sponsored," the Staff nevertheless contends that such ethical ramifications are important enough to articulate further. *Id*., p. 23. On this, and in response to the ALJ's ruling wherein the ALJ stated that the Staff did not identify any issues or potential prejudices and the ALJ could not think of any, the Staff states:

> When a party submits expert testimony, and they do so under oath, there are certain implications that necessarily follow. For instance, witnesses are signing their names onto an expert opinion based upon which the witness may be cross-examined, even if submitted at the ALJ's behest. The witness can be called to account for their methodology and by extension their integrity and credibility are subject to impeachment. If expert witnesses are forced to present evidence they do not agree with as part of reaching their expert opinion, this certainly can be used by a skillful attorney to impeach that witness's credibility in more ways than one. If the witness cannot speak to the validity or details of the analysis they are compelled to sponsor, they could be attacked on cross examination about the manner in which they conducted said analysis, implying laziness, lack of preparedness, or lack of thoroughness. Perhaps it could be said that the ALJ and Commission could disregard that impeachment– provide no weight to it. Yet, the testimony is public record and could be still used against the witness in another case. There is little anyone can do to control the manner in which another trier of fact may weigh that evidence no matter how this ALJ intends it to be used in this singular case.

> Additionally, it obliterates counsel's obligation to present evidence it believes is necessary, relevant, and, by extension, admissible. First, consider the context of this request and the seemingly endless topics on which similar analyses could be compelled if this approach were upheld. Second, Staff's motion went to lengths citing counsel's obligation to the rules of ethics. Staff submits that this presentation makes clear that forcing a party to sponsor evidence it does not believe is relevant, necessary, or supportive of the party's position, could be seen to force counsel to violate their ethical duties. As it is not for the judge to invade the role of a party, it is improper for an attorney to dictate the manner in which a witness, particularly an expert, performs their analysis.

Id., pp. 23-24.

Lastly, even assuming arguendo that it is appropriate for an administrative law judge to mandate parties to conduct certain investigations and perform certain analyses, the Staff explains why the mandate in the July 8 memo, and even more so with the September 5 amended scheduling memo, is too vague for the parties to comply with. *Id*., pp. 25-27. The Staff, in this regard, addresses the issue of costs placed upon a party to comply, along with several terms within the September 5 amended scheduling memo that are subject to varying definitions, are entirely different concepts, or are vague and confusing. Per the Staff, even assuming this provision is considered a lawful clarifying question for an administrative law judge under MRE 614, this provision "does not offer clarity" but rather does the opposite and "frustrates the duties of an expert further at each parties' [sic] own recoupable expense." *Id*., p. 27.

The Staff concludes:

> For the above-mentioned reasons, Staff respectfully request the Commission order that the ALJ remove the provisions of the scheduling memorandum that improperly mandate the parties present prefiled testimony in the manner in which this scheduling memorandum does. Similar to how the Commission has already acknowledged in Case No. U-21291, this is a matter of balancing the duties of the ALJ and the rights to the parties before it. It is necessary to strike this provision to ensure a fair and impartial determination by the ALJ and ultimately the Commission. Parties must be able to present their arguments substantively; in the matter they determine best demonstrates their position. To force a party to present evidence in this fashion is impermissible penetration of a party's providence to present their case and irreparably forces them to cut into time and resources they

> would have delegated elsewhere[, n]ot to mention the ethical predicaments that it unnecessarily creates.
>
> There is no dispute that authority exists for an ALJ to call a witness or question a witness as defined in MRE 614. However, as stated in Michigan administrative proceedings, the Michigan Court of Appeals, the Michigan Supreme Court, and the Federal District Court of the Eastern District of Michigan, this should be a closely guarded ability, and used in limited circumstances wherein context and timing are considered. There is not any authority cited in the ruling denying Staff's motion, nor any that Staff is otherwise aware of, where MRE 614 has been wielded in such a manner, and it should not be permitted to stand.

Id., p. 28. The Staff accordingly requests that its application for leave to appeal be granted and the ROE provision be stricken.

Consumers Energy Company's Response

In its response, Consumers expresses its support for the Staff's motion, the Attorney General's response, and the Staff's application for leave to appeal. Consumers' response, p. 2.

