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 INDIANA MICHIGAN POWER COMPANY For approval of a Power Supply Cost Recovery Plan and factors (2022)	)))))	Case No. U-21052

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 March 29, 2023.

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 April 19, 2023, or within such further period as may be authorized for filing exceptions. If exceptions are filed, replies thereto may be filed on or before May 3, 2023.

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

Jonathan F. Thoits

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Date: 2023.03.29 09:35:23 -04'00'

March 29, 2023
Lansing, Michigan

Jonathan F. Thoits
Administrative Law Judge

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 INDIANA MICHIGAN POWER COMPANY For approval of a Power Supply Cost Recovery Plan and factors (2022)	)))))	Case No. U-21052

PROPOSAL FOR DECISION

I.

PROCEDURAL HISTORY

On September 30, 2021, Indiana Michigan Power Company (I&M) filed its application with the Public Service Commission pursuant to MCL 460.6j, 1982 PA 304 (Act 304) requesting approval of its Power Supply Cost Recovery (PSCR) plan and monthly PSCR Factors for the 12-month period January 2022 through December 2022. I&M's application sought approval of a PSCR factor of 6.23 mills per kilowatt-hour (kWh). In addition, I&M submitted for the Commission's review a 5-year forecast of projected power supply requirements of the company's customers, along with the sources and costs of supply to meet the same.

Pursuant to due notice, a pre-hearing conference was conducted on December 14, 2021. I&M and Commission Staff appeared at that proceeding, the

Attorney General intervened by right, and intervention was granted to Sierra Club and the Citizens Utility Board (CUB).[1]

Based upon the schedule established at the pre-hearing conference, the hearing was held on May 10, 2022. During the hearing, I&M entered the testimony of the following employees:

1. Hazel A. Baker, Resource Planning Analyst in the Corporate Planning and Budgeting Department, (Direct);

2. Keith A. Steinmetz, Manager of Nuclear Engineering, (Direct);

3. Justin R. Ray, Manager of Transportation, Logistics, and Railcar Fleet in the Commercial Operations Division, (Direct);

4. Shelli A. Sloan, Director of Financial Support and Special Projects in the Corporate Planning and Budgeting Department, (Direct);

5. Michelle M. Howell, Director of Transmission Settlements, (Direct);

6. Jason E. Walcutt, Senior Regulatory Consultant in the Regulatory Services Department, (Direct);

7. Jason M. Stegall, Manager of Regulatory Pricing and Analysis, (Direct and Rebuttal).

Through these witnesses, I&M entered exhibits IM-1 through IM-23.[2]

Commission Staff entered the direct testimony of Raushawn Bodiford, an engineer in the Act 304 and Sales Forecasting Section, and entered the exhibits S-1 and S-1C.

Sierra Club entered the direct testimony of Devi Glick, a principal associate at Synapse Energy Economics, an energy research and consulting firm, and through her Sierra Club entered exhibits SC-1 through SC-37, and SC-43 through SC-51.

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[1] I Tr 7.

[2] Certain testimony and exhibits filed by the parties in this case are deemed confidential and have been filed under seal.

The other intervening parties did not offer any evidence, did not participate in the cross-examination of any witnesses, and did not file any briefs.

The evidentiary record is contained in the testimony and exhibits bound into the record during the May 10, 2022 hearing. I&M, Staff, and Sierra Club filed initial briefs on June 7, 2022.[3] I&M and Sierra Club filed reply briefs on June 28, 2022.

II.

STATUTORY REQUIREMENTS

Public Act 304 of 1982 (Act 304), among other things, governs PSCR clauses, annual PSCR plan cases, and annual PSCR reconciliation cases for electrical utilities. Specifically, Act 304 provides for a PSCR clause that "permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility, incurred under reasonable and prudent policies and practices." MCL 460.6j(1)(a).

Subsection 6j(3) of Act 304 requires a utility with a PSCR clause to annually file a complete PSCR plan describing the expected sources of electric power supply and the changes in the cost of power supply anticipated over a future 12-month period. Based on this information, the utility is to request specific PSCR factors for each of the 12 months covered by its PSCR plan. The PSCR plan must also describe all major contracts and power supply arrangements for the 12-month period.

[3] Sierra Club filed a public, redacted initial brief and a confidential initial brief.

Subsection 6j(4) of Act 304 requires the utility to file--contemporaneously with the submission of its PSCR plan--a five-year forecast of its power supply requirements, its anticipated sources of supply, and its projections of power supply costs, all in light of its existing sources of electrical generation and sources of electric generation under construction.

Subsection 6j(5) of Act 304 provides that, after a utility files its PSCR plan and five-year forecast, the Commission is to conduct a proceeding to review the reasonableness and prudence of the PSCR plan and to establish PSCR factors for the period covered by the plan.

