

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of)
Consumers Energy Company for)
approval of criteria for the formation)
of a Legally Enforceable Obligation)
under the Public Utility Regulatory)
Policies Act of 1978 and for other relief.)

Case No. U-21131

NOTICE OF PROPOSAL FOR DECISION

The attached Proposal for Decision is being issued and served on all parties of record in the above matter on September 29, 2022.

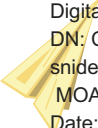
Exceptions, if any, must be filed with the Michigan Public Service Commission, 7109 West Saginaw, Lansing, Michigan 48917, and served on all other parties of record on or before October 20, 2022, or within such further period as may be authorized for filing exceptions. If exceptions are filed, replies thereto may be filed on or before November 3, 2022.

At the expiration of the period for filing exceptions, an Order of the Commission will be issued in conformity with the attached Proposal for Decision and will become effective unless exceptions are filed seasonably or unless the Proposal for Decision is reviewed by action of the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due.

MICHIGAN OFFICE OF ADMINISTRATIVE
HEARINGS AND RULES

For the Michigan Public Service Commission

**Martin D.
Snider**

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Date: 2022.09.29 08:39:52 -04'00'

September 29, 2022
Lansing, Michigan

Martin D. Snider
Administrative Law Judge

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PROPOSAL FOR DECISION

I.

PROCEDURAL HISTORY

On September 1, 2021, Consumers Energy Consumers (Consumers) filed an application to request that the Michigan Public Service Commission (Commission) grant approval, pursuant to the Commission's July 2, 2021, Order in U-20905 *et al.* (Order) and other applicable law, of its proposed criteria and process for determining the formation of a Legally Enforceable Obligation (LEO) under the Public Utility Regulatory Policies Act of 1978 (PURPA) and for other relief. Consumer's Application included testimony from Emily M. Walainis, Manager of Supply Contracts, and Nicholas B. Tenney, Senior Engineer Lead for Distribution Agreements, to support its proposed LEO criteria.

On September 27, 2021, the Commission's Executive Secretary issued a Notice of Hearing which set a Prehearing date for October 27, 2021.

On October 20, 2021, the Michigan Energy Innovation Business Council, and Institute for Energy Innovation (MEIBC) filed a Petition to Intervene.

On October 27, 2021, Administrative Law Judge (ALJ) Martin D. Snider convened a prehearing. During the pre-hearing, the ALJ granted MEIBC's unopposed Petition to Intervene and established a schedule for this matter which, among other things, set an April 12-13, 2022, date for Cross Examination.

On October 28, 2021, the ALJ issued a Scheduling Memo and posted the same on the Commission's efile site.

On February 3, 2022, the Commission's staff (Staff) filed the direct testimony and exhibits of Meredith A. Hadala and direct testimony of Julie K. Baldwin. Also on February 3, 2022, MEIBC filed the direct testimony exhibits of Dr. Laura S. Sherman and the direct testimony of Steven J. Levitas.

On March 4, 2022, Consumers filed rebuttal testimony from Nicholas B. Tenney and Emily M. Walainis. Also on March 4, 2022, MEIBC filed the rebuttal testimony of Dr. Laura S. Sherman.

On March 24, 2022, at the request of the parties the ALJ issued a Scheduling Memo which, among other things, rescheduled cross examination to June 7-8, 2022.

On June 2, 2022, at the request of the parties the ALJ issued a Scheduling Memo which, among other things, rescheduled cross examination to July 12, 2021.

On July 12, 2022, the ALJ convened an evidentiary hearing. During the hearing, the parties waived all cross-examination and stipulated to the admission of all exhibits. The following testimony and exhibits were bound into the record and admitted.

Consumers

Nicholas B. Tenney	Direct and Rebuttal testimony Exhibits: None
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Emily M. Walainis	Direct and Rebuttal testimony Exhibits: None
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Staff

Meredith A. Hadala	Direct testimony Exhibits: S-1, S-2
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Julie K. Baldwin	Direct testimony Exhibits: None
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MEIBC

Dr. Laura S. Sherman	Direct and Rebuttal testimony Exhibits: EIB-1, EIB-2, EIB-3, EIB-4
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Steven J. Levitas	Direct testimony Exhibits: None
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On July 28, 2022, Consumers, Staff and MEIBC filed Initial Briefs. On August 24, 2022, Consumers, Staff and MEIBC filed Reply Briefs. The record consists of 164 transcript pages and 6 exhibits.

II.

BACKGROUND

Consumers is, among other things, engaged as a public utility in the business of generating, purchasing, distributing, and selling electric energy to approximately 1.9 million retail customers in Michigan. The retail electric system of Consumers is operated as a single utility system in which the same rates and tariffs are applicable. Consumers retail electric business is subject to the jurisdiction of the Commission pursuant to various Michigan statutes and regulations.

On July 16, 2020, the Federal Energy Regulatory Commission (FERC) issued order 872, *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, 172 FERC ¶ 61,041 (“Order 872”), which included revisions to the implementation of statutory Sections 201 and 210 of PURPA, 16 USC 824a-3, in the rules set forth in 18 CFR Parts 292 and 375. FERC Order 872 contained provisions, regarding when a utility subject to PURPA, must purchase electricity from a Qualifying Facility (QF) pursuant to a Legally Enforceable Obligation (LEO). Order 872 also provided some and guidance regarding the formation of a LEO.

FERC Order 872, also adopted the Notice of Proposed Rulemaking proposal “to require QFs to demonstrate that a proposed project is commercially viable and that the QF has a financial commitment to construct the proposed project, pursuant to objective, reasonable, state-determined criteria in order to be eligible for a LEO.” See FERC Order 872, pages 373-374. FERC affirmed that “states have flexibility as to what constitutes an acceptable showing of commercial viability and financial commitment, albeit subject to the criteria being objective and reasonable.” *Id.*

On January 21, 2021, Commission issued an Order in U-20905 *et al.* that, among other things, directed each utility as part of its next biennial review of avoided costs and associated issues to provide clear guidance on the criteria it will use to evaluate a QF’s commercial viability and financial commitment in determining whether a LEO has been formed. See U-20905 *et al.*, Order, pages 32-33.

On July 2, 2021, the Commission issued a second order in U-20905 which clarified its previous orders regarding where certain utilities should submit proposed LEO criteria and directed Consumers to submit its proposed LEO criteria in a

standalone proceeding. See U-20905 July 2 Order, page 5. Consumers was directed by the Commission to file in a new docket by September 1, 2021, an application containing its respective LEO criteria. On September 1, 2021, Consumers filed its application which contains its proposed LEO criteria and supporting testimony.

Consumers indicated in its application that even though its application contains Consumers proposed LEO criteria, Consumers believes that FERC order 872 does not require Consumers to adopt new LEO criteria because FERC Order 872 provided only minimum guidance for the establishment of a LEO. Consumers indicated in its application that the Commission should affirm FERC's Order 872 directive regarding minimum requirements for the establishment of a LEO and order that QF's who meet minimum requirement requirements does not mean that the QF has formed a LEO. Consumers believes that the Commission should continue its current LEO determination process of assessing each QF project on a case-by-case basis to determine if the QF project is a real, viable project on which customers can rely. Alternatively, Consumers requests the Commission adopt Consumers proposed LEO criteria and process for determining a LEO.

Additionally, Consumers requests that the Commission provide an opportunity to assess other objective and project-specific factors, beyond the adopted LEO criteria, on a case-by-case basis to determine whether a QF has established a LEO.

In summary, Consumers requests the Commission do the following:

- Approve Consumers proposal to adopt minimum LEO criteria and continue the current LEO determination process of assessing each QF project on a case-by-case basis,

- Alternatively approve Consumers proposed LEO criteria and process for determining a LEO,
- Approve Consumers proposed process for the abrogation of a LEO, and
- Grant Consumers any further lawful and appropriate relief.

III.

POSITIONS OF THE PARTIES

A. Consumers

Consumers argues in its Initial Brief that the Commission should not adopt LEO criteria in this matter because FERC Order 872 does not require the Commission to create LEO criteria in this proceeding and only provides minimum guidance regarding the creation of a LEO. FERC Order 872 regulations require QFs, pursuant to objective, reasonable, state-determined criteria, to demonstrate that a proposed project is commercially viable and that the QF has a financial commitment to construct the proposed project. See FERC Order 872, pp. 373-374. Witness Walainis testified that FERC, in its order, indicated that “states have flexibility as to what constitutes an acceptable showing of commercial viability and financial commitment, albeit subject to the criteria being objective and reasonable.” *Id.* Witness Walainis testified that the Commission should not establish LEO criteria and should instead affirm FERC Order 872 directives by approving minimum LEO establishment requirements which indicates that a QF’s meeting LEO requirement does not, in and of itself, mean that the QF has formed a LEO. 2 TR 40.

Witness testified that Consumers believes that before a QF can establish a LEO the QF can demonstrate that it is commercially viable and has made appropriate financial commitments to demonstrate its viability. *Id.*

Additionally, Consumers believes that the Commission should clarify its process of establishing whether or not a QF project has a LEO. Consumers recommends the Commission continue its current case-by-case LEO determination process when determining if a QF project is a viable project on which customers can rely. *Id.*

Consumers witness Walainis testified that if the Commission choses to adopt new LEO criteria, then the proposed LEO criteria must ensure QF project viability and financial commitment, so Consumers has the ability to make technical and financial plans, to ensure system safety, reliability, and resource adequacy. 2 TR 41. Consumers and its customers must be able to rely on the QF's commercial operation date (COD), and performance obligations of generation resources included in capacity planning, in order to provide customers with adequate capacity and energy. *Id.*

1. Proposed LEO Criteria

The Commission, in U-20095, emphasized QF viability in the context of LEO requirements. See U-20095 January 21, 2021, Order p 29 . FERC, in Order 872, also acknowledged the importance of viability in the context of LEO requirements:

...“that requiring a showing of commercial viability and financial commitment, based on objective and reasonable criteria, will ensure that no electric utility obligation is triggered for those QF projects that are not sufficiently advanced in their development, and therefore, for which it would be unreasonable for a utility to include in its resource planning.

See FERC Order 872, page 374.

Witness Walainis testified that Consumers' proposed LEO criteria are based on FERC Order 872 and the Commission's Order in U-20905. 2 TR 42. Consumers'

proposal is also based on Consumers experiencing very few of the hundreds of proposed QF projects claiming formation of a LEO, ultimately demonstrated viability. Consumers proposes that a LEO is established between the QF and the electric utility when a QF has proven project viability and demonstrated a commitment to enter into a Power Purchase Agreement (PPA) at the utility's avoided cost rates. Consumers proposes the following LEO criteria.

a. Consumers Proposed LEO Criterion 1

Provided documentation to the electric utility of having obtained “qualifying facility” status from FERC pursuant to the certification procedures set out in 18 CFR 292.207 for QFs with net capacity greater than 1 MW.

Witness Walainis testified that Consumers proposes this criterion because, under PURPA, utilities are not required to purchase from generators that are not QFs. 2 TR 44. Consumers believes that it is essential that a project demonstrate that it has obtained FERC certification as a QF before any determination is made regarding the PURPA-based legal obligations of a utility. Consumers updated this criterion in its rebuttal to apply to QFs with net capacity of more than 1 MW. QF's with a net capacity of 1 MW or less are not required to make a filing with FERC to claim QF status. 2 TR 56.

b. Consumers Proposed LEO Criterion 2(i)

Provided documentation to the electric utility of all of the following:

(i) A description of the location of the project and its proximity to other projects within one mile of the project and within ten miles of the project, which are owned or controlled by the same developer or owner or otherwise affiliated with the qualifying facility.

This proposed criterion was listed by the Commission as a common starting point criteria in the Commission's July 2 Order. Witness Walainis testified that Consumers

agrees with this Commission recommended criteria because this information is necessary to determine if a proposed project is in Consumers' service territory and if the project is a sufficient distance from other projects owned by the developer so that it may be considered a separate project. 2 TR 44. A project's location may also be used to determine the amount of generation originating in an area and any risks regarding congestion, losses, fuel supply, permitting, and customer acceptance. *Id.* Witness Walainis testified that Consumers added "*or owner or otherwise affiliated with the QF*" because the developer is not always the owner or operator of the QF. See 2 TR 44-45. Consumers believes that the owner or other affiliated parties should be included in this criterion to better understand which projects in the vicinity are "owned or controlled" by the same entity. See 2 TR 45.

c. Consumers Proposed LEO Criterion 2(ii)

(ii) An estimated, non-binding, good-faith estimate of the energy production for the project that includes the kilowatt-hours or megawatt-hours to be produced by the QF for each month and year of the entire term of the project's anticipated power purchase agreement.

Criterion 2(ii) is another Commission common starting point criteria that the Commission provided in its July 2 Order. Witness Walainis testified that Consumers agrees with this criterion because it allows the Consumers and the Commission to understand how the project contributes to utility capacity and energy plans and needs. 2 TR 45.

d. Consumers Proposed LEO Criterion 2(iii)

(iii) An Internal Revenue Service Form W-9.

Witness Walainis testified that this criterion and criteria 2(iv), (v), (vi), (vii), and (viii), are based on Consumers' actual experience with developers with significant

uncertainty regarding project financing, equipment availability, project construction schedules, and project development progress. See 2 TR 45. Proposed criterion 2(iii), a requires an IRS Form W-9 which is consistent with the Midcontinent Independent System Operator, Inc.'s (MISO) interconnection rules that require a developer to submit an IRS Form W-9. *Id.* Witness Walainis testified that this form provides basic taxpayer information and allows MISO to identify legally binding relationships held by developers. Consumers believes that it is reasonable for Consumers to require similar identification for entities connecting to its distribution system. *Id.*

e. Consumers Proposed LEO Criterion 2(iv)

(iv) Evidence of an engineering, procurement, and construction program that will result in commercial operation of the project (and the project's interconnection) on a defined schedule and, if entered into at avoided cost rates including compensation for capacity, one that is consistent with the capacity needs of the purchasing utility.

Proposed criterion 2(iv) requires evidence of an engineering, procurement, and construction program that will result in commercial operation of the facility (and the facility's interconnection) on a schedule that is consistent with the capacity needs of the utility. Consumer believes that this information is necessary to demonstrate that the QF project is able to be completed on schedule and a contract may be maintained without price adjustments or terminations for cause. See 2 TR 45-46. The required schedule would also show a developer's commitment to the project and evidence that a project is viable. *Id.*

Witness Walainis testified in Consumers' rebuttal testimony, that Consumers updated its initial proposed criterion 2(iv) to include "*if entered into at avoided cost rates including compensation for capacity, one that is consistent with the capacity needs of*

the purchasing utility.” 2 TR 56. The updated language provides that a QF must provide a defined schedule consistent with the capacity needs of the purchasing utility if the LEO is for avoided cost rates including compensation for capacity. Consumers believes that this a reasonable clarification because the QF would only receive compensation for capacity if the utility has a capacity need. The QF must prove that it can meet that need to establish a LEO.

f. Consumers Proposed LEO Criterion 2(v)

(v) Evidence of a secured commitment from major equipment manufacturers for the delivery and/or installation of all major equipment to be utilized by the project.