While Consumers indicates that it is ready and willing to comply with the ALJ's ROE directives, the company echoes the Staff's and the Attorney General's concerns with providing this substantive evidence as it could compromise a party's discretion in how it wishes to present testimony on the issue, citing as support several statements provided in the Staff's motion and brief in support. *Id*. (citing Staff's motion, p. 8; Staff's brief in support, pp. 2, 4). Agreeing with the Staff and the Attorney General, the company further asserts that the ALJ's ROE directives run contrary to the principles of Mich Admin Code, R 792.10106 (Rule 106) and R 792.10403 (Rule 403) as the directives in the scheduling memo are open to interpretation and a party's presentation must be consistent with the legal requirements set forth in *Bluefield Water Works and Improvement Co v Pub Serv Comm of W Va*, 262 US 692-693; 43 S Ct 675; 67 L Ed 1176 (1923) (*Bluefield*) and based on facts that a party believes are most relevant and useful to its case. Consumers' response, pp. 2-3 (citing Staff's motion, pp. 7-12; Attorney General's response, p. 2).

Consumers further expresses concern that the ALJ's directive may improperly invade the role and prerogative of expert witnesses. The company states:

> Rule 702 of the Michigan Rules of Evidence ("MRE") requires an expert witness to demonstrate that his or her testimony is the product of reliable principles and methods and reflects a reliable application of the principles and methods to the facts of the case. The ALJ's directive may require a party's expert to include data in the case that the expert does not agree is the product of reliable principles or methods, or which the expert does not believe reflects a reliable application of the principles and methods to the facts of the case. Furthermore, the expert compelled to include this data may not agree that it is "helpful to clearly understand" the witness's own testimony or to determining a fact in issue in the case, as provided in Rule 701 of the MRE. It does not seem appropriate to require an expert to present information in a case that the expert does not agree has any probative relevance to the issue on which he or she is testifying.

Consumers' response, p. 4.

Consumers also states that an administrative law judge is required to conduct a full, fair, and impartial hearing pursuant to Rule 106(1)(a), and, as the Staff and the Attorney General suggest, "if multiple parties are making arguments based on the directives issued in the memorandum that they do not believe is most relevant and useful to their case, the result would be excessive testimony produced out of obligation which the submitting witnesses themselves do not support," contrary to the requirement for the administrative law judge to limit repetitious testimony and time for presentations under Rule 106(1)(h). *Id*. (citing Staff's motion, p. 11; Attorney General's response, pp. 2-3). Consumers further highlights, as noted in the Staff's motion, that both Rules 106 and 403 favor efficiency and fairness in the process whereas the ALJ's requirement potentially leads to the opposite effect. Consumers' response, p. 4 (citing Staff's motion, p. 11). Consumers argues, "[t]he end result is needlessly extending an already dense docket by obligating the parties to present evidence that they may consider contrary to their position." Consumers' response, pp. 4-5.

Consumers further argues that the ALJ's directive "could be seen as a prejudicial ruling on the weight of the evidence." *Id*., p. 5. While the company agrees that setting a reasonable ROE is a fundamental issue in the case, none of the parties at this point in the proceeding have argued that the information required by the ALJ is necessary information under *Bluefield* or *Fed Power Comm v Hope Natural Gas Co*, 320 US 591; 64 S Ct 281; 88 L Ed 333 (1944). Therefore, per Consumers:

> while the ALJ must "consider all relevant information in evidence" as presented in the proceeding, there may be evidence that is more relevant or necessary under those holdings. See Ruling, page 3. The ALJ's selection of the "requested information" runs the risk of prejudicing other relevant evidence that the ALJ has not considered when rendering his "fully informed findings of fact and conclusions of law." See Ruling, page 3. While the parties, with the assistance of legal counsel, make strategic decisions on which relevant evidence to present, the ALJ may be suggesting which evidence he considers persuasive when setting a reasonable ROE.

Consumers' response, pp. 5-6. Consumers, in this context, shares the Staff's concern "that the ALJ's directive could give undue emphasis or weight to the requested information (assuming it is relevant) in the proceeding, including while the ALJ is exercising his 'statutorily prescribed duty and obligation to make findings of fact and conclusions of law regarding the issues at stake in the case.'" *Id*., p. 6 (quoting September 4 ruling, p. 3).

Considering the concerns raised by the Staff, the Attorney General, and Consumers, the company asserts that the Commission should grant the Staff's application for leave to appeal and strike the ALJ's ROE provision from the September 5 amended scheduling memo.