Subsection 6j(6) of Act 304 provides that, in its final order in a PSCR plan case, the Commission shall evaluate the reasonableness and prudence of the decisions underlying the utility's plan, and shall approve, disapprove, or amend the plan accordingly. In evaluating the decisions underlying the utility's plan, the Commission shall consider the cost and availability of the electrical generation open to use by the utility; the cost of available short-term firm purchases; the availability of interruptible service; the ability of the utility to reduce or eliminate any firm sales to out-of-state customers (if the utility is not a multi-state utility whose firm sales are subject to other regulatory authority); whether the utility has taken all appropriate steps to minimize the cost of fuel; and other relevant factors. In its final order, the Commission must approve, reject, or amend the 12 monthly PSCR factors requested by the utility, which factors shall not reflect any items that the Commission could reasonably anticipate would be disallowed under Subsection 6j(13), which sets forth the criteria to be considered in a

subsequent PSCR reconciliation concerning the 12-month period covered by the plan in question.

Subsection 6j(7) of Act 304 provides that the Commission must evaluate the decisions underlying the 5-year forecast filed by a utility. The Commission may also indicate any cost items in the 5-year forecast that, on the basis of present evidence, the Commission would be unlikely to permit the utility to recover from its customers in rates, rate schedules, or power supply cost recovery factors established in the future. This is colloquially known as a "Section 7 warning."

III.

THE 2022 PSCR PLAN AND 5-YEAR FORECAST

Except as detailed below, I&M's proofs concerning several components of its PSCR Plan and 5-year Forecast were unrefuted. Those components include for the period of 2020 through 2024 annual and monthly projections of: sales forecast by customer class; energy requirements; generating capacity; annual peak energy and load factors; energy sources from generation and purchased power; costs associated with those energy sources, i.e., fossil, nuclear, hydro, wind and solar; and coal purchasing strategy. In addition, I&M provided extensive evidence on the basis and methodology used to develop the projections. Based on this record, the projections for these categories as used to develop the proposed PSCR factor should be accepted. The sole components of the Plan and Forecast that are at issue are the projected costs for purchased power from 2020 through 2024 under an Inter-Company Power Agreement (ICPA) with the Ohio Valley Electric Corporation (OVEC), and I&M's unit commitment decisions at the Rockport power plant.

The projected purchases by MWh from OVEC for the Plan Year and 5-Year Forecast are detailed in Ex. IM-8 and IM-9. Those costs, which are I&M's share of OVEC's surplus generation at a price set in the ICPA, are a component of the projected $56,700,000 in non-affiliated PSCR costs I&M projects for the Plan Year.[4] For the 5-year Forecast period, non-affiliated purchased power costs range between $57,689,000 in 2022 to $66,127,000 in 2024.[5] The Sierra Club contends the costs under ICPA are excessive compared to the equivalent market services, and I&M's customers should not be responsible for them. Staff contends the costs are reasonable and should be recovered through the reconciliation process.

Mr. Stegall provided testimony regarding I&M's share of energy received from OVEC under the relevant ICPA, as well as an overview of the history of the ICPA.[6] Mr. Stegall testified that I&M and its customers benefit from the ICPA, and the company uses its 7.85% share of OVEC's capacity to help meet its own capacity requirements in PJM, the Regional Transmission Organization (RTO) to which the company belongs.[7] Mr. Stegall testified that the OVEC ICPA is a "net benefit" to I&M's customers, the company's continued participation in the ICPA is reasonable, and any change to the ICPA would require approval by the Federal Energy Regulatory Commission (FERC) and the other companies that sponsor the agreement.[8]

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[4] 3 Tr 117-118; Ex. IM-14.
[5] Ex. IM-16.
[6] 3 Tr 134-135.
[7] 3 Tr 136.
[8] 3 Tr 141.

IV.

CHALLENGES TO THE 2022 PSCR PLAN & 5-YEAR FORECAST

A. Sierra Club

The Sierra Club takes issue with the PSCR costs in both the Plan and Forecast attributed to the ICPA with OVEC. Specifically, the Sierra Club argues:

1. The ICPA is substantially higher cost than the value of the products and services provided by OVEC to I&M and therefore the OVEC contract is not reasonable or prudent under current market conditions for the 2022 plan year.

2. The OVEC contract is likely to cost more than equivalent market products and services during the five-year forecast period from 2022 to 2026, based on I&M's own forecasts of PJM market prices (energy and capacity) and from other power purchase benchmarks and agreements.

3. I&M has been purchasing power from OVEC under the ICPA at above market value and passing those costs on to customers at least since 2017, and therefore there is no valid claim that the high costs of the OVEC contract in the years at issue here are anomalous.