Proposed criterion 2(v), requires evidence of a secured commitment from major equipment manufacturers, because solar and wind project developers, must demonstrate that sufficient panels or turbines have been, or will be, secured to develop the proposed project. 2 TR 46. Witness Walainis testified that this proposed criterion is important due to recent solar supply chain issues. *Id.* Witness Walainis testified that Solar panel materials, including aluminum and polysilicon, have become more difficult to obtain and when obtained are subject to increased shipping costs. *Id.* Proof of secured commitments from major equipment manufacturers provides evidence that a project is financially and operationally viable. *Id.*

g. Consumers Proposed LEO Criterion 2(vi)

(vi) evidence that the project is financeable; and

Witness Walainis testified that proposed criterion 2(vi) is essential to show project viability. Secured project financing demonstrates that a project would be financially viable if a contract or LEO is obtained. 2 TR 46.

h. Consumers Proposed LEO Criterion 2(vii)

(vii) proof of fuel security, or, if the project is for wind, solar, or hydroelectric generation, the amount of available fuel at the project's location.

Witness Walainis testified that if a QF requires fuel to operate, then proof of fuel commitment demonstrates a commitment to the project and evidence that a project will be viable if a contract or LEO is obtained. See 2 TR 46. The amount of fuel available with a 90% confidence or probability, for potential wind, solar, and hydro facilities would provide Consumers with a basis to estimate the financial viability of the project and establish reasonable performance expectations. *Id.*

i. Consumers Proposed LEO Criterion 3

Demonstrated it has taken meaningful steps to obtain site control adequate to commence construction of the project at the proposed location.

Criterion 3 was listed by the Commission in its July 2 Order as a common starting point criterion. Consumers agrees with this proposed criterion because a demonstration of meaningful steps to obtain site control shows a greater certainty that a project is viable and will be sited in the location proposed by the developer. 2 TR 47.

j. Consumers Proposed LEO Criterion 4

Submitted all applications, including filing fees, to obtain all necessary local permitting and zoning approvals.

Criterion 4 was listed by the Commission its July 2 Order as a common starting point criterion. Consumers agrees with this proposed criterion because the submission of all applications, including filing fees, for all necessary local permitting and zoning approvals shows a greater certainty that a project is viable and will be sited in the location proposed.

k. Consumers Proposed LEO Criterion 5

If qualifying as a “cogeneration facility” as defined by 18 CFR 292.202(c), written proof, provided to the electric utility, of a steam host that is willing to contract for steam over the full term of the project’s anticipated power purchase agreement for a cogeneration facility.

Criterion 5 was listed in by the Commission in its July 2 Order as a common starting point criterion. Consumers agrees with this proposed criterion because certain projects only qualify for QF status if they provide cogeneration (i.e., electricity and steam). See 2 TR 47. Witness Walainis testified that these projects, must demonstrate that a steam host is willing to contract for the steam output of the proposed project. Without a steam host, the project would not qualify as a QF, and the utility would have no PURPA-based obligation to purchase electricity. *Id.*

l. Consumers Proposed LEO Criterion 6

Submitted an interconnection application and completed the process of obtaining any necessary interconnection study results (engineering review and/or distribution system study results) from the Company under R 460.620. If the utility is the sole cause of not meeting the timelines in R 460.620, which may be extended or modified by a Michigan Public Service Commission-granted waiver, criteria 6 and 7 will not be required for a particular, affected QF.

m. Consumers Proposed LEO Criterion 7

Agreed, in writing, to pay the system construction or modification costs identified in any interconnection study pursuant to R 460.620(10).

Consumers believes that its Criterion 6 and Criterion 7 are essential to determining the viability of a QF project. Witness Walainis testified that consistent with FERC Order 872 and Commission requirements, a QF’s commercially viable, requires an interconnection agreement, cost estimates and an agreement to pay the required interconnection costs. 2 TR 48. Consistent with the Commission’s existing Interconnection Standards Consumers is proposing, that QFs be required to obtain any

necessary interconnection studies from Consumers and then agree, in writing, to pay any system construction or modification costs identified in those studies. *Id.* Witness Walainis testified that the agreement may be satisfied by executing a facilities agreement or providing written notice that the QF has reviewed the interconnection study results and will proceed with the project at the estimated interconnection costs. *Id.* Because the process and timing for such studies is objective, predictable, and governed by Commission rules, Consumers' proposed criteria do not place formation of a LEO solely in the hands of the utility.

Witness Tenney testified that the Commission in U-15787 adopted the Electric Interconnection and Net Metering Standards (Interconnection Standards). 2 TR 18. These Standards establish the procedures that Consumers and other regulated Michigan utilities must follow when customers or project developers seek to interconnect generation facilities to the electric distribution system. 2 TR 18-19. The Commission's Interconnection Standards provide a step-by-step process for project applicants to obtain an interconnected project. The interconnection process includes the interconnection application, engineering review, distribution study, and interconnection agreements. 2 TR 19. The following summarizes the Commission's interconnection process as described by witness Tenney:

- The Commission's interconnection process is not within the control of the utility. If the time a utility receives an interconnection application, then the utility must review that application and determine if it is complete within 10 business days. 2 TR 19.

- The utility then has an additional 10 working days to review the application and determine whether an engineering review is required. *Id.*
- Deadlines for completing engineering review and for completing subsequent distribution studies where necessary, vary by project size.
- Most commonly, engineering reviews for Category 4 projects (projects that are “greater than 550 kW and not more than 2 MW) and Category 5 projects (projects that are “greater than 2 MW) must be completed and provided to the applicant within 25 business days and 45 business days, respectively, of receiving the applicant’s notification to proceed with the engineering review and its corresponding payment. *Id.*
- The distribution study for Category 4 and Category 5 projects must be completed and provided to the applicant within 45 and 60 business days, respectively, of receiving the applicant’s notification to proceed with the study and its corresponding payment. *Id.*

Witness Tenney testified that Consumers, like any other utility, does not have control over the Commission’s interconnection process schedule activities because the application review, engineering review, and distribution study timelines are mandated through the Commission’s rules. 2 TR 21.

Witness Tenney testified that Consumers’ criterion 6 clarifies that the interconnection process and required studies are not within the control of the utility. Consumers criterion 6, provides that “*If the utility is the sole cause of not meeting the timelines in R 460.620, which may be extended or modified by a Michigan Public Service Commission-granted waiver, criteria 6 and 7 will not be required for a*

particular, affected QF." 2 TR 28. Consumers' criteria 6 provides that if the utility is the reason for a delay in the completion of the interconnection timelines, then criteria 6 and 7 will not be used to determine the establishment of a LEO. Consumers' proposed language further ensures that the utility cannot delay or control the establishment of a LEO.

Witness Tenney testified that filing an interconnection application does not establish project viability. When Consumers deems the interconnection application complete, the utility knows the preliminary design of the project which includes proposed equipment, nameplate capacity, and location, among other details. 2 TR 21. At this process stage, Consumers has not performed any studies and has provided no guidance regarding project feasibility or interconnection costs. 2 TR 21-22. Witness Tenney testified that if project applicant does not provide an agreement to pay interconnection costs, Consumers is unable to determine if a developer is financially committed to the project. 2 TR 23.

Witness Tenney testified that the engineering review and distribution study process provides the information necessary for the utility to determine if a project is viable and the developer's financial commitment. The engineering review process involves the modeling of the impact of the proposed generator interconnection on the electric distribution system. This review includes a steady-state and short-circuit analysis to determine if the proposed interconnection which would violate system planning and/or system protection criteria or any other negative impacts. 2 TR 22. Witness Tenney testified that Consumers provides engineering study results to the project developer which includes a summary of the study results, the proposed plan to

interconnect the proposed generator to Consumers electric distribution system and a non-binding cost estimate “to assist the applicant in determining whether to proceed with the project” as defined in R 460.620(7) of the Commission’s Interconnection Standards. *Id.* (emphasis added). Witness Tenney testified that Consumers process is known as a “feasibility study” and is provided to potential applicants and new project developers. *Id.* Subsequently, a follow up distribution study is required to determine final estimated costs for use in preparation of interconnection agreements.

Consumers’ distribution study process involves detailed cost analysis of the project scope and distribution upgrades required to connect the project to the distribution system. 2 TR 22. The results of these studies are incorporated into interconnection agreements upon request of project developers. *Id.* Witness Tenney testified that the costs detailed in the studies are used as the final estimate used to collect payment in advance of construction of any distribution upgrades. *Id.*

Consumers believes that the interconnection process is a key indicator of project viability and developer financial commitment. Witness Tenney testified that:

- Many proposed QF projects either are non-viable, or otherwise ceased development, following the receipt of the interconnection studies and cost estimates.
- Almost all projects requiring distribution studies are Category 4 or greater.
- Consumers received 601 Category 4 or greater projects applications between January 1, 2017, and August 5, 2021.

- 361, or 60%, of projects, did not move forward with a distribution study.

2 TR 23

Consumers believes the results of its interconnection process demonstrate that without completing that process, it cannot be known if a QF project is truly viable. *Id.*

Witness Tenney testified that QF project developers also play an important role in the interconnection process which affects determining a QF project viability. During the interconnection application process applications can remain dormant for months waiting developer activity. 2 TR 20. These delays typically occur in the application review stage when the utility is awaiting updates from a project developer so the project can be deemed complete and move forward through the process. Significant project developer delays also occur with either the engineering review or distribution study. *Id.* These delays create great uncertainty regarding capacity resource and operational resource planning. *Id.* Consumers believes that because importance of the interconnection process in determining project viability and developer financial commitment and because project developers have a significant role in the interconnection process, the Commission should adopt Consumers LEO criteria. Consumers believes that because its LEO criteria that consider the entire process, and not just the filing of an interconnection application that its LEO criteria are more reasonable than other recommended criteria.

n. Consumers Proposed LEO Criterion 8

Unilaterally signed and tendered a proposed power purchase agreement (“PPA”) to the purchasing utility if a standard offer PPA is available for a QF of that size or, if a standard offer PPA is not available for a QF of that size, agreed, in writing, to reasonable PPA terms and conditions at a price term consistent

with the purchasing utility's avoided costs, with the specific beginning and ending dates for delivery of energy, capacity, or both to be purchased by the utility.

Witness Walainis testified that Consumers proposed criterion requires the QF to sign and tender the publicly available standard offer PPA, if applicable, or provide a written commitment to reasonable terms and price which is publicly available through the standard offer PPA or terms and conditions of similar QFs as filed with the Commission and an avoided cost rate which is also publicly filed by Consumers with the Commission.² TR 49-50. Witness Walainis testified that the Commission should adopt this criterion because a unilaterally signed and tendered PPA or written agreement to reasonable terms and conditions and price that are publicly available does not rely on the utility. ² TR 49. If a QF does not agree with reasonable PPA terms or prices because either is prohibitive to a viable QF project then, a LEO should not be formed. *Id.* Consumers criterion 8 does not require a fully executed PPA because that action would be within the control of the utility. *Id.*

o. Consumers Proposed LEO Criterion 9

Demonstrated project COD is within 365 days of a LEO being formed.

Witness Walainis testified that the Commission should adopt Consumers' criterion 9 because a QF project seeking a LEO should only be eligible for avoided cost rates consistent with current avoided costs set close to the project's COD so that customers are not burdened with the expense of outdated avoided costs. ² TR 50. Witness Walainis further testified that, because Consumers avoided cost rates are updated on an annual basis, 365 days is a reasonable amount of time to allow between forming a LEO and project COD. *Id.*

p. Consumers Proposed LEO Criterion 10

Demonstration that the proposed facility will be at a size which is at or below the purchasing utility's PURPA purchase obligation threshold as determined by FERC.

Witness Walainis testified that the Commission should adopt Consumers' criterion 10 because if the size of the proposed facility is above the purchasing utility's PURPA must-purchase obligation threshold, then the utility is not required to enter into a PPA with the proposed facility. If a QF is at a size above Consumers' must-purchase obligation threshold, then no LEO can be established. 2 TR 50.

In addition to the criteria above, the Commission should also consider additional objective factors on a case-by-case basis in determining whether a QF has established a LEO.

Witness Walainis testified that the Commission should consider additional objective information, on a case-by-case basis not covered by Consumers recommended LOE criteria. If a Commission proceeding is initiated to resolve a LEO dispute, the Commission should consider additional information to the extent that information shows that a LEO has or has not been formed. 2 TR 51. A developer, to establish a LEO, must meet the Commission approved LEO criteria but the Commission should also consider project-specific information which shows that a LEO has or has not been formed. *Id.* Consumers recommend that the Commission's LEO criteria should not be a simple check list which could be manipulated to suggest that a non-viable project has a LEO. *Id.*

2. LEO Abrogation

Consumers proposes the following criteria for LEO abrogation:

After the formation of a LEO by a QF, there may be modifications made by the QF which "materially" change the nature, and

potential viability, of a proposed project and which result in the termination of the initially determined LEO. Such circumstances include material modifications by the QF, as defined and applied by R 460.601b of the Commission's Electric Interconnection and Net Metering Standards. After such a material modification, the QF shall be required to reestablish that it meets the LEO criteria. If the QF fails to reestablish that it meets the LEO criteria, the QF will be subject to a termination of its LEO status, and the utility shall have the right to terminate the LEO. If the QF cannot meet its planned commercial operation date, as initially identified at the formation of the LEO, the utility shall also have the right to terminate the LEO. Additionally, the LEO shall also terminate in the event that a PPA entered by the utility and the QF is terminated in accordance with the PPA's terms, and a new LEO would be needed before the utility is required to enter into a new PPA with the QF. If a QF at any time does not maintain its QF status, the utility has the option of terminating the LEO and associated pricing.

Witness Walainis testified that the Commission should adopt Consumers' proposed LEO abrogation standard because after a LEO is formed by a QF, modifications may be made which materially change the nature, and potential viability, of a proposed project. 2 TR 51. Witness Walainis testified that one example of a material QF modification would be a change to the project design which would require a new interconnection study and new interconnection cost estimates. *Id.* When this occurs a QF should be required to do the following:

- Re-affirm its commitment to paying the new interconnection costs.
- Demonstrate it has taken meaningful steps toward site control for the modified project; and
- Provide evidence that the revised project remains financeable.

Id.

Consumers believes that is a QF cannot reasonably meet its planned COD, then the utility can no longer rely on that project and the utility must have the right to terminate the LEO. *Id.* Additionally, when there is PPA with a QF, the LEO should terminate with the PPA if the QF fails to meet the PPA requirements, consistent with other third-party generators that enter PPAs with the Consumers. *Id.* A new LEO would then be needed before the utility is required to enter into a new PPA.

B. Staff

Staff argues that Consumers proposed LEO criteria are neither consistent with FERC Order 872 nor the Commissions orders Staff argues that FERC Order 872 provides both examples LEO criteria and criteria limits to be consider and applied by the Commission. In it July 2, 2021, Order in U-20905 the Commission summarized Order 872 as follows:

With respect to LEOs, Order 872 requires states to establish objective and reasonable criteria to determine a QF's commercial viability and financial commitment to the construction of a generation facility before a QF is entitled to an LEO. The order states that the factors a state may require a QF to demonstrate must be in the QF's control and provides the following non-exhaustive list of examples: (1) taking meaningful steps to obtain site control adequate to commence construction of the project at the proposed location; (2) filing an interconnection application with the appropriate entity; and (3) submitting all applications, including filing fees, to obtain all necessary local permitting and zoning approvals. The order also clarifies that a demonstration of financial commitment does not require the QF to show that it has obtained financing and that requiring a showing of obtained financing, or a signed power purchase agreement (PPA) is prohibited. Rather, requiring QFs to apply for all relevant permits, to take meaningful steps to seek site control, or to meet other objective and reasonable milestones in the QF's development can sufficiently demonstrate QF developers' financial commitments.

Staff Initial Brief pp 5-6; U-20905 Order p 2.; FERC. Order 872, ¶¶ 684-688.