Michigan Environmental Council, Citizens Utility Board of Michigan, Sierra Club, and Natural Resources Defense Council, Inc.'s Application for Leave to Respond, Brief in Support, and Response

In its motion, MNSC states that it was not served with a copy of the Staff's application for leave to appeal and did not become aware of the filing until being served with Consumers'

response on October 2, 2025. MNSC thus seeks leave from the Commission to respond to the Staff's application for leave to appeal as a result, pursuant to Mich Admin Code, R 792.10432(1). MNSC's motion, p. 1; *see also*, MNSC's brief in support, pp. 1-2.

In its response, MNSC requests that the Commission deny the Staff's application for leave to appeal, arguing that the appeal fails to state a proper basis for interlocutory appeal under the Commission's rules as it is not supported by specific factual allegations to support a conclusion that the Staff or the public is likely to suffer substantial harm from the ALJ's September 4 ruling. MNSC further contends that the ALJ's September 4 ruling is non-precedential as it can be challenged through regular briefing and the exceptions process and it is the Commission's order that establishes precedent, not the ALJ's ruling or scheduling memo. MNSC's response, pp. 2-3.

MNSC additionally states that the September 5 amended scheduling memo allows a witness to be exempt from the ROE requirement if in good faith the witness attempted to locate the requested information but was unable to do so. Looking at the prefiled testimony, MNSC argues that the Staff did not establish that it would be harmed by providing the information like the Attorney General did or by failing to provide the requested information like CUB. MNSC's response, p. 3 (citing Direct Testimony of Sebastian Coppola, pp. 157-160, and Direct Testimony of Matthew Bandyk, p. 4). Per MNSC, and as noted by the ALJ in his September 4 ruling, "[b]y its terms, the scheduling memorandum does not force a party to supply evidence nor take a position on the requested information." MNSC's response, p. 3 (citing September 4 ruling, p. 7).

Continuing, MNSC argues that the Staff does not explain how providing this information may be used prejudicially against it in the future. Nevertheless, should that situation arise, MNSC asserts that that situation can be addressed and rectified through the regular appellate process. MNSC further states that "[t]estimony was filed September 30; any harm incurred locating the

information passed; any harm arising from providing or not providing the requested information is presently hypothetical and will arise (if at all) later in the proceeding such that it may be addressed in the Commission's final order." MNSC's response, p. 4. As such, according to MNSC, the Staff has not identified any harm that justifies interlocutory relief. However:

> [e]ven if Staff were immediately harmed by the ruling (which MNSC disputes), the harm alleged is likely not "substantial," as is required under Mich Admin [Code,] R 792.10433(2)(b). The Commission, for example, has previously granted appeals under Mich Admin [Code,] R 792.10433(2)(b) for denied applications to intervene and motions for summary disposition. Staff's interlocutory appeal is not like those scenarios, where but-for appeal, the adverse ruling would have immediate, substantial prejudicial effect on the party. If the ALJ were to penalize Staff in some unidentified way for failing to produce the requested information, Staff has recourse to obtain redress through the regular process. Alternatively, the Commission may disregard or give little weight to the information the ALJ requested. As indicated in the ALJ's ruling, parties may explicitly challenge the relevance or weight of the requested evidence "by way of testimony, exhibit(s), and/or a brief," and parties (or their witnesses) will not be considered sponsors of the requested testimony.

MNSC's response, p. 4 (footnotes omitted).

MNSC further asserts that granting the Staff's application for leave is also not likely to materially advance a timely resolution in this case but rather do the opposite. MNSC, in this context, agrees with the ALJ that ROE is a fundamental issue in this case and argues that the effect of granting the Staff's appeal will be to eliminate relevant evidence that the ALJ may need to timely resolve this case. *Id*., pp. 4-5.

Lastly, MNSC contends that the ALJ's request "ensures some reasonable benchmarks are included in the record and provides a modicum of guidance to the parties, which MNSC welcomes," and any errors to this may be addressed by the Commission in its final decision in this case. *Id*., p. 5.

Considering the above, MNSC thus asserts that the Staff's application for leave to appeal should be denied. *Id*.

Discussion

Rule 433(2) provides that the Commission will grant an application and review the presiding officer's ruling if any of the following provisions apply:

> (a) A decision on the ruling before submission of the full case to the commission for final decision will materially advance a timely resolution of the proceeding.
> (b) A decision on the ruling before submission of the full case to the commission for final decision will prevent substantial harm to the appellant or the public-at-large.
> (c) A decision on the ruling before submission of the full case to the commission for final decision is consistent with other criteria that the commission may establish by order.

If the Commission grants immediate review, it will reverse an administrative law judge's ruling if the Commission finds that a different result is more appropriate. *See*, June 5, 1996 order in Case No. U-11057, p. 2.