4. I&M and [sic] has not demonstrated reasonable management of its OVEC contract, including by approving or acquiescing to the ELG/CCR capital expenditures and failing to take any steps to end self-scheduling of the OVEC units into the PJM energy market.

5. The Commission should issue a Section 7 warning to I&M that on the basis of present evidence it will likely disallow I&M's recovery of the Michigan jurisdictional share of compensation for the ICPA in 2022-2026.

6. The Commission should confirm its finding that OVEC is an "affiliate" of I&M under the Michigan Code of Conduct.

7. The Commission should apply the Code of Conduct and direct a disallowance equal to the difference between the payments I&M makes under the ICPA and the costs that I&M ratepayers would pay for the same amount of energy and capacity at market prices.

8. The Commission should warn I&M that it will disallow recovery in future fuel cost reconciliation dockets of the fuel portion of all net revenue losses incurred as a result of imprudent unit commitment decisions at Rockport.[9]

Sierra Club asserts that the OVEC ICPA incurs excessive costs such that it is not reasonable or prudent under current market conditions for either the 2022 plan year or the forecasted years 2022-2026.[10] Sierra Club contends that the ICPA has provided services at a significantly higher cost than equivalent PJM capacity auction prices since at least 2017.[11] Sierra Club also projects that from 2022 to 2026, the ICPA will cost I&M approximately $83.7 million in present value terms more than the market value of services provided.[12]

Sierra Club argues that I&M has long been aware of the uneconomic nature of the ICPA because a 2016 report by AES Services Corp presented to OVEC's Board of Directors assessed a negative valuation of the ICPA.[13] In a similar vein, Sierra Club asserts that Duke Energy Ohio and FirstEnergy Solutions—two other utilities that are also OVEC co-sponsors—have likewise determined that the OVEC ICPA is uneconomical.[14] Ms. Glick also testified that in 2018 the credit rating agency Moody's conducted an assessment of the ICPA that, when scaled to match I&M's share, suggested annual losses ranging from $16 million to $20 million.[15]

Sierra Club also provides benchmarks for long-term supply agreements to compare against the ICPA in response to the Commission's previous statement that

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[9] Sierra Club Initial Brief, p. 4.
[10] Id, p. 13.
[11] Id, p. 13-14; 3 Tr 264.
[12] Id, p. 14.
[13] Id, p. 15-16; 3 Tr 267; Ex. SC-19C.
[14] Id, p. 16; Ex. SC-16 and SC-17; 3 Tr 266; 3 Tr 266-267.
[15] 3 Tr 267; Ex. SC-18; Sierra Club Initial Brief, p. 16.

long-term supply options were appropriate for cost comparisons with the OVEC ICPA.[16] Ms. Glick asserts that the cost per MWh of the ICPA was higher than any of the alternative long-term supply options identified by Sierra Club.[17] Sierra Club argues that its data shows that even the cost of new entry (CONE) for building a new power plant is lower than paying OVEC demand charges.[18] In response to criticism that some of the long-term supply options were non-dispatchable renewable resources, Sierra Club argues that the Commission never limited the resource types for consideration and that in any event a combined solar and battery storage option is a dispatchable renewable resource.[19]

Sierra Club rejects I&M's contention that the ICPA should be compared with the Consumers Energy power purchase agreements (PPA) with Michigan Power Limited Partnership (MPLP) and North American Natural Resources, Inc. (NANRI) or compared with the transfer price construct from the Commission's renewable energy plan docket.[20] Sierra Club argues that the facilities underlying the referenced Consumers Energy PPAs—a 125 MW gas generator and a 4.8 MW landfill gas generator—are inapt comparisons to OVEC, and that the MPLP PPA costs less per MWh than the OVEC ICPA, which supports a disallowance.[21] Sierra Club argues that it is inappropriate to use the Commission's transfer price construct because it was not intended by the Commission to represent the market cost of a long-term supply option for a single year

[16] Sierra Club Initial Brief, p. 17; 3 Tr 275.
[17] Id, p. 18; 3 Tr 275.
[18] Id, p. 19.
[19] Id, p. 19.
[20] Id, p. 20.
[21] Id, p. 22.

and would effectively compare the cost of OVEC coal plants built in 1955 with the average cost of power for the next 20 years of a new gas plant built this year.[22]

Sierra Club asserts that I&M made no effort to convince other OVEC Operating Committee members to correct OVEC's uneconomic unit commitment practices.[23] Sierra Club also points out that I&M either supported or acquiesced to OVEC's decision to perform environmental upgrades to comply with new regulations rather than retire its two coal plants, and those upgrades carry a nine-figure price tag that will be partially paid for by I&M's Michigan customers through the PSCR.[24] Sierra Club contends that I&M's approval or acquiescence to OVEC's commitment to make a nine-figure capital expenditure on already uneconomic power plants is "a blatant failure of oversight or reasonable and prudent decision-making."[25] Sierra Club argues that it would be inappropriate to permit recovery of these costs from Michigan customers in the PSCR because I&M never received Commission approval for taking on its share of environmental upgrade costs at OVEC and never submitted an economic analysis of OVEC until I&M's 2022 IRP.[26]