Staff does not agree with Consumers' belief that FERC did not consider whether a utility study through the Commission's interconnection standards, would be consistent with Order 872 and would not put control in the hands of the utility. Staff believes that FERC Order 872 and the Commission's orders in U-20905 addressed utility QF studies. Staff indicated in its Initial Brief that Consumers argument relies on the testimony of Consumers Witness Walainis:

While FERC did state in Order 872 that "requiring completion of a utility-controlled study places too much control over the LEO in the hands of the utility and defeats the purpose of a LEO and is inconsistent with PURPA", and the Commission followed the same logic in Case No. U-20905, FERC did not appear to consider a rule set similar to Michigan's, such as the Commission's Interconnection Standards, which require studies to be completed within a certain timeframe.

See 2 TR 28-29.

Staff argues in its Initial Brief that Consumers LEO criteria requirements that a QF show financial viability and commercial commitment place too much control in the hands of the utility and do not place the control in the hands of the QF. Staff used this basic position to evaluate Consumers LEO criteria and recommend the following changes to Consumers LEO criteria.

1. Consumers criterion 2(v)

Staff recommends that CE's proposed LEO criterion 2(v) be removed as a premature and overly burdensome requirement for a LEO, taking control away from the QF.

Consumers criterion 2(v) indicates that a QF be required to provide:

(vi) evidence of a secured commitment from major equipment manufacturers for the delivery and/or installation of all major equipment to be utilized by the project.

Staff witness Hadala testified:

This is a new proposal by Consumers. Staff recommends Consumers remove this criterion. At this point in the process, a QF is unlikely to have secured a commitment from equipment manufacturers and this criterion should not be used as a basis for establishing an LEO.

See 2 TR 92

Based on witness Hadala testimony Staff recommends that the Commission not adopt Consumers LEO criteria 2(v).

2. Consumers criterion 2(vi)

Staff agrees that evidence of financing is appropriate and argues that some components of criteria 2 (vi) are too stringent. Consumers criteria 2(vi) requires evidence that the [QF] project is financeable. See 2 TR 43. Staff witness Hadala testified that Staff agrees in part with this criterion but believes that some of its proposed factors would be overly burdensome to a QF. Witness Hadala testified:

Staff has reviewed additional information provided by Consumers, as shown in Exhibit S2. Staff agrees with Consumers on three items in the list shown in Exhibit S-2:

- Description of QF and/or developer's experience financing similar projects
- Plan for funding types (e.g., internal, sponsor equity, vendor financing, construction loan, other bank loan, etc.) during each phase (e.g., development, construction, etc.)
- If equity financed, ability of QF and/or developer for internal funding with supporting financial statements and credit worthiness of QF and/or developer with supporting financial statements.

Staff argues that because a LEO may be a major factor in a QF obtaining financing Staff believes it may not be possible for a QF to meet the remaining two criteria listed in Exhibit S-2 before an LEO is established.

- If debt financed, a commitment letter from the lender detailing any conditions 2 or stipulations to loan approval, or a standard term sheet signed by both the QF/developer and the financing entity
- If tax equity financed, a standard term sheet signed by both the QF/developer and the tax equity partner including a statement that this project is included under the term sheet if the term sheet is at a portfolio level.

Staff recommends that these criteria be removed from the list of acceptable 2 (vi) criteria to determine whether a QF is financeable.

See 2 TR 92-93.

Staff argues that Consumers second bulleted 2 (vi) criteria as shown above are not appropriate prerequisites for LEO formation as they take the control from the hands of the QF and put it into the hands of utility. See Initial Brief p 8.

3. Criteria 4

Staff agrees in part with CE's proposed criterion 4 and proposes a modification. Witness Hadala testified that Consumer criteria 4 is similar to the Commission's proposed criterion 5. Staff recommends adding clarifying language to criteria 4 to address a situation where a permit has not been applied for, but the QF may "provide a date of expected application, expected permit fee, and expected permit issue date."

See 2 TR 94. Staff Initial Brief pp.8-9.

4. Criteria 6

Staff agrees in part with Consumers' proposed criterion 6 and proposes that Commission criterion #3 and #7 from the U-20905 July 2 Order be adopted. Staff agrees that the QF should submit an interconnection application but does not agree with Consumers that it a QF must obtain the results of any necessary subsequent interconnection studies before obtaining a LEO. Consumers' criterion 6 provides that a QF must have:

Submitted an interconnection application and completed the process of obtaining any necessary interconnection study results (engineering review and/or distribution system study results) from the Company under R 460.620.

See 2 TR 43

Staff argues that it is too burdensome to a QF and contrary to FERC Order 872 to require a QF to obtain the study results as a LEO is developed because it puts the control in the hands of the utility. Staff witness Hadala testified:

Staff recommends the adoption of the Commission's criterion #3 and criterion #7: Commission criterion #3 states:

"Demonstration of the submission of an interconnection application with the appropriate electric utility, and proof of payment of applicable application fees."

Commission criterion #7 states:

"Proof of a deposit, paid in full, to cover the estimated costs for a system impact or facilities study, such as an engineering review or distribution study, should a study or studies become necessary."

See 2 TR 95.

Staff's recommended Criteria 3 and 7 are the same criteria proposed by the Commission in U-20905 July 2 Order at page 16. Staff also proposes a QF pay deposit amounts for the any necessary utility required LEO study See Staff Initial Brief pp. 9-10.

5. Advance Payment of Interconnection Costs

Consumer proposes that there be a written agreement that the QF will pay interconnection related modification costs before a LEO is formed. Staff does not agree with Consumers that a QF must agree in advance to specific interconnection implementation costs for the formation of a LEO because Staff believes that these costs, early in the process, are unknown. Staff argues that Consumers criteria places too much control in the hands of the utility for the formation of a LEO. Staff argues that Consumers criteria is neither consistent FERC Order 872. Nor the Commission July 2, 2021, order in U-20905. Staff witness Hadala testified that the Commission's July 2 Order at page 19 restates FERC Order 872 which provides in pertinent part:

“requiring the completion of a utility-controlled study places too much control over the LEO in the hands of the utility and defeats the purpose of a LEO and is inconsistent with PURPA.”

See FERC Order 872, ¶ 695.

Staff argues that requiring a written agreement between the QF and the utility to pay modification costs, before those costs may be fully known, is no different than requiring the completion of a utility-controlled study. Staff believes that because this requirement takes too much control away from the QF the Commission should not adopt this Consumers criteria requirement. See Staff Initial Brief pp 9-10.

6. Criteria 8

Consumers criteria 8, required QFs to sign a PPA based on the standard offer agreement or propose reasonable terms for a PPA in order to form a LEO. Staff witness Hadala testified that Staff recommends that small QFs in the standard offer size range be able to indicate in writing that they agree to the terms of standard offer contract and be allowed to execute a contract at a later date when more information

about the interconnection is available. Staff indicated in its Initial Brief that it agrees with Consumer that larger QFs should provide reasonable PPA terms prior to forming a LEO. See Initial Staff Brief p 11; 2 TR 95-96. Staff recommends that Consumers criteria 8 be modified for smaller QFs.

7. Criteria 9

Staff disagrees with Consumers criteria 9 regarding project commercial operation and suggests a reasonable modification. Consumers' criteria 9 provides that the QF's "Demonstrated project commercial operation date (COD) is within 365 days of an LEO being formed." Staff argues that if the parties mutually agree the COD could be extended for more than 365 days Staff witness Baldwin recommends the following criteria 9 changes:

Demonstrated project commercial operation date ("COD") is within 365 days of the utility delivering the results of the final interconnection study to the QF, unless the utility construction schedule necessitates a longer period to be agreed upon.

MEIBC witness Levitas testified that he also does not support Consumers rigid 365-day COD limits:

Having a fixed time period after LEO formation within which a project must be placed in service (365 days under Criteria 9) is patently unreasonable and runs afoul of the prohibition on utility control of LEO formation. Not only does the utility study process create uncertainty about the QF's ability to satisfy that requirement, but there is very little likelihood that the utility can complete both the study process and any required interconnection construction activities within that time frame. I would also note that existing Consumers' PPAs, approved by the PSC, do not require that QFs be placed in service within 365 days of contract execution.

See 2 TR 162.

Staffs argues in its Initial Brief that Staff proposed criteria 9 proposed changes are fair and would facilitate a reasonable time period for construction by considering the unique characteristics of a specific project. See Staff Initial Brief p 12.

8. LEO Utility Study Amounts.

Staff argues in its Initial Brief that utilities have historically taken the control away from a QF is by charging an excessive amount for a utility study. Because of this recommends the Commission adopt reasonable amounts for a LEO study deposit. Staff witness Baldwin testified that Staff recommends LEO study deposit amounts be determined using Consumers witness Tunney's testimony in which he discusses the present cost for engineering reviews for 550 kW (Category 4) and greater projects. For projects smaller than

≤150 kW: \$0

>150 kW - 550 kW: \$500

>550 kW low voltage distribution connected projects: \$1,200

>550 kW high voltage distribution connected projects: \$4,500.

See 2 TR 82

Staff witness Baldwin testified regarding Staff's reasoning for not requiring payment for small projects under 150 kW to obtain a LEO study as a requirement prior to LEO formation:

Projects in this size range are unlikely to require a costly study. Pursuant to the Commission's criterion #3 regarding submission of the interconnection application recommended for inclusion in Consumers' LEO criteria by Staff witness Merideth A. Hadala, the QF will pay the interconnection application fee as part of the necessary steps to establish the LEO. Independent of the LEO, the QF would still be responsible for paying the full cost of any needed studies.

2 TR 83

Staff argues that the Commission adopt Staff's LEO study deposit amounts because the amounts are reasonable for the purpose of establishing an LEO. Staff also recommends that if additional funding is necessary to complete a study, Staff supports the QF paying the full cost of any studies. See Staff Initial Brief pp.12-13.

9. LEO Termination Criteria

Staff agrees with Consumers LEO termination criteria. Staff witness Baldwin testified that Consumers' LEO termination criteria reasonable. Witness Baldwin testified that when a QF cannot agree with the utility to terminate a LEO, the utility may file a complaint with the Commission. Additionally, Staff agrees with Consumers regarding the following criteria:

- If modifications are made which materially change the nature, and potential viability, of a proposed project.
- If at any point the QF cannot reasonably meet its planned commercial operation date (COD); and
- If the QF fails to meet the PPA (Power Purchase Agreement) requirements.

See 2 TR 83.

Staff indicated in its Initial Brief that Consumers LEO termination requirements would appropriately protect ratepayers from the costs of projects that prove to be not viable and situations where a QF is not committed. See Staff Initial Brief pp 13-14.

C. MEIBC & IEI

Michigan EIBC/IEI argues in its Initial Brief that the Commission do the following:

- Adopt LEO criteria rather than relying on *ad hoc*, case-by-case determinations.
- Reject Consumers Criterion 1 insofar as it would require QFs exempted by 18 C.F.R. § 292.203(d)(1) to file a Form 556 self-certification.
- Reject Consumers Criterion 2(iv) because Consumers' must-purchase obligation does not depend on whether it has a capacity need.
- Reject Consumers Criterion 2(v) because fulfilling it would be outside a QFs control and effectively require the QF to obtain a PPA and/or financing before LEO formation.
- Reject or clarify and substantially reduce Consumers Criterion 2(vi) in scope because it would likely require financing and the completion of interconnection studies.
- Clarify which local permits are not required by Consumers Criterion 4.
- Reject Consumers' Criteria 6 and 7 as inconsistent with FERC's prohibition on requiring interconnection studies as a LEO criterion.
- Reject Consumers Criteria 6 and 7 also because their fulfillment—regardless of utility control—is outside of a QF's control.
- Reject Consumers Criterion 8 because it would functionally require a QF to obtain a PPA; and

- Reject Consumer Criterion 9 and adopt the revised criterion recommended by Michigan EIBC/IEI because the commercial operation date of a project is outside the control of a QF.
- Adopt Michigan EIBC/IEI's revised list of LEO criteria for Consumers and all Michigan utilities.

MEIBC recommends, the Commission adopt LEO criteria consistent with 18 C.F.R. § 292.304(3) and FERC Order 872, and recommends the Commission adopt consistent LEO criteria for all utilities in Michigan. See MEIBC Initial Brief p .3.

MEIBC argues that the Commission must reject Consumer's recommendation that the Commission does not adopt LEO criterion and instead make *ad hoc*, case-by-case determinations. See MEIBC Initial Brief pp. 3-10. MEIBC argues that the Commission has recognized in U-20905 that FERC directed state regulatory commissions to adopt "objective and reasonable criteria" for determining the existence of a LEO and excluded the possibility that a particular QF's LEO be adjudicated on an *ad hoc* basis. MEIBC recommends the Commission reject Consumers' proposal regarding case-by-case determinations and adopt a "clear articulation of objective and reasonable criteria consistent with FERC Order 872 and the Commission's orders in U-20905. See MEIBC Initial Brief p 10.

MEIBC argues that because Order 872 and 872-A and Commission's order in U-20905 provide that LEO Criteria must Not allow a utility to "unilaterally and unreasonably decide when its obligation arises," a requirement that a QF have completed Interconnection Studies cannot be made part of the LEO Criteria. See Order 872 at ¶ 684. See MEIBC Initial Brief p 10-11. Additionally, MEIBC argues that the

Commission in its July 2 Order, wrote “while a deposit for a study may be required to be paid in full as part of demonstrating a QF’s financial commitment to the project, the completion of the study is not required in order to establish a LEO.” See U-20905 July 2, 2021, Order pp.19-20.

MEIBC argues that the Commission’s approved LEO criteria must be within the control of the QF to determine the QF’s commercial viability and financial commitment.

FERC Order 872 provides in pertinent part:

A QF that has submitted an application for interconnection, as well as having taken meaningful steps to obtain site control and has applied for all relevant permits, while not a guarantee that the project will be completed, are all objective and reasonable indicators that the QF developer is seriously pursuing the project and has spent time and resources in developing the project to show a financial commitment. See FERC Order 872 at 694.

When reviewing factors to demonstrate commercial viability and financial commitment, states thus should place emphasis on those factors that show that the QF has taken meaningful steps to develop the QF that are within the QF’s control to complete. *Id.* at 695.

We note that the factors that the state requires must be factors that are within the control of the QF. *Id.* at 685.

MEIBC argues that Order 872 provides that states could “require a QF to demonstrate that it is *in the process of obtaining* site control or *has applied for* all local permitting and zoning approvals,” but that they could not require a QF to show, for example, “that it has *obtained* site control or *secured* local permitting and zoning.” ID at 685. See MEIBC Initial Brief pp.11-12.

MEIBC also argues the FERC Order 872 prohibits LEO criteria which directly or indirectly requires a QF to obtain a PPA or financing. MEIBC argues that FERC in its responses to comments to order 872 indicated:

“[D]emonstrating financial commitment does not require a demonstration of having obtained financing. . . . Obtaining a PPA or financing cannot be required to show proof of financial commitment.”

Order 872 at 687; See MEIBC Initial Brief p p-12-13.

MEIBC’s final preliminary argument is that a LEO cannot be denied because a utility does not have a capacity need. MEIBC argues that Order 872 clarified existing FERC precedent regarding the coordination of utilities’ capacity needs with their PURPA must-purchase obligation. According to FERC the lack of a capacity need may reduce the price for capacity owed to a QF to zero, but a utility still has a must-purchase obligation to such a QF to purchase energy at its avoided energy cost. See MEIBC Initial Brief p. 13.