Here, the Commission agrees with the Staff that a decision on the September 4 ruling is necessary at this juncture to prevent the possibility of substantial harm to the Staff and other parties not only in this case, but also as guidance for simultaneous and future cases as well, and thus finds that the Staff's application for leave to appeal should be granted. The Commission also finds that MNSC's motion should be granted due to a lack of proper service and therefore takes MNSC's timely response into consideration in this decision.

The Commission appreciates the administrative law judges who preside over Commission cases, finds their work to be indispensable to the Commission, and understands the need for a fulsome record upon which to base a PFD, as well as the acute time pressures associated with 10-month deadlines for rate cases. However, the Commission agrees with the Staff, the Attorney General, and Consumers and finds that the amended ROE provision from the September 5 amended scheduling memo should be stricken as going beyond the role of the administrative law judge.

Expanding on this decision, the Commission is concerned that the requirement in the September 5 amended scheduling memo may impact due process for parties in terms of the potential appearance of impartiality and unfairness in the use of the evidence directed by the ALJ and therefore finds it necessary and appropriate to strike this provision to ensure a fair and impartial determination by the ALJ and also the Commission. The Commission, in this regard, agrees that administrative hearing rules governing matters before the Commission favor efficiency and fairness in the process, whereas the ALJ's requirement potentially leads to the opposite effect. *See*, Rule 403(2).[2] The Commission is further concerned about the precedent that this requirement, and potential similar scheduling memo requirements in the future, may have on the processing of 10-month rate cases moving forward, particularly considering the already established framework for the processing of these cases with the rate case filing requirements and the parties' expectations of the same. *See*, Case No. U-18238; *see also*, MCL 460.6a(5). The Commission also acknowledges the parties' confusion with the ROE provision, which notably occurred *sua sponte* as a requirement before all party testimony was even prefiled in the case, let alone offered for admission. The ALJ's subsequent official notice of facts issued on October 3, 2025, relative to this issue, also gives the appearance that the parties may not have filed the evidence that the ALJ wanted, adding credence to the parties' asserted confusion and casting doubt as to whether the ROE provision was truly necessary for the ALJ to adjudicate the issue in the first place. *See*, September 4 ruling, p. 3.

[2] The Commission notes that portions of Part 1 of the Michigan Administrative Hearing Rules, including Rule 106(1), do not apply to proceedings before the Commission. *See*, Mich Admin Code, R 792.10101(3) which states that "[t]he rules in this part [Part 1] do not govern part 4 proceedings before the Michigan public service commission, except [Mich Admin Code,] R 792.10106(2), (3), (4), (5), (6), and (7), provisions for disqualification and recusal of administrative law judges, and [Mich Admin Code,] R 792.10121, provisions for telephone and electronic hearings."

That said, if the ALJ assigned to this case finds it necessary and appropriate, the ALJ can recommend further evidence he would like to see on this issue in the future in his PFD for the Commission's consideration in reaching its final decision in this matter. And with this decision, given the commencement of the evidentiary hearing in this matter on November 4, 2025, the Commission further finds that any evidence filed in response to the September 5 amended scheduling memo and that has since been admitted into the record should also be accordingly stricken.

THEREFORE, IT IS ORDERED that:

A. The Commission Staff's September 18, 2025 application for leave to appeal is granted, along with the requested relief therein.

B. Michigan Environmental Council, Citizens Utility Board of Michigan, Sierra Club, and Natural Resources Defense Council, Inc.'s motion for leave to respond is granted.

C. The amended return on equity provision set forth in the September 5, 2025 amended scheduling memo is stricken, along with any evidence filed in response thereto and since admitted into the record.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at LARA-MPSC-Edockets@michigan.gov and to the Michigan Department of Attorney General - Public Service Division at sheac1@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

Daniel C. Scripps, Chair

Katherine L. Peretick, Commissioner

Shaquila Myers, Commissioner

By its action of November 6, 2025.

Lisa Felice, Executive Secretary

PROOF OF SERVICE

STATE OF MICHIGAN)

Case No. U-21870

County of Ingham)

Brianna Brown being duly sworn, deposes and says that on November 6, 2025 A.D. she electronically notified the attached list of this Commission Order via e-mail transmission, to the persons as shown on the attached service list (Listserv Distribution List).

Brianna Brown

Subscribed and sworn to before me
this 6th day of November 2025.

Angela P. Sanderson
Notary Public, Shiawassee County, Michigan
As acting in Eaton County
My Commission Expires: May 21, 2030

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