1. Consumers LEO Criterion 1

MEIBC argues that Consumers’ Criterion 1 would require a QF to provide “documentation to the electric utility of having obtained ‘qualifying facility’ status form FERC pursuant to the certification procedures set out in 18 C.F.R. § 292.207.” See 2TR 119. MEIBC Initial Brief p 13.

MEIBC witness Sherman testified that FERC’s rules at 18 C.F.R. § 292.203(d)(1) provide that “Any facility with a net power production capacity of 1 MW or less is exempt from the filing requirements of paragraph[] (a)(3) . . . of this section.” See 2 TR 129. Witness Sherman testified that Consumer’s criteria 1 should not apply to facilities smaller than 1 MW in size. Consumers Witness Walainis in rebuttal agreed with witness

Sherman's conclusion. See 2 TR 56. Because Consumers does not oppose MEIBC's recombination MEIBC recommend that Commission approve Consumers criteria 1 with the agreed upon modification. See MEIC Initial Brief pp 13-14.

2. Consumers' Criterion 2(iv)

MEIBC witness Sherman testified that Consumers criteria 2(iv) requires "evidence of an engineering, procurement and construction program that will result in commercial operation of the project (and the project's interconnection) on a defined schedule that is consistent with the capacity needs of the purchasing utility." See 2 Tr 119. MEIBC argues that PURPA, does not relieve utilities of their obligations to purchase from QFs regardless of their capacity need; it only reduces the capacity rate to zero. MEIBC witness Levitas testified that Consumers criteria 1 capacity need language is a "blatant violation of PURPA. See 2 TR 159.

MEIBC recommends the Commission reject Consumers 1 criterion because Consumers' must-purchase obligation does not depend on whether Consumers has a capacity need. See MEIBC Initial Brief p 14.

3. Consumers Criterion 2(v)

Consumers' criterion 2(v) requires "evidence of a secured commitment from major equipment manufacturers for the delivery and/or installation of all major equipment to be utilized by the project." MEIBC argues this requirement is not consistent with the principle that LEO criteria be within the control of a QF. Witness Sherman testified that she does not agree with Consumers witness Walainis' belief that this criterion is necessary due to recent solar supply chain issues which could negatively impact the viability of a project. Witness Sherman testified that global supply

chain issues are the result complex interconnected global activities which are outside the control of the QF. See 2 TR 130.

MEIBC argues that “secured commitment” may only be obtained through actions outside the control of a QF by non-governmental, non-utility third parties. Obtaining site control depends on the cooperation of non-governmental, non-utility third parties and not allowed in LEO criteria is prohibited because it is outside of a QF’s control. MEIBC argues that requiring a secured commitment from major manufacturers must also be prohibited. Witness Sherman testified that:

[F]or a QF to obtain a secured commitment from major equipment suppliers, the QF would likely need to make some measure of financial commitment to a supplier, such as a deposit. The QF would likely need to obtain financing before being able to place such a deposit. . . . Thus, if the Commission were to adopt criterion 2v, it would place QFs in a “chicken or egg” situation whereby the QF could not obtain financing without an LEO but could not obtain an LEO without financing. See 2 TR 130-131

MEIBC witness Levitas also testified “[n]o developer is going to contractually commit itself to procuring millions of dollars of equipment before it has reasonable certainty about the economics of its project, the most essential ingredient of which is the firm PPA pricing established through LEO formation.”

Staff witness Hadala recommended that the Commission remove this criterion because “[a]t this point in the process, a QF is unlikely to have secured a commitment from equipment manufacturers. 2 TR 92.

MEIBC argues that the Commission should reject Consumers’ proposed Criterion 2(v) because it requires the QF to fulfill a requirement that is outside of its control and because it would require either a PPA or financing (or both). See MEIBC Initial Brief pp 15-16.

4. Criterion 2(vi)

MEIBC witness Sherman testified that Consumers Criterion 2(vi), requires “evidence that the project is financeable, is overly broad, lacks specificity, and could easily be manipulated or misconstrued in a manner to prevent the formation of an LEO. See 2 TR 161. Witness Levitas testified that Consumers Criterion 2(vi) is

problematic because the ultimate “finance ability” of a particular QF cannot be determined until interconnection studies are complete, which FERC has said may not be a condition of LEO formation. A preliminary “finance ability” determination made at the LEO formation stage must necessarily be based only on the information known and knowable at that point in time and it is unclear how “finance ability” would be established. This vague criterion is not likely to provide any meaningful evidence of the QF’s commitment to sell and would create fertile ground for disputes to spring up, undermining FERC’s goals in requiring “objective and reasonable” criteria for LEO formation. See 2 TR 159.

Witness Levitas recommended that this criterion be modified to only require a QF developer to demonstrate that it has successful experience in financing the development of QFs and has a reasonable plan for doing so. See 2 TR 160.

Staff witness Hadala testified that Staff believe that the following more specific requirements would be acceptable to Staff.

- Description of QF and/or developer’s experience financing similar projects
- Plan for funding types (e.g., internal, sponsor equity, vendor financing, construction loan, other bank loan, etc.) during each phase (e.g., development, construction, etc.)
- If equity financed, ability of QF and/or developer for internal funding with supporting financial statements and credit worthiness of QF and/or developer with supporting financial statements.

See 2 TR 143-144.

Staff witness Hadala also testified that the remaining two items listed in Exhibit S-2 would likely not be possible for a QFs before they obtained financing. 2 TR 92.

MEIBC witness Sherman testified that she agreed with the first two bulleted items referenced in Staff witness Hadala's testimony. Witness Sherman recommended that "the first two bullets proposed by Consumers in Staff Exhibit S-2 would be sufficient to provide evidence that a project is financeable. See 2 TR 144-145. Additionally, witness Sherman recommended that those two requirements be added to the criterion for clarity. MEIBC recommend the Commission either reject Criterion 2(vi) or revise it consistent with MEIBC's recommendations. See MEIBC Initial Brief p 17.

5. Criterion 4

MEIBC indicated in its Initial Brief that generally MEIBC agrees with Consumers criterion 4. MEIBC recommends the Commission revise Criterion 4 to require a QF to have applied for permits typically applied for before obtaining financing because certain local permits are not applied for (or not even able to be applied for) until shortly before construction and long after a LEO would need to be established. See 2 TR 133 MEIBC Initial Brief p. 18.

Consumers witness Walainis testified that only material and time-intensive permits such as Michigan Department of Environment, Great Lakes, and Energy (EGLE) environmental studies, permitting (e.g., Federal / State / Local, including Special Land Use Permit – "SLUP," etc.) and construction permits would be included. Consumers Criterion 4. See 2 TR 65. Despite MEIBC's agreement with Consumers criterion 4 MEIBC argues that, that Criterion 4's term "construction permits" should be clarified so it

is clear it does not cover permits that are customarily not obtained until shortly before construction. See MEIBC Initial Brief p 18.

6. Criterion 6 and 7

MEIBC indicated in its Initial Brief that it does not agree with Consumers Criterion 6 and 7 because these criteria are inconsistent with findings in FERC order 872 and findings in the Commission's orders in U-20905 that "the completion of [a] study is not required in order to establish a LEO," See MEIBC Initial Brief p 19. Consumers' proposed LEO criteria 6 and 7 include the following requirements:

6. Submitted an interconnection application and completed the process of obtaining any necessary interconnection study results (engineering review and/or distribution system study results) from the Company under R. 460.620(10).
7. Agreed, in writing, to pay the system construction or modification costs identified in any interconnection study pursuant to R. 460.620(10).

MEIBC argues that it does not agree with Consumers' witness Tenney's testimony that the submission of an interconnection application is no guarantee that a project will be built or that it will be built in short order, and Consumers does not control the interconnection process nor that there is great uncertainty with regard to both (i) capacity resource planning . . . and (ii) operational resource planning." 2 TR 121-122

MEIBC witness Sherman testified that a perception of project delays is possible on the part of developers" but most of those perceived "delays" may occur when developers are in full compliance with the current interconnection standards. Current

interconnection standards set relatively short timelines for utility action (10 to 60 business days, in general), give developers 6 months to determine whether or not to proceed with studies and do not impose a deadline by which developers must respond to an application deficiency See 2 TR 122-124. These issues may be solved with updated Interconnection Standards in U-20890. *Id.*

MEIBC does not agree with witness Walainis testified that Consumers “does not have control over the schedule of these activities as the timelines associated with the application review, engineering review, and distribution study are mandated through rules promulgated by the Commission.” See 2 TR 21. MEIBC witness Sherman testified that:

Although the Company is correct in pointing out that it does not have control over the regulatory timelines, that does not mean that it does not have control over the engineering review and distribution study themselves. These are utility-controlled studies that are conducted by Company employees. As stated by witness Tenney, the costs of either an engineering review or a distribution study “are the costs for Consumers Energy employees to complete this work.”

See 2 TR 124-125

Witness Sherman testified that Consumers does control “the schedule of the activities” even though “the Company does not create the required timeline.” See 2 TR 125. Exhibits EIB-2, EIB-3 and EIB-4 provide information regarding Consumers compliance with interconnection timelines. Witness Sherman testified that these exhibits show that that since 2019 Consumers:

- Failed to meet deadlines for engineering reviews of Category 3, 4, and 5 projects 16% of the time, including several occasions on which delays were multiple weeks in length.

- For Category 3, 4 and 5 distribution studies, Consumers failed to meet timelines 19% of the time, and
- For Category 5 projects, Consumers failed 29% of the time, including one instance when a distribution study was 183 working days late.

See 2 TR 126-127.

MEIBC does not agree with Consumers witness Tunney's testimony regarding FERC order 872 that "FERC did not appear to consider a rule set similar to Michigan's, . . . which require studies to be completed within a certain timeframe," and that therefore Michigan's interconnection standards "do[] not place control over the LEO in the hands of the utility for criterion 6." See 2 TR 29.

MEIBC argues that FERC's use "utility-controlled study (Order 872 at 695) intended to carve out the possibility of "non-utility-controlled" interconnection studies. MEIBC argues FERC understood when issuing Order 872 that there is no such thing as a "non-utility-controlled" interconnection study.

MEIBC recommends the Commission reject Criterion 6 because it requires the completion of interconnection studies and Consumers Criterion 7 because it also requires the completion of interconnection studies, See MEIBC Initial Brief p 22.

MEIBC argues that if the Commission accept Consumers' argument that it does not in control interconnection studies, QF compliance with Consumers criteria 6 and 7 is still beyond a QF's ability to control and therefore impermissible. See MEIBC Initial Brief p 22.

7. Criterion 8

Consumers' Criterion 8 would require a QF to have:

Unilaterally signed and tendered a proposed power purchase agreement ("PPA") to the purchasing utility if a standard offer PPA is available for a QF of that size or, if a standard offer PPA is not available for a QF of that size, agreed, in writing, to reasonable PPA terms and conditions at a price term consistent with the purchasing utility's avoided costs, with the specific beginning and ending dates for delivery of energy, capacity, or both to be purchased by the utility.

See 2 TR 133.

MEIBC argues that it has concerns regarding the criterion use of the word "reasonable" and regarding who determines whether a signed and tendered PPA contains "reasonable PPA terms and conditions." MEIBC witness Sherman testified:

Although criterion 8 does not clearly require the PPA to be countersigned by the utility, the inclusion of the words "agreed . . . to reasonable PPA terms and conditions" suggests that some measure of agreement between the QF and the utility would be necessary before the LEO would be established. Since it is entirely possible that the Company's definition of "reasonable" would be different from the QF's definition of "reasonable," the negotiations that would be involved would likely be complex, with significant compromise on the part of both parties. It is therefore unreasonable that a QF would not receive an LEO if the utility deemed, at some point in the negotiations, that the terms sought by the QF were not "reasonable."

Ultimately, as a practical matter, once an agreement is reached, signing it becomes a formality. The mere fact that Consumers' criterion 8 does not require a formally countersigned PPA, therefore, does not mean that it does not require the practical equivalent of one.

2 TR 134

MEIBC witness Levitas testified that he does not know what purpose this criterion would serve, because a LEO involves the right to enter into a contract (PPA) with firm pricing and the actual PPA negotiation, including the determination of PPA terms reasonableness follows. Witness Levitas testified:

Once a LEO has been established, PPA negotiations can properly take place, and if a dispute were to arise between the QF and the utility concerning PPA terms, the Commission can be called on to resolve it. Since the LEO is in place to benefit the QF, if the utility prevails on a dispute over PPA terms, the QF should be permitted to walk away.

Id.

MEIBC argues that because Consumers criterion 8 functionally requires a signed PPA and that PPA negotiation properly comes after the establishment of a LEO, requiring a signed PPA serves little purpose. Therefore, MEIBC recommends that Commission reject Consumers Criterion 8. See MEIBC Initial Brief p 24.

8. Criterion 9

Consumers' proposed Criterion 9 would require a QF to demonstrate that its "project commercial operation date . . . is within 365 days of an LEO being formed." See 2 TR 44. Consumers witness Walainis testified that this timeline is necessary "to ensure that customers are not saddled with the expense of outdated avoided costs." See 2 TR 50. MEIBC does not agree with Consumers Criterion 9.

MEIBC witness Levitas testified that "there is very little likelihood that the utility can complete both the [interconnection] study process and any required interconnection construction activities within [365 days of LEO formation]." Witness Sherman testified that a COD 365 days from LEO formation is unreasonable, because many "steps that go into the development of a project, particularly with respect to financing, permitting and zoning" and the fact that "current supply chain issues, which are completely outside the control of the QF, may impact the COD of a project." 2 TR 135.

MEIBC argues that the testimony of witnesses Levitas and Sherman shows that that few QFs are likely to be developed within 365 days of LEO formation. MEIBC argues that criterion 9 would effectively prevent QF development, and is inconsistent with

PURPA's requirement that FERC adopt rules "it determines necessary to encourage cogeneration and small power production", See 16 U.S.C. § 824(a)-3(a). Additionally, MEIBC argues that its witness testimony shows that obtaining a COD within 365 days of LEO formation falls outside a QF's ability to achieve on its own.

MEIBC recommends that the Commission thus reject Consumers' proposed Criterion 9 and adopt MEIBC's revised Criterion 9 which requires a COD that is "within 120 days of the utility completing construction of necessary interconnection and network upgrades after the delivery of the results of the final interconnection study to the QF. See 2 TR 150. MEIBC Initial Brief pp-24-25.

9. MEIBC's Recommended LEO Criteria

MEIBC argues in its Initial Brief that the Commission should adopt LEO criteria in this matter for all Michigan regulated utilities. Witness Sherman provided the following MEIBC's proposed LEO criteria in her direct testimony, which MEIBC argues are consistent with 18 C.F.R. § 292.304(3), Orders 872 and 872-A .

1. For QFs with a net capacity greater than 1 MW, provided documentation to the electric utility of having obtained "qualifying facility" status from FERC pursuant to the certification procedures set out in 18 CFR 292.207.
2. Provided documentation to the electric utility of all of the following:
 - (i) a description of the location of the project and its proximity to other projects within one mile of the project and within 10 miles of the project, which are owned or controlled by the same developer or owner or otherwise affiliated with the qualifying facility.
 - (ii) an estimated, non-binding, good faith estimates of the energy production for the project that includes the kilowatt-hours or megawatt hours to be produced by the QF for each

month and year of the entire term of the project's anticipated power purchase agreement.

(iii) an Internal Revenue Service ("IRS") Form W-9.

(iv) [Reserved].

(v) [Reserved].

(vi) evidence that the project is financeable (for which (a) a description of the QF's and/or developer's experience financing similar projects and (b) a plan for funding types (e.g., internal, sponsor equity, vendor financing, construction loan, other bank loan, etc.) during each phase (e.g., development, construction, etc.) shall be sufficient); and

(vii) [Reserved].

3. Demonstrated it has taken meaningful steps to obtain site control adequate to commence construction of the project at the proposed location.

4. Submitted all applications, including filing fees, to obtain all necessary local permitting and zoning approvals, except with respect to any such permits that are ordinarily not obtained prior to obtaining financing.

5. If qualifying as a "cogeneration facility" as defined by 18 CFR 292.202(c), written proof, provided to the electric utility, of a steam host that is willing to contract for steam over the full term of the project's anticipated power purchase agreement for a cogeneration facility.

6. Demonstration of the submission of an interconnection application with the appropriate electric utility, and proof of payment of applicable application fees.

7. [Reserved.]
8. [Reserved.]
9. Demonstrated project commercial operation date (“COD”) is within 120 days of the utility completing construction of necessary interconnection and network upgrades after the delivery of the results of the final interconnection study to the QF.
10. Demonstration that the proposed facility will be at a size which is at or below the purchasing utility’s PURPA purchase obligation threshold as determined by FERC. See 2 Tr 136–37.

MEIBC argues that its recommended LEO criteria be adopted by the Commission in this matter. MEIBC also argues that if the Commission adopts MEIBCs LEO criteria that these criteria be applied to all applicable Michigan regulated utilities.

III.

DISCUSSION

On July 16, 2020, FERC issued an Order 872 which included revisions to the implementation of statutory Sections 201 and 210 of PURPA, 16 USC 824a-3, in the rules set forth in 18 CFR Parts 292 and 375. FERC Order 872, among other things, addresses situations where a utility must, under PURPA, pursuant to a LEO, purchase from a QF and provides minimum LEO formation guidance.

FERC Order 872, FERC adopts the Notice of Proposed Rulemaking proposal “to require QFs to demonstrate that a proposed project is commercially viable and that the QF has a financial commitment to construct the proposed project, pursuant to objective, reasonable, state-determined criteria in order to be eligible for a LEO.” FERC

Order 872, pages 373-374. FERC affirmed that the Commission has the ...” flexibility as to what constitutes an acceptable showing of commercial viability and financial commitment, albeit subject to the criteria being objective and reasonable.” *Id.*

On January 21, 2021, the Commission in U-20905, among other things, directed Consumers as part of its next biennial review of avoided costs and associated issues to provide clear guidance on the criteria it will use to evaluate a QF’s commercial viability and financial commitment in determining whether a LEO has been formed. See U-20905 Order, pages 32-33. On July 2, 2021, the Commission issued an order which clarified its previous orders with regard to where certain utilities should submit proposed LEO criteria and directed Consumers to submit its proposed LEO criteria in a standalone proceeding by September 1, 2021. See U-20905 Order, page 5 (July 2 Order).

On September 1, 2021, pursuant to the Commission’s July 2, 2021, order in U-20905, Consumers filed an application which includes Consumers proposed LEO criteria and a request that the Commission approve its proposed criteria and process for determining the formation of a LEO under PURPA.

The Commission’s July 2 Order provided proposed LEO criteria identified by the Commission as a “common starting point.” See July 2 Order, pages 16-18. The Commission further indicated in its order that its proposed LEO criteria did “not represent the final and approved criteria that will be relied upon by each utility to determine when an LEO has been established” and the Commission found that “[e]ach utility will file its own criteria that will be subject to the contested case proceeding and, ultimately, the Commission’s determination.” See U-20905 Order p 18.

The Commission's order in U-20905 provides the following "common starting point criteria to be used to evaluate commercial viability and financial commitment in determining whether an LEO has been formed:

1. Documentation of having obtained "qualifying facility" status from FERC pursuant to the certification procedures set out in 18 CFR 292.207. 2.
2. Documentation provided to the electric utility of all of the following: (i) a description of the location of the project and its proximity to other projects within one mile of the project and within 10 miles of the project, which are owned or controlled by the same developer, and (ii) an estimated, non-binding, good faith estimate of the energy production for the project that includes the kilowatt-hours or megawatt hours to be produced by the QF for each month and year of the entire term of the project's anticipated power purchase agreement
3. Demonstration of the submission of an interconnection application with the appropriate electric utility, and proof of payment of applicable application fees.
4. Demonstration of meaningful steps to obtain site control⁶ adequate to commence construction of the project at the proposed location.
5. Submission of all applications, including filing fees, to obtain all necessary local permitting and zoning approvals.
6. If qualifying as a "cogeneration facility" as defined by 18 CFR 292.202(c), written proof, provided to the electric utility, of a steam host that is willing to

contract for steam over the full term of the project's anticipated power purchase agreement for a cogeneration facility.

7. Proof of a deposit, paid in full, to cover the estimated costs for a system impact or facilities study, such as an engineering review or distribution study, should a study or studies become necessary.

The Commission emphasized on its' order that this list does not represent the final and approved criteria that will be relied upon by each utility to determine when an LEO has been established. See U-20905 Order p 18.

The Commission's order specifically directed each utility in filing its proposed LEO criteria to propose a deposit amount reflective of the estimated cost of the studies, a method for truing up actual costs, and to thoroughly justify the basis and reasonableness of the proposed deposit amount. Additionally, the Commission's order provides the following Commission definitions for System impact study or facilities studies, Engineering review and Distribution system study to be used by Consumers in its LEO criteria.

- System impact study or facilities studies refer to studies that may be necessary in the interconnection process under the Commission's Electric Interconnection and Net Metering Standards, Mich Admin Code, R 460.601a et seq., and may include an engineering review or distribution system study.
- Engineering review means a study to determine the suitability of the interconnection equipment including any safety and reliability complications arising from equipment saturation, multiple technologies,

and proximity to synchronous motor loads. Mich Admin Code, R 460.601a(u).

- Distribution system study means a study to determine if a distribution system upgrade is needed to accommodate the proposed project and to determine the cost of an upgrade if required. Mich Admin Code, R 460.601a(q).

Id.

The Commission's July 2, 2021, order discusses FERC Order 872 provisions "...requiring the completion of a utility-controlled study places too much control over the LEO in the hands of the utility and defeats the purpose of a LEO and is inconsistent with PURPA." Order 872, ¶ 695. In U-20156 the Commission found that no LEO existed because the QF had not received a distribution study performed by the utility, and therefore could not commit to pay costs for any distribution upgrades found to be required by the study. See U-20156 order, p. 54. In its July 2, 2021, order the Commission clarified that while a deposit for a study may be required to be paid in full as part of demonstrating a QF's financial commitment to the project, the completion of the study is not required in order to establish an LEO. See U-20905, July 2 Order pp 19-20. The Commission indicated that:

..." the finding of an LEO is only one part of the process in that an LEO effectively provides a QF with a contract to sell to the utility the output of its generation project and gives the QF a path to move forward with the project. The establishment of an LEO does not, however, obviate other responsibilities connected with the ultimate completion of the project, including the payment of system upgrade costs necessary to interconnect the project." *Id.*

1. The Requirement to Create LEO Criteria

Consumers argues in its Initial Brief that FERC Order 872 does not require the Commission to adopt LEO criteria in this proceeding. See Initial Brief pp 5-6. Consumers believes that FERC Order 872 and FERC's 2020 regulations provide only minimum guidance to the Commission for the establishment of a LEO. FERC's 2020 new regulations, "require QFs to demonstrate that a proposed project is commercially viable and that the QF has a financial commitment to construct the proposed project, pursuant to objective, reasonable, state-determined criteria in order to be eligible for a LEO." FERC Order 872, pages 373-374. Consumers argues that FERC 872 provides that "states have flexibility as to what constitutes an acceptable showing of commercial viability and financial commitment, albeit subject to the criteria being objective and reasonable." *Id.* Consumers concludes in its' Initial Brief that the Commission is not required to create LEO criteria in this proceeding. See Initial Brief p6.

Consumers' witness Walainis testified that rather than establish LEO criteria the Commission should affirm FERC Order 872 language regarding minimum requirements for the establishment of a LEO and indicate in its order that a QF:

- That meets the minimum requirements does not mean that the QF has formed a LEO; and
- Must demonstrate that it is commercially viable and has made appropriate financial commitments to demonstrate its viability before a LEO can be established.

See 2 TR 40

Witness Walainis testified that additionally the Commission should clarify that when determining whether a QF project has a LEO, the Commission will continue its current a case-by-case LEO determination process to determine if the QF project is a viable project on which customers can rely. *Id.*

Staff does not agree with Consumer's conclusion that FERC Order 872 does not require the Commission to establish LEO criteria. See Staff Initial Brief pp 3-4. Staff indicated in its Initial Brief that the Commission in U-20344 directed Staff to complete stakeholder process to develop rules for defining and establishing an LEO under PURPA, rather than evaluating each case individually. On September 19, 2019, FERC issued a Notice of Proposed Rulemaking (NOPR) to review, its PURPA regulations. On July 16, 2020, FERC issued Order 872 and on November 19, 2020, FERC issued Order 872-A which created guidelines for state LEO evaluations. Due to FERC orders 872 and 872-A, the Commission removed its own draft LEO rules from the Interconnection and Distributed Generation ruleset and opened U-20905 to formulate specific LEO criteria based on the FERC orders.

Staff argues that the Commission's Order in U-20905, specifically requires Consumers to develop and file proposed LEO criteria to be used to determine when a LEO is formed. See Staff Initial Brief pp 3-5. The Commission required Consumers to provide:

...clear guidance on the criteria it will use to evaluate a QF's commercial viability and financial commitment in determining whether an LEO has been formed, again consistent with FERC and Commission precedent. The applicable criteria should allow both the utility and the QF to unambiguously determine whether an LEO has been formed based on factors *within the control of the QF*. Interested parties will also have the opportunity to provide evidence around these criteria as part of the contested case process

See U- 20905 January 21, 2021 Order p 32: July 2, 2021, Order p 15.

MEIBC agrees with Staff that FERC order 872 requires the Commission to develop and adopt LEO criteria and the Commission's orders in U-20905 require Consumers to develop and file proposed LEO criteria with the Commission. See MEIBC Initial Brief pp 3- 10. MEIBC argues in its Initial Brief that the Commission clearly recognized in U-20905 that FERC directed state regulatory commissions to adopt "objective and reasonable criteria" for determining the existence of a LEO and excluded the possibility that a particular QF's LEO be adjudicated on an *ad hoc* basis. MEIBC like Staff recommends that the Commission reject Consumers' proposal that the Commission continue a case-by-case LEO determination process and recommends the Commission adopt a clear articulation of objective and reasonable LEO criteria See MEIBC Initial Brief p 10.

The evidence presented shows that FERC Order 872 requires the Commission to adopt LEO criteria. The Commission's orders in U-20905 require Consumers to develop and file proposed LEO criteria consistent with FERC Order 872. Therefore, I recommend the Commission reject Consumers' proposal to determine LEO formation on a case-by-case basis rather than using specific LEO criteria.

2. Consumers Proposed LEO Criterion 1

Provided documentation to the electric utility of having obtained "qualifying facility" status from FERC pursuant to the certification procedures set out in 18 CFR 292.207 for QFs with net capacity greater than 1 MW.

Consumers witness Walainis testified that Consumers proposes this criterion because, under PURPA, utilities are not required to purchase from generators that are not QFs. 2 TR 44. Consumers believes that it is essential that a project demonstrate

that it has obtained FERC certification as a QF before any determination is made regarding the PURPA-based legal obligations of a utility. Consumers updated this criterion in its rebuttal to apply to QFs with net capacity of more than 1 MW. QF's with a net capacity of 1 MW or less are not required to make a filing with FERC to claim QF status. 2 TR 56.

Staff witness Hadala testified that Consumer's criterion 1 is essentially the same as the Commissions criterion 1 and Staff has no comments or recommendations. See 2 TR 91.

MEIBC indicated in its Initial Brief that Consumers' criterion 1 would require a QF to provide "documentation to the electric utility of having obtained 'qualifying facility' status form FERC pursuant to the certification procedures set out in 18 C.F.R. § 292.207. MEIBC witness Sherman testified that according to FERC rules any facility with a net power production capacity of 1 MW or less is exempt from the filing requirements of paragraph[] (a)(3) . . . of this section." See 18 C.F.R. § 292.203(d)(1). MEIBC witness Sherman testified that Consumers that criterion 1 should not apply to facilities smaller than 1 MW in size. See 2 TR 129. In its rebuttal testimony Consumers and Initial Brief agreed with MEIBC and changed its recommended Criterion 1. See Consumers' Initial Brief p 8. Neither Staff nor MEIBC opposes Consumer's updated criterion 1. Therefore, I recommend the Commission adopt Consumer's criterion 1.

3. Consumers Proposed LEO Criterion 2(i).

Provided documentation to the electric utility of all of the following:

A description of the location of the project and its proximity to other projects within one mile of the project and within ten miles of the project, which are owned or controlled by the same developer or owner or otherwise affiliated with the qualifying facility.

Consumers' proposed criterion 2(i) was listed by the Commission as a common starting point criterion in the Commission's its July 2 Order. Consumers' witness Walainis testified that Consumers agrees with this Commission recommended criteria because this information is necessary to determine if a proposed project is in Consumers' service territory and if the project is a sufficient distance from other projects owned by the developer so that it may be considered a separate project. 2 TR 44. A project's location may also be used to determine the amount of generation originating in an area and any risks regarding congestion, losses, fuel supply, permitting, and customer acceptance. *Id.* Witness Walainis testified that Consumers added "*or owner or otherwise affiliated with the QF*" because the developer is not always the owner or operator of the QF. See 2 TR 44-45. Consumers believes that the owner or other affiliated parties should be included in in this criterion to better understand which projects in the vicinity are "owned or controlled" by the same entity. See 2 TR 45.

Staff witness Hadala testified that Consumer's proposed criterion 2(i) is essentially the same as the Commission's' criterion 2(i). Staff reviewed Consumers proposed criterion 2(i) and has no comments or recommendations. See 2 TR 91. MEIBC did not oppose this criterion in its witness testimony nor briefs. Therefore, I recommend the Commission adopt Consumers criterion 2(i).

4. Consumers Proposed LEO Criterion 2(ii).

An estimated, non-binding, good-faith estimate of the energy production for the project that includes the kilowatt-hours or megawatt-hours to be produced by the QF for each month and year of the entire term of the project's anticipated power purchase agreement.

Criterion 2(ii) uses the same language as the Commissions' common starting point criteria that the provided in its July 2 Order. Consumers' witness Walainis testified

that Consumers agrees with this criterion because it allows the Consumers and the Commission to understand how the project contributes to utility capacity and energy plans and needs. 2 TR 45.

Staff witness Hadala testified that Consumers' proposed criterion 2(ii) mirrors the Commission's criterion 2(ii) and Staff has no comments or recommendations. See 2 TR 91. MEIBC's recommended criterion 2(ii) is identical to the Commission's criterion 2 (ii). See MEIBC Initial Brief p 26. Therefore, I recommend the Commission adopt Consumers proposed LEO criterion 2(ii).

5. Consumers' Proposed LEO Criterion 2(iii)

An Internal Revenue Service Form W-9.

Consumers' witness Walainis testified that this criterion and criteria 2(iv), (v), (vi), (vii), and (viii), are based on Consumers' actual experience with developers with significant uncertainty regarding project financing, equipment availability, project construction schedules, and project development progress. See 2 TR 45. Proposed criterion 2(iii), a requires an IRS Form W-9 which is consistent with the Midcontinent Independent System Operator, Inc.'s (MISO) interconnection rules that require a developer to submit an IRS Form W-9. *Id.* Witness Walainis testified that this form provides basic taxpayer information and allows MISO to identify legally binding relationships held by developers. Consumers believes that it is reasonable for Consumers to require similar identification for entities connecting to its distribution system. *Id*

Staff witness Hadala testified that Consumer's Proposed Criterion 2(iii) is a new Criterion. Staff had no comments or recommendations. MEIBC's proposed LEO criterion 2(iii) is identical to Consumers. See Initial Brief p 26. I recommend the Commission adopt Consumers' proposed LEO criterion 2(iii).

6. Consumers' Proposed LEO Criterion 2(iv)

Evidence of an engineering, procurement, and construction program that will result in commercial operation of the project (and the project's interconnection) on a defined schedule and, if entered into at avoided cost rates including compensation for capacity, one that is consistent with the capacity needs of the purchasing utility.

Consumers believes that this information is necessary to demonstrate that the QF project is able to be completed on schedule and a contract may be maintained without price adjustments or terminations for cause. See 2 TR 45-46. The required schedule would also show a developer's commitment to the project and evidence that a project is viable. *Id.*

Witness Walainis testified in Consumers' rebuttal testimony, that Consumers updated its initial proposed criterion 2(iv) to include "*if entered into at avoided cost rates including compensation for capacity, one that is consistent with the capacity needs of the purchasing utility.*" 2 TR 56. The updated language provides that a QF must provide a defined schedule consistent with the capacity needs of the purchasing utility if the LEO is for avoided cost rates including compensation for capacity. Consumers believes that this is a reasonable clarification because the QF would only receive compensation for capacity if the utility has a capacity need. The QF must prove that it can meet that need to establish a LEO.

MEIBC witness Sherman testified that the capacity needs of the purchasing utility should not be linked to establishing a LEO. See 2 TR 129, 159.

Consumers argues that if a QF is asserting a LEO to obtain avoided cost rates, then generation from the QF project must be provided consistent with the Consumers' capacity and resource planning needs. See Consumers' Initial Brief p 20-21.

Consumers argues that FERC orders and findings provide:

- Utilities are not required to purchase capacity from QFs when utilities have no capacity need. See *City of Ketchikan*, 94 FERC ¶ 61,293 at 62,061.
- The formation of a LEO is intended to strike "an appropriate balance between the needs of the QFs and the needs of the purchasing utilities." See Order No. 872-A, 173 FERC ¶ 61,158 at p 384.
- "To meet the needs of the purchasing utility, requiring a showing of commercial viability and financial commitment will ensure that no electric utility obligation is triggered for those QF projects that are not sufficiently advanced in their development and, therefore, for which it would be unreasonable for a utility to include in its resource planning." *Id.* at p 385.

Given these various FERC findings Consumers argues that it is reasonable for LEO criteria to include the resource planning needs of utilities and would be unreasonable to force customers to pay for QF generation when it is not needed by them.

Staff witness Hadala testified that Staff reviewed Consumers' proposed criterion 2(iv) Witness Hadala testified that this is a new proposal by Consumers and based on

the information provided by Consumers. Staff has no objections or recommendations. See 2 TR 92; Staff Exhibit S-1.

In response to MEIBC's concerns Consumers adjusted its' initial proposed Criterion 2(iv) to clarify that the utility's capacity needs should only be considered when the QF is being compensated for capacity. Consumers updated proposed criterion 2(iv) to now includes "*if entered into at avoided cost rates including compensation for capacity, one that is consistent with the capacity needs of the purchasing utility.*" See 2 TR 56. This new language clarifies that a QF must provide a defined schedule consistent with the capacity needs of the purchasing utility if the LEO includes avoided cost rates including compensation for capacity. I find that this clarification is reasonable since the QF would only receive compensation for capacity if the utility has a capacity need.

Therefore, I recommend that the Commission adopt Consumer's revised proposed LEO criterion 2(iv).

7. Consumers Proposed LEO Criterion 2(v)

Proposed criterion 2(v), requires evidence of a secured commitment from major equipment manufacturers, because solar and wind project developers, must demonstrate that sufficient panels or turbines have been, or will be, secured to develop the proposed project. 2 TR 46. Witness Walainis testified that this proposed criterion is important due to recent solar supply chain issues. *Id.* Witness Walainis testified that Solar panel materials, including aluminum and polysilicon, have become more difficult to obtain and when obtained are subject to increased shipping costs *Id.* Proof of secured

commitments from major equipment manufacturers provides evidence that a project is financially and operationally viable. *Id*

Staff and MEIBC oppose the Consumers' proposed criterion 2(v). Staff witness Hadala testified that Staff does not agree with Consumers' criterion 2(v) because "[a]t this point in the process, a QF is unlikely to have secured a commitment from equipment manufacturers." 2 TR 92. Consumers argues that because the Commission directed Consumers to file LEO criteria to determine at what point in the generator development process a LEO is established Staff's recommendation to reject criterion 2(v) based on a point in time which is not currently known (i.e., the point when a LEO is established) should not be adopted by the Commission. See Consumers Initial Brief p.22.

Consumers argues that because FERC's findings in Orders 872 and 872-A provide that LEO criteria may require "a showing of commercial viability and financial commitment." (See FERC Order 872-A, 173 FERC ¶ 61,158 at p 384) it is reasonable to require a QF to show "evidence of a secured commitment from major equipment manufacturers for the delivery and/or installation of all major equipment to be utilized by the project," . Consumers' witness Walainis testified in rebuttal that criterion 2(v) does not require that the QF purchase all equipment necessary to build a project. criterion 2(iv) only requires a QF show that there is a commitment to provide the necessary equipment for a project .2 TR 57. Consumers argues that this requirement is consistent with FERC's Order 872 finding that "demonstrating the required financial commitment does not require a demonstration of having obtained financing." See FERC Order 872, page 375; See Consumers' Initial Brief p. 22.

Additionally, witness Walainis testified that Consumers included criterion 2(v) because in the past developers presented projects to Consumers with included equipment that was never available. Consumers believes that this past history shows that developers had neither contacted a manufacturer to determine equipment availability and equipment costs nor determined whether equipment costs would support a viable project. 2 TR 58.

MEIBC witness Sherman testified MEIBC does not agree with criterion 2(iv) because, among other things, the criterion requires things not within the QF's control. 2 TR 129. Consumers responds that a commitment from major equipment manufacturers for QF project necessary equipment is within the control of a QF. Consumers witness Walainis testified that, a QF, just like other generation project developers have:

- The ability to work with suppliers to ensure that the appropriate equipment can be acquired to develop a project. 2 TR 59.
- There are no impediments which prevent QFs from interacting and contracting with equipment suppliers.

Id.

Consumers argues that criterion 2(v) is consistent with FERC Order 872 and 872-A. Additionally, FERC indicated in Order 872 that it was “raising the bar to prevent speculative QFs from obtaining LEOs.” See Order No. 872, 172 FERC ¶ 61,041 at P 688. Consumers argues that criterion 2(v) is necessary to balance the resource planning of the utility and to prevent speculative LEOs. See Consumers Initial Brief p. 23.

MEIBC witness Sherman testified that Consumers' proposed criterion 2(v) should be rejected because "the QF would likely need to make some measure of financial commitment to a supplier, such as a deposit." See 2 TR 129. Consumers argues that FERC indicated in Order 872-A that:

"[r]equiring a QF to make a deposit or whether the QF has applied for system impact, interconnection or other needed studies are the types of factors that may show that the QF has taken meaningful steps to develop the QF that are within the QF's control and the type of objective and reasonable standards that states can consider in their implementation."

Order No. 872-A, 173 FERC ¶ 61,158 at p 380

Consumers argues that If a QF is required to make a deposit to secure a commitment for the necessary project equipment FERC has indicated that those deposits are reasonable for demonstrating project viability and to show financial commitment. See Consumers' Initial Brief pp 23-24. I agree.

MEIBC believes that criterion 2(v) "would require the QF to obtain financing before establishing an LEO." 2 TR 130. Consumers witness Walainis testified that MEIBC has no basis to suggest that financing is necessary for a QF to secure a commitment from major equipment manufacturer nor to pay a deposit to an equipment manufacturer. Witness Walainis testified that if a QF is unwilling to pay a deposit, it would suggest that the project is speculative and not viable. 2 TR 58. Consumers witness Walainis testified that not requiring QFs to pay deposits would give QFs preferential treatment over other non-QF developers that commonly pay deposits in the early project development stages for bid binding security to

participate in competitive solicitations, permit application fees, manufacturer deposits, safe harbor investments, and engineering, procurement, and construction contract deposits. *Id.* FERC indicated in Order 972 that obtaining financing is not required before establishing a LEO but QFs can be required to pay deposits prior to the establishment of a LEO (see Order No. 872, page 375) MEIBC's belief that that criterion 2(v) would require financing for required for deposits and deposits are too onerous for a QF is contrary to FERC's findings.

I find that Staff's and MEIBC's opposition to criterion 2(v) are not supported by the evidence provided. Therefore, I recommend the Commission adopt the Consumers' proposed LEO criterion 2(v).

8. Consumers Proposed LEO Criterion 2(vi)

Evidence that the project is financeable.

Consumers witness Walainis testified that Consumers believes that proposed criterion 2(vi) is essential to show project viability. Secured project financing demonstrates that a project would be financially viable if a contract or LEO is obtained. See 2 TR 46.

Staff witness Hadala testified that Staff agrees in part with the Consumers' proposed criterion 2(vi). 2 TR 92-93. MEIBC witness Sherman testified that MEIBC opposes criterion 2(vi). 2 TR 132.

Staff does not take issue with the actual text of criterion 2(vi) but instead took issue with two examples of evidence that the project is, as provided by the Consumers in discovery. In a discovery response provided as Exhibit S-2, Consumers provided the following examples of evidence that a QF project is financeable :

- Description of QF and/or developer's experience financing similar projects
- Plan for funding types (e.g., internal, sponsor equity, vendor financing, construction loan, other bank loan, etc.) during each phase (e.g., development, construction, etc.)
- If debt financed, a commitment letter from the lender detailing any conditions or stipulations to loan approval, or a standard term sheet signed by both the QF/developer and the financing entity
- If tax equity financed, a standard term sheet signed by both the QF/developer and the tax equity partner including a statement that this project is included under the term sheet if the term sheet is at a portfolio level
- If equity financed, ability of QF and/or developer for internal funding with supporting financial statements and credit worthiness of QF and/or developer with supporting financial statements.

See Exhibit S-2

Staff witness Hadala testified that Staff agrees with the first two examples and the fifth example of evidence of financeability provided by the Consumers but indicated that "it may not be possible for a QF to meet the remaining two criteria listed in Exhibit S-2 before an LEO is established" (i.e., examples three and four above). 2 TR 92. Consumers argues that Staff's position regarding examples three and four is incorrect and should be rejected. See Consumers' Initial Brief pp 24-25. Staff in its Reply Brief agrees with MEIBC that only the first two examples provided by Consumers proposed criterion 2(vi) are reasonable. See Staff Reply Brief pp 2-3.

Consumers witness Walainis testified that commitment letters and term sheets are standard financing documents and would be available to a QF. 2 TR 62. Witness

Walainis testified that Staff's concerns about when a QF would be able to obtain the necessary evidence can be acquired by a QF may be remedied by including any conditions or stipulations for obtaining the financing such as a LEO being formed or a PPA being executed. *Id.*

Witness Walainis testified that the economic feasibility of a QF projects is the most important component of a viable project. Evidence that a project is financeable is critical to the formation of a LEO because financing is required for project completion because the financing party is demonstrating through their agreement that a project is economically viable. *Id.*

MEIBC witness Sherman testified that MEIBC believes that Consumers criteria 3 and 4 are sufficient to show financeability and criterion 2(vi) is not necessary. 2 TR 132. Consumers witness Walainis testified in rebuttal that the financial commitment required in Consumers criteria 3 and 4 is relatively small compared to full project furnacing. Criteria thee and found require very little financing to demonstrate meaningful steps to obtain site control and, submission of all applications and filing fees for local permitting and zoning approvals, 2 TR 62-63. Consumers witness Walainis further testified that criterion 2(vi) is designed to obtain evidence that the project is financeable in order to screen for commercial viability *and* financial commitment. 2 TR 63.

MEIBC witness Sherman testified that Consumers' proposed criterion 2(vi) is inconsistent with FERC Order 872. See 2 TR 131. FERC stated that QFs may be required to "apply for all relevant permits, take meaningful steps to seek site control, or meet other objective and reasonable milestones in the QF's development." Order No. 872, 172 FERC ¶ 61,041 at p 687. FERC did not limit the LEO criteria for

financeability to steps related to site control and permitting, as MEIBC appears to claim. Consumers' proposal requires QFs to provide objective and reasonable evidence establishing that a financing milestone has been reached. Therefore, it is consistent with FERC Order 872.

I find that the evidence presented shows that Consumers' proposed criterion 2(vi) is reasonable, and I recommend the Commission adopt Consumers proposed criterion 2(vi).

9. Consumers Proposed LEO Criterion 2(vii)

Proof of fuel security, or, if the project is for wind, solar, or hydroelectric generation, the amount of available fuel at the project's location.

Staff witness Hadala testified that Staff reviewed Consumers proposed criterion 2(vii) and had no comments or recommendations. See 2 TR 93.

MEIBC witness Sherman testified that MEIBC opposes proposed criterion 2(vi) because it believes it is duplicative of criterion 2(ii). 2 TR 132.

Consumers witness Walainis testified that criterion 2(vi) is not duplicative of criterion 2(ii). Criterion 2(ii) requires an estimate of energy produced, but does not require the amount of available fuel at the project's location as does criterion 2(vii). 2 TR 63. Consumers witness Walainis testified that the information regarding available fuel for wind, solar, and hydroelectric generation assets provided in response to criterion 2(vii) validates and provides a level of certainty for the energy production estimates provided in response to criterion 2(ii). *Id.*

I find based on the evidence presented that Consumers' proposed criterion 2 (vii) is reasonable. Therefore, I recommend the Commission adopt Consumers' proposed criterion 2(vii).

10. Consumers Proposed LEO Criterion 3

Demonstrated it has taken meaningful steps to obtain site control adequate to commence construction of the project at the proposed location.

Criterion 3 was listed by the Commission in its July 2 Order as a common starting point criterion. Consumers' witness Walainis testified that Consumers agrees with this proposed criterion because a demonstration of meaningful steps to obtain site control demonstrated a greater certainty that a project is viable and will be sited in the location proposed by the developer. 2 TR 47.

Staff witness Hadala testified that Staff reviewed Consumers criterion 3 and has no comments or recommendations. MEIBC did not take a position regarding Consumers criterion 3.

I find based on the evidence presented that Consumers' proposed criterion 3 is reasonable. Therefore, I recommend the Commission adopt Consumer's' proposed criterion 3.

11. Consumers Proposed LEO Criterion 4

Submitted all applications, including filing fees, to obtain all necessary local permitting and zoning approvals.

Criterion 4 was listed by the Commission its July 2 Order as a common starting point criterion. Consumers indicated in its Initial Brief that it agrees with this proposed criterion because the submission of all applications, including filing fees, for all necessary local permitting and zoning approvals shows a greater certainty that a project is viable and will be sited in the location propose. See Consumers Initial Brief pp-27-28. Staff witness Hadala proposed changes to criterion 4. See 2 TR 93 Witness Hadala testified that because there may be cases where a QF cannot obtain all permits at the

time of a LEO determination Staff recommends that language be added that if a permit has not been applied for the QF may provide and expected date of the application, expected permit fee, and expected permit issue date. See 2 TR 93. Staff indicated at page 8 of its Initial Brief, it recommended clarifying language to address these concerns. Staff in its Reply Brief indicated that Staff also does not oppose MEIBC's alternative proposal for criterion 4 which addressed Staff's concerns. See Staff Reply Brief p 4.

MEIBC witness Sherman testified that certain local permits and plan approvals are not typically applied for until shortly before construction begins. See 2 TR 160. Witness Sherman testified that criterion 4 should be limited to permits typically obtained prior to obtaining financing. See 2 TR 132-133.

Consumers correctly argues in its Initial Brief that FERC indicated in Order 872 that "states can require QFs to have applied for all of the necessary permits and zoning variances, including the payment of all necessary fees, as a factor in demonstrating the QF's commercial viability." Order 872, p 375. FERC further found that "[s]tates may require a showing that such applications have been submitted to the relevant regulatory bodies (including payment of the application fees)." See Consumers Initial Brief p 28. Therefore, Consumers' proposed criterion 4 is consistent with FERC Order 872.

Consumers witness Walainis testified that it is not burdensome or unreasonable to require QFs to apply for permits prior to establishing a LEO because these are actions that any developer would take in the early stages of project development. I agree. Additionally, Staff's proposal is contrary to the intent of FERC Order 872. See Order. 872, page 376.

Witness Walainis testified that Consumer's provided additional information to respond to MEIBC's concerns regarding what permits would be required for the

establishment of a LEO. Proposed criterion 4 applies only to material and time-intensive permits including, but not limited to, Michigan Department of Environment, Great Lakes, and Energy (EGLE) environmental studies, permitting (e.g., Federal / State / Local, including Special Land Use Permit - "SLUP", etc.), and construction permits. 2 TR 65. Witness Walainis testified that these permits are the "necessary permits" referenced in FERC Order 872. However, Consumers is not taking the position in its Criterion 4 that additional permits (e.g., road use agreement, EGLE Storm Water Pollution Prevention Plan permits, etc.) are needed to establish a LEO. *Id.*

I find that the evidence presented shows that Staffs and MEIBIC concerns regarding Consumers proposed LEO criterion 4 are not supported. Consumers' proposed LEO criterion 4 with clarifying language that criterion 4 applies only to material and time-intensive permits including, but not limited to, Michigan Department of Environment, Great Lakes, and Energy (EGLE) environmental studies, permitting (e.g., Federal / State / Local, including Special Land Use Permit - "SLUP", etc.), and construction permits. These clarifications, offered by Consumers, would render criterion 4 reasonable. Therefore, I recommend the Commission adopt Consumers proposed LEO criterion 4 with the clarifying language proposed by Consumers.

12. Consumers Proposed LEO Criterion 5

If qualifying as a "cogeneration facility" as defined by 18 CFR 292.202(c), written proof, provided to the electric utility, of a steam host that is willing to contract for steam over the full term of the project's anticipated power purchase agreement for a cogeneration facility.

Criterion 5 was listed in by the Commission in its July 2 Order as a common starting point criterion. Consumers agrees with this proposed criterion because certain projects only qualify for QF status if they provide cogeneration (i.e., electricity and

steam). See 2 TR 47. Witness Walainis testified that these projects, must demonstrate that a steam host is willing to contract for the steam output of the proposed project. Without a steam host, the project would not qualify as a QF, and the utility would have no PURPA-based obligation to purchase electricity. *Id.*

Staff witness Hadala testified that Staff reviewed Consumers proposed LEO criterion 5. Staff has no comments or recommendations. See 2 TR 93-94.

MEIBC did not take a position regarding Consumers proposed LEO criterion 5.

I find based on the evidence presented that Consumers proposed LEO criterion 5 is reasonable. Therefore, I recommend that the Commission adopt Consumers proposed LEO criterion 5.

13. Criterion 6

Submitted an interconnection application and complete the process of obtaining any necessary interconnection study results (engineering review and/or distribution system study results) from the Consumers under R 460.620. If the utility is the sole cause of not meeting the timelines in R 460.620, which may be extended or modified by a Michigan Public Service Commission-granted waiver, criteria 6 and 7 will not be required for a particular, affected QF.

14. Criterion 7

Agreed, in writing, to pay the system construction or modification costs identified in any interconnection study pursuant to R 460.620(10).

Consumers believes that its Criterion 6 and criterion 7 are essential to determine QF project. Witness Walainis testified that FERC Order 872 and Commission requirements, a QF's commercially viable, requires an interconnection agreement, cost estimates and an agreement to pay the required interconnection costs. 2 TR 48. Consumers is proposing, that QFs be required to obtain any necessary interconnection studies from Consumers and then agree, in writing, to pay any system construction or

modification costs identified in those studies. *Id.* Consumers proposed agreement may be satisfied by executing a facilities agreement or providing written notice that the QF has reviewed the interconnection study and will proceed with the project at the estimated interconnection costs. *Id.* Consumers believes that because its proposed process for interconnection studies is objective, predictable, and subject to Commission rules. Consumers believes its proposed criteria do not place the formation of a LEO solely in the hands of the utility.

Staff agrees in part with Consumers' proposed criterion 6 and proposes that the Commissions' criterion #3 and #7 from the U-20905 July 2 Order be adopted.

Commission criterion #3 states:

“Demonstration of the submission of an interconnection application with the appropriate electric utility, and proof of payment of applicable application fees.”

Commission criterion #7 states:

“Proof of a deposit, paid in full, to cover the estimated costs for a system impact or facilities study, such as an engineering review or distribution study, should a study or studies become necessary.”

See U-20905, Order p 16.

Staff agrees that the QF should submit an interconnection application but does not agree with Consumers that a QF must obtain the results of any necessary subsequent interconnection studies before obtaining a LEO. See Staff Initial Brief pp 9-10. Staff opposes Consumers criteria 6 and 7 because Staff feels that these criteria place too much control over a LEO in the hands of the utility. See 2 TR 94-95

MEIBC also opposes Consumers' proposed criteria 6 and 7. MEIBC also believes that Consumers' proposed criteria 6 and 7 place too much control over a LEO in the hands of the utility. See 2 TR 127-128.

FERC Order 872 provides in pertinent part:

... “ requiring the completion of a utility owned- controlled study places too much control over the LEO in the hands of the utility and defeats the purpose of a LEO and is inconsistent with PURPA”

FERC Order 972 p 95; U-20905 July 2,2021 Order p 19.

Consumers disagrees with Staff and MEIBC's conclusion that criteria 6 and 7 place too much control over the LEO in the hands of the utility. To address Staff's and MEIBC's concerns and the impact of the Commission's Interconnection Standards, Consumers modified these criteria to remove them from consideration in the determination of a LEO if the utility is the cause of not meeting the deadlines set forth in the Commission's Interconnection Standards. See Consumers Initial Brief pp 29-30.

Consumers believes that because it must follow the Commission's Interconnection Standards timelines provided in R 460.620. Consumers does not have the level of “control” that Staff and MEIBC claim. See 2 TR 29 Consumers argues that the Commission has required strict compliance with the Interconnection standards timelines. In U-20444 and U-20828, the Commission refused to grant Consumers a waiver of the Interconnection timelines. See 2 TR 28. Consumers argues that given its lack of control over the interconnection timing Consumers essentially has no control over the interconnection process. Consumers believes that its modified criteria 6 addresses its lack of control over the Interconnection process and therefore is neither inconsistent with FERC Order 872 nor the Commission's orders in U-20905.

I agree with Staff that criterion 6 requirements that the QF submit and interconnection application and pay the appropriate application fees are appropriate criteria for the establishment of a LEO. I also agree with Staff that criterion 6 requirement regarding the completion of the interconnection process and obtaining the necessary interconnection study results is unreasonable because at this point in the process a LEO does not require the full completion of interconnection studies. See 2 TR 94. This finding is consistent with the Commission's July 2, 2021, order in U-20905 where the Commission wrote:

“FERC's statement in Order 872 that requiring the completion of utility-controlled study places too much control over the LEO in the hands of the utility and defeats the purpose of a LEO and is inconsistent with PURPA”.

See U-20905, July 2, 2021, Order p 19.

Therefore, I recommend the Commission adopt the Commissions' criterion #3 and #7 from the U-20905 July 2 Order which states:

Criterion #3

“Demonstration of the submission of an interconnection application with the appropriate electric utility, and proof of payment of applicable application fees.”

Criterion #7

“Proof of a deposit, paid in full, to cover the estimated costs for a system impact or facilities study, such as an engineering review or distribution study, should a study or studies become necessary.”

See U-20905, Order p 16

I also agree with Staff that Consumers proposed criterion 7 is unreasonable because a QF will not know these costs prior to the completion of an interconnection

study. Additionally, Criterion 7 is not consistent with the FERCs Order 872 and the Commission's July 2, 2021, order in U-20905 where the Commission wrote:

FERC's statement in Order 872 that requiring the completion of utility-controlled study places too much control over the LEO in the hands of the utility and defeats the purpose of a LEO and is inconsistent with PURPA".

See U-20905, July 2, 2021, order p 19.

Therefore, I recommend the Commission not adopt Consumers proposed LEO criterion 7 and adopt Staff's proposal.

15. Consumers Proposed LEO Criterion 8

Unilaterally signed and tendered a proposed power purchase agreement ("PPA") to the purchasing utility if a standard offer PPA is available for a QF of that size or, if a standard offer PPA is not available for a QF of that size, agreed, in writing, to reasonable PPA terms and conditions at a price term consistent with the purchasing utility's avoided costs, with the specific beginning and ending dates for delivery of energy, capacity, or both to be purchased by the utility.

Consumers witness Walainis testified that Consumers proposed criterion requires the QF to sign and tender the publicly available standard offer PPA, if applicable, or provide a written commitment to reasonable terms and price which is publicly available through the standard offer PPA or terms and conditions of similar QFs as filed with the Commission and an avoided cost rate which is also publicly filed by Consumers with the Commission.² TR 49-50. Witness Walainis testified that the Commission should adopt this criterion because a unilaterally signed and tendered PPA or written agreement to reasonable terms and conditions and price that are publicly available does not rely on the utility. ² TR 49. If a QF does not agree with reasonable PPA terms or prices because either is prohibitive to a viable QF project, then a LEO should not be formed. *Id.* Consumers Criterion 8 does not require a fully executed PPA because that action would be within the control of the utility. *Id.*

Staff witness Hadala testified that Staff recommends that small QFs in the standard offer size range be able to indicate in writing that they agree to the terms of standard offer contract and be allowed to execute a contract at a later date when more information about the interconnection is available. Staff indicated in its Initial Brief that it agrees with Consumer that larger QFs should provide reasonable PPA terms prior to forming a LEO. See Initial Staff Brief p 11; 2 TR 95-96. Staff recommends that Consumers Criterion 8 be modified for smaller QFs.

Staff recommended “Consumers add language that a QF may send a request for Consumers to provide its current avoided cost information within five (5) business days or provide the current avoided cost information on the Consumers’ website (Consumers should provide a usable link).” 2 TR 95-96. Consumers witness Walainis testified that Staff’s recommendation duplicates the language in the Standard Offer Purchased Power tariff. 2 TR 66. The tariff provides in pertinent part

“In order to execute the Standard PPA, the Seller must complete all of the general project information requested in the applicable Standard PPA. When all information required in the standard PPA has been received in writing from the Seller, the Consumers will respond within 15 business days with a draft Standard PPA.”

Id.

The Standard Offer PPA referenced in the tariff would also include the current avoided cost information. Consumers witness Walainis testified that although Consumers opposes adding Staff’s recommendation to the LEO criteria, Consumers agrees that it will provide current avoided cost information to QFs in a timely fashion. *Id.* Additionally, although not part of the LEO criteria, Consumers proposes to provide the current Standard Offer Contract without current avoided cost pricing on the consumers’ website. *Id.*

MEIBC witness Sherman testified that requiring a written agreement to reasonable terms and conditions and price suggests agreement between the QF and utility. 2 TR 133-134. I find these concerns have no merit. Criterion 8 only requires a unilaterally signed and tendered a PPA, and not a fully executed PPA and is required to support project viability. Consumers witness Walainis testified that if the QF cannot execute an economic project based on the PPA pricing and terms and conditions, the project would not be viable. 2 TR 67.

FERC and the Commission have both indicated in their orders that obtaining a PPA cannot be a prerequisite to a LEO. See Order 872, 172 FERC ¶ 61,041 at p. 380; U-20905 July 2 Order p 15. Staff indicated in its Reply Brief that MEIBC concerns regarding Consumers criterion requirement for a unilaterally signed PPA were partially alleviated by the Commission's order in U-21090 (Consumers 2021 IRP settlement approved June 23, 2022). See Staff Reply Brief pp 4-5. The Commission's order approved a standard offer contract applicable to projects up to 5 MW where previously it was only 2 MW. Therefore, a standard offer contract can be provided by Consumers to the QF.

I agree with Consumers that a written agreement by the QF (i.e., unilaterally signed PPA and not fully executed) to price is necessary to demonstrate the QF understands available pricing and is proposing a viable project. Criterion 8 is important because a LEO establishes a commitment which must be incorporated into financial and electric supply planning. Consumers witness Walainis testified that the absence of the terms, conditions and price of the obligation would make it very difficult for Consumers to plan, given the long lead times for electric supply asset procurement. 2

TR 68. Additionally, not requiring a QF to comply with Criterion 8 would be inconsistent with FERC 's directions regarding balancing the resource planning needs of utilities in the LEO establishment process. See Order No. 872-A, 173 FERC ¶ 61,158 at p 385.

I find that the evidence presented shows that given the Commission's order in U-21090 Consumers may now offer a QF a standard offer contract applicable to projects up to 5 MW. The evidence shows that its reasonable for Consumers to require a QF provide a written commitment to reasonable terms and price which is publicly available through the standard offer PPA or terms and conditions of similar QFs as filed with the Commission and an avoided cost rate which is also publicly filed by Consumers with the Commission. Therefore, I recommend the Commission adopt Consumers' proposed criterion 8.

16. Consumers Proposed LEO Criterion 9

Demonstrated project COD is within 365 days of a LEO being formed.

Consumers' witness Walainis testified that the Commission should adopt Consumers' criterion 9 because a QF project seeking a LEO should only be eligible for avoided cost rates consistent with current avoided costs set close to the project's COD so that customers are not burdened with the expense of outdated avoided costs. 2 TR 50. Witness Walainis further testified that, because Consumers avoided cost rates are updated on an annual basis, 365 days is a reasonable amount of time to allow between forming a LEO and project COD. *Id.*

MEIBC witness Sherman testified that MEIBC opposes Consumers criterion 9 because requiring a project COD within 365 days of LEO formation is unreasonable. 2 TR 135, 162.

Consumers witness Walainis testified in rebuttal that requiring COD 365 days from a LEO being formed is a reasonable amount of time. 2 TR 68. Witness Walainis testified that because a LEO requires a showing of commercial viability and a financial commitment to construct the facility (see FERC Order 872, page 45) it is reasonable to expect a facility to be operational within a year. Additionally, because a QF project seeking a LEO should only be eligible for the current avoided costs rates set close to the project's COD. This would prevent Consumers' customers from paying additional avoided costs due Consumers annual adjustment of avoided cost rates when the COD exceeds one year. Witness Walainis testified that because Consumers' avoided cost rates are updated on an annual basis, 365 days is a reasonable amount of time to allow between forming a LEO and project COD. *Id.*

Staff indicated in its Reply Brief that Consumers Criterion 9 should be modified to allow Consumers and a QF to mutually agree to a longer period of time. Staff witness Baldwin testified that Staff believes that Consumers' proposed criteria 9 be modified to state:

Demonstrated project commercial operation date (COD) is within 365 days of the utility delivering the results of the final interconnection study to the QF, unless the utility construction schedule necessitates a longer period to be agreed upon.

See 2 TR 81. Staff Reply Brief p 11.

MEIBC witness Levitas does not support Consumers proposed 365-day COD requirement. Witness Levitas testified that:

Having a fixed time period after LEO formation within which a project must be placed in service (365 days under Criteria 9) is patently unreasonable and runs afoul of the prohibition on utility control of LEO formation. Not only does the utility study process create uncertainty about the QF's ability to satisfy that requirement, but there is very little likelihood that the utility

can complete both the study process and any required interconnection construction activities within that time frame. I would also note that existing Consumers' PPAs, approved by the PSC, do not require that QFs be placed in service within 365 days of contract execution.

2 TR 162

MEIBC witness Sherman testified that Consumer's proposed criterion 9 is unreasonable because it does not consider the time required for the interconnection studies and construction. Witness Sherman believes that a more reasonable approach should use a time period from the date the utility interconnection facilities are completed. Witness Sherman recommends 120 days from the date the interconnection upgrades are completed by the utility. See 2 TR 150.

Witness Sherman testified the MEIBC recommends the following language for criterion 9:

Demonstrated project commercial operation date (COD) is within 120 days of the utility completing construction of the necessary interconnection and network upgrades after the delivery of the results of the final interconnection study to the QF.

Id.

I find the evidence presented shows that Staff's proposed modified criterion 9 is the most reasonable. Consumers proposed criterion 9 does not provide for projects which require COD more than 365 days from the completion of the interconnection studies. MEIBC's proposal fails to consider the avoided cost issues raised by Consumer's witness Walainis. I find that Staff's proposed modification (above) is fair and would facilitate a reasonable time period for construction that allows for the characteristics of the specific project. Therefore, I recommend the Commission adopt Staff's proposed criterion 9.

17. Consumers Proposed LEO Criterion 10

Demonstration that the proposed facility will be at a size which is at or below the purchasing utility's PURPA purchase obligation threshold as determined by FERC.

Witness Walainis testified that the Commission should adopt Consumers' criterion 10 because if the size of the proposed facility is above the purchasing utility's PURPA must-purchase obligation threshold, then the utility is not required to enter into a PPA with the proposed facility. If a QF is at a size above Consumers' must-purchase obligation threshold, then no LEO can be established. 2 TR 50.

Staff witness Hadala testified that Staff reviewed Consumers' proposed Criterion 10 and has no comments or recommendations.

Neither MEIBC witness Sherman nor witness Levitas addressed Consumers proposed Criterion 10 in their testimony. Neither Staff nor MEIBC address this criterion in their briefs.

I find that no party is opposing Consumers' proposed criterion 10. Therefore, I find that Consumer's proposed criterion 10 is reasonable and should be adopted by the Commission.

18. LEO Review Timeline

Staff witness Hadala testified that Staff recommends that "Consumers provide a timeline or a time limit for its review of the LEO criteria" and submitted that "30 calendar days as a reasonable time limit for this review." 2 TR 97. Staff further recommends that "[t]he LEO formation date would be the date the QF provided all necessary LEO documentation." *Id.*

Consumers witness Walainis testified in rebuttal that Consumers agrees that there should be a timely review of LEO requests, however, Consumers believes a 30-calendar daytime limit, as Staff proposes is inadequate. 2 TR 68. Witness Walainis testified that Consumers proposes 90 calendar days' time limits to determine whether or not a LEO has been established or to request additional information or clarification. 2 TR 68-69. If additional information or clarification is sought, it would extend the 90-day review period based on the time it takes the QF to submit additional information or provide clarification (for example, if it takes 10 calendar days for the QF to provide additional information or clarification, the review period would be extended to 90 calendar days plus 10 additional calendar days). *Id.* Additionally, witness Walainis testified that Consumers agrees with Staff that the LEO formation date would be the date the QF provided all necessary LEO documentation to the Consumers. *Id.*

I agree with Staff and Consumers that Consumers establish a time limit for its review of the LEO criteria. However, Staff's recommended 30-day time limit is too short. Therefore, I recommend that Commission adopt Consumers proposed 90 -day LEO review period. This extended time period would allow Consumers sufficient time to obtain the necessary information to complete a LEO review. I agree with Staff and Consumers that the LEO formation date should be the date the QF provided all necessary LEO documentation to Consumers.

19. LEO Abrogation

Consumers proposes the following criteria for LEO abrogation:

After the formation of a LEO by a QF, there may be modifications made by the QF which "materially" change the nature, and potential viability, of a proposed project and which result in the termination of the initially determined LEO. Such circumstances include

material modifications by the QF, as defined and applied by R 460.601b of the Commission's Electric Interconnection and Net Metering Standards. After such a material modification, the QF shall be required to reestablish that it meets the LEO criteria. If the QF fails to reestablish that it meets the LEO criteria, the QF will be subject to a termination of its LEO status, and the utility shall have the right to terminate the LEO. If the QF cannot meet its planned commercial operation date, as initially identified at the formation of the LEO, the utility shall also have the right to terminate the LEO. Additionally, the LEO shall also terminate in the event that a PPA entered by the utility and the QF is terminated in accordance with the PPA's terms, and a new LEO would be needed before the utility is required to enter into a new PPA with the QF. If a QF at any time does not maintain its QF status, the utility has the option of terminating the LEO and associated pricing.

Witness Walainis testified that the Commission should adopt Consumers' proposed LEO abrogation standard because after a LEO is formed by a QF, modifications may be made which materially change the nature, and potential viability, of a proposed project. See 2 TR 51. Witness Walainis testified that one example of a material QF modification would be a change to the project design which would require a new interconnection study and new interconnection cost estimates.

Id. When this occurs a QF should be required to do the following:

- Re-affirm its commitment to paying the new interconnection costs.
- Demonstrate it has taken meaningful steps toward site control for the modified project; and
- Provide evidence that the revised project remains financeable.

Id.

Consumers believes that if a QF cannot reasonably meet its planned COD, then the utility can no longer rely on that project and the utility must have the right to terminate the LEO. *Id.* Additionally, when there is PPA with a QF, the LEO should

terminate with the PPA if the QF fails to meet the PPA requirements, consistent with other third-party generators that enter PPAs with the Consumers. *Id.* A new LEO would then be needed before the utility is required to enter into a new PPA.

Staff witness Baldwin testified that Consumers LEO termination criteria is appropriate and that if a QF cannot agree to terminate a LEO, then the utility should file a complaint with the Commission. Staff agrees with Consumers LEO abrogation criteria.² TR 83. Staff indicated in its Initial Brief that Consumers proposed LEO termination would appropriately protect ratepayers from the costs of projects that prove to be not viable and situations where a QF is not committed. Staff Initial Brief p 14.

MEIBC indicated in its Reply Brief that Consumers is proposed that a “material modification” be defined by R 460.604b of the Commission’s existing Interconnection and Net Metering Standards. See R 460.601a *et seq.* MEIBC argues that because the Commission in U-20890 will replace these rules with its proposed Interconnection and Distributed Generation Standards the Commission should clarify in LEO abrogation criteria adopted in this matter that any subsequent rules amending or replacing R 460.604b will be used to define “material modification”. Additionally, MEIBC argues that the Commission should, construe “material modification” as narrowly as possible to avoid arbitrary LEO terminations. See MEIBC Reply Brief p 18.

MEIBC indicated in its Reply Brief that it does not dispute the reasonableness in principle of Consumers’ second LEO abrogation criteria but points out that circumstances could reasonably replace criterion 9, where a QF would not have to make an upfront showing that it will meet a COD within the time period set by that

criterion but would merely have its LEO terminated in the event the COD deadline were missed. *Id.*

MIEIBC did not take a position regarding Consumer's proposed LEO abrogation criteria 3.

Therefore, based on the evidence presented I find that Consumers proposed LEO abrogation criteria are reasonable. I recommend the Commission adopt Consumers proposed LEO abrogation criteria.

20. LEO Study Deposits

Staff argues in its Initial Brief that because utilities have historically taken the control away from a QF by charging high utility study fees, Staff recommends that the Commission set reasonable amounts for a LEO study deposit. See Staff Initial Brief pp 12-13. Staff witness Baldwin testified that Staff recommends basing Consumers LEO study deposit amounts using Consumers witness Tenney's testimony regarding the present cost for engineering reviews for 550 kW (Category 4) and greater projects Staff recommends the following study deposit amounts:

≤150 kW: \$0

>150 kW - 550 kW: \$500

>550 kW low voltage distribution connected projects: \$1,200

>550 kW high voltage distribution connected projects: \$4,500.

2 TR 82

Staff witness Baldwin testified that Leo study deposit should not be required not for small projects under 150 kW because:

Projects in this size range are unlikely to require a costly study. Pursuant to the Commission's criterion #3 regarding submission of the interconnection

application recommended for inclusion in Consumers' LEO criteria by Staff witness Merideth A. Hadala, the QF will pay the interconnection application fee as part of the necessary steps to establish the LEO. Independent of the LEO, the QF would still be responsible for paying the full cost of any needed studies.

2 TR 83

Witness Baldwin testified that Staff recommends a deposit fee for \$500 for project between 150kW and 550 Kw because on FERC's Small Generator Interconnection Procedures Attachment 2 Small Generator Interconnection Request. Witness Baldwin testified that this information shows that under the Fast Track Process requests between 150kW and 550kW have a non-refundable fee of \$500. A QF paying an interconnection fee under the Commission's LEO Criterion 3 would pay \$250 plus a LEO study deposit of \$500. Independent of a LEO the QF would be responsible for the full cost of any needed studies. *Id.*

Staff believes that its proposed LEO study deposit amounts are reasonable amounts for the purpose of establishing an LEO.

Consumers does not agree with Staff's recommendations regarding the collection of study deposits in lieu of the performance of actual studies as a requisite criterion to establish a LEO. See Consumers Reply Brief p 21. Consumers argues that if the Commission adopts Staff's deposit proposal as part of any adopted LEO criteria, the Commission should increase the required deposit for larger projects Category 4 and 5 projects, to reflect the true cost for Consumers to complete the interconnection study See 2 TR 20: 2 TR 35. Consumer's witness Tenney testified that the typical cost for distribution studies at all voltage levels is \$5,000. 2 TR 35. Witness Tenney testified that the deposits for projects above 550 kW should be increased to \$6,200 for low-voltage distribution connected projects and \$9,500 for high-voltage distribution connected

projects. Id. Witness Tenney testified that Staff's proposed deposit amounts due not reflect true cost for Consumers interconnection work on larger projects.

I find that the evidence presented shows that Staff's recommended interconnection study fees for projects above 550kW do not properly reflect Consumers true costs. Therefore, I recommend the Commission adopt Staff's recommendation regarding deposit fees for projects under 550kW and adopt Consumers proposed fees for low voltage projects above 550kW. The fee for high voltage distribution connection projects should be \$9500.

21. Application of LEO Criteria to all Michigan Utilities.

On page 27 of its Initial Brief MEIBC argues that it proposed LEO criteria should be adopted for all other Michigan utilities. MEIBC witness Sherman testified that FERC policy and practical reasons indicates that there should be one set of LEO criteria rather than separate criteria for each utility. MEIBC witness Sherman testified that:

FERC's directive to establish "standards" around LEO criteria implies generally applicable policies, not policies that differ by utility. In addition to the challenges that non-uniform standards may present to utilities, there is no policy or business justification for establishing different LEO standards for each utility. Developers would likely be adversely impacted by non-uniform standards, as it would be a difficult and unnecessary burden to adjust and comply with different criteria depending on which utility would be the off taker of a QF's energy and/or capacity. In addition, as is borne out by the lack of intervening parties in this docket, the establishment of multiple contested cases to determine LEO criteria on a utility by-utility basis is incredibly burdensome on interested parties, many of whom are unable to participate in multiple contested case proceedings.

See 2 TR 116-117.

Consumers witness Walainis testified that Consumers also believes that there should be a uniform set of LEO criteria for all Michigan utilities.

Yes, there should be one set of LEO standards for all Michigan utilities. If the Commission desires to adopt specific criteria for the formation of a LEO, the Commission should consider such criteria in a proceeding that involves all Michigan utilities. There should be uniformity in the LEO criteria required of all Michigan utilities so that one or more utilities are not required to utilize a potentially less stringent LEO standard. In DTE Electric Company's recent PURPA avoided cost case in Case No. U-18091, the Commission approved changes to the structure of DTE Electric Company's Standard Offer "in the interest of more uniform QF development across the State." Case No. U-18091, July 31, 7 2017 Opinion and Order, page 21. The Commission should reach a similar finding with respect to the criteria for LEO formation.

See 2 TR 51-52

The Commission in its orders in U-20905 directed each utility identified in its orders to prepare and file LEO criteria with the Commission. It is clear from those orders that the Commission's intent was to allow each Michigan utility to prepare and present to the Commission, under a separate docket, proposed LEO criteria specifically tailored to each utility. If the Commission determined that one uniform set of LEO criteria was needed the Commission could have directed all regulated utilities to file their proposed LEO criteria under the same docket and then, based on the evidence submitted, adopt a single set of LEO criteria. However, the Commission chose to have Michigan utilities file their LEO criteria under separate dockets. Because of this it is not possible, for a variety of reasons related to due process, for the Commission to now adopt LEO criteria in this proceeding, and apply the criteria to any utility other than Consumers. Additionally, the LEO criteria proposed by MEIBC cannot apply to other Michigan utilities with current and recently approved Commission LEO criteria. In the last calendar year, the Commission has approved LEO criteria for:

- Indiana Michigan. See U-21127 See Order dated February 14, 2022

- Upper Peninsula Power Company. See U-21129 UPPCO, Order dated April 14, 2022,
- Upper Michigan Energy Resources Company. See U-21130 Order dated May 12, 2022, and
- DTE Electric in U-18091 See Order dated July 7, 2022.

Contrary to MEIBC witness Sherman and Consumer witness Walainis testimony it is not possible for the Commission to apply the LEO criteria adopted in this matter to all Michigan utilities. Therefore, for the reasons above I recommend the Commission reject MEIBCs proposal to apply the LEO criteria in this proceeding to any utility other than Consumers.

IV.

CONCLUSION

For the reasons stated above I recommend the Commission do the following:

1. Adopt Consumers' proposed Criterion 1, 2(i),2(ii),2(iii), 2(iv), 2(v), 2(vi), 2(vii), Criterion 3, 4 with clarifying language, and Criterion 5.
2. Not adopt Consumers' proposed Criterion 6 and adopt Staffs' proposed Criterion 6.
3. Not adopt Consumers' proposed Criterion 7 and adopt Staff's proposed Criterion 7.
4. Adopt Consumers' proposed Criterion 8.
5. Adopt Staffs' proposed Criterion 9.
6. Adopt Consumers proposed Criterion 10.
7. Adopt Consumers proposed 90 -day LEO review period.

8. Adopt Consumers proposed LEO abrogation criteria.
9. Adopt the LEO study deposit amounts provided on page 84 of this PFD.
10. Reject MEIBC's proposal that the LEO criteria approved by the Commission in this proceeding apply to all Michigan utilities.

MICHIGAN OFFICE OF ADMINISTRATIVE
HEARINGS AND RULES

For the Michigan Public Service Commission

**Martin D.
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Martin D. Snider
Administrative Law Judge

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