B. Staff

Staff asserts that the I&M's plan is reasonable and prudent, and recommends that the Commission approve the utility's plan as filed.[27]

Mr. Bodiford testified that Staff reviewed the company's filing to assess the reasonableness and prudence of the plan.[28] He indicated that Staff's review found that

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[22] Id., p. 23, 24.
[23] Id., p. 25.
[24] Id., p. 27; 3 Tr 282.
[25] Id., p. 27.
[26] Id., p. 28; 3 Tr 283.
[27] Staff brief, p. 9.

I&M's plan "did not introduce any new issues" and is consistent with past Commission approvals.[29] Mr. Bodiford added that I&M's plan assumes utilization of its existing resources and that the projections that produce the factors provide a reasonable representation of future events.[30]

Staff describes I&M's share of OVEC energy and capacity costs as the "one sticking point in this case[,]" and Staff asserts that I&M's projected OVEC costs, which are incorporated into the PSCR billing factor for the 2022 plan year, are reasonable.[31] According to Mr. Bodiford, I&M's discussion of OVEC costs satisfies the company's obligations pursuant to the May 13, 2021 Commission order in Case No. U-20529 that directed the company to demonstrate that the amended OVEC ICPA, as an affiliate contract, is in compliance with the pricing provisions of Rule 8(4).[32] Staff contends that I&M presented testimony and exhibits demonstrating that the OVEC cost of capacity was significantly less than the company's embedded cost of capacity.[33] Mr. Bodiford also noted that with the exception of 2020 -- a year characterized by a disruptive global pandemic -- OVEC has been profitable on an energy-only basis and has returned to profitability during the 12-month period ending June 2021.[34] For those reasons, Staff asserts that I&M's projected OVEC ICPA costs are reasonable for the purposes of establishing a PSCR billing factor, adding that this assessment "is not a long-term

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[28] 3 Tr 375.
[29] 3 Tr 375.
[30] 3 Tr 375.
[31] Staff brief, pp. 3, 5.
[32] 3 Tr 381-382; Staff brief, p.4, 7-8.
[33] Staff brief, p. 4; 3 Tr 382 and Ex. I&M-22.
[34] Id., p. 4; 3 Tr 382.

recommendation on the reasonableness of the OVEC ICPA for customers" and that the agreement will be evaluated again in the 2023 PSCR plan.[35]

Staff contends that it has evaluated some of Sierra Club's arguments, but that "none of them warrant a disallowance."[36] Staff noted that Sierra Club claims that I&M inappropriately pays OVEC above-market prices for power in violation of the Code of Conduct, while I&M contends that the Code of Conduct does not apply because I&M does not view OVEC as an affiliate.[37] Staff asserts that the Commission has already resolved both issues by determining that the Code of Conduct applies and that long-term OVEC contract costs should not be compared to short-term market purchases.[38]

Staff also disagrees with Sierra Club and asserts that there is no need for the Commission to issue a warning that it may disallow Rockport fuel costs because of uneconomic commitment practices.[39] Staff asserts that I&M "has done nothing to merit a warning[,]" arguing that the company is complying with previous orders to document its commitment decisions, and that the company's commitment decisions regarding the Rockport facility are already under review in I&M's 2021 PSCR reconciliation proceeding.[40]

V.

ANALYSIS

In prior Orders, the Commission has set forth principles and made findings applicable to the contested issues in this case.

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[35] Staff brief, p. 5; 3 Tr 383.
[36] Id., p. 5-6.
[37] Id., p. 6.
[38] Id., p. 7, citing Case No. U-20529, Order, May 13, 2021, p. 17-18.
[39] Id., p. 8.
[40] Id., p. 9.

In I&M's 2018 PSCR plan case, the Commission stated:

> [T]he utility has a responsibility to arrange least-cost fuel and purchased power to serve customers under Michigan's Act 304. Part of this responsibility involves the utility examining existing contracts as market conditions or other factors change over time and pursuing amendments or new contractual arrangements for fuel or power supply through good faith negotiations (with affiliates or independent third parties as applicable) and/or filings at FERC to institute changes. Thus, the question at issue here is whether I&M demonstrated it acted in a reasonable and prudent manner in this regard or has been complacent by not pursuing changes to the existing affiliate wholesale power agreement.
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> . . .
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> I&M must demonstrate to this Commission, in the PSCR reconciliation proceeding and future plan cases, that its wholesale purchases from affiliates are just and reasonable under current market conditions, tax structures, and I&M's participation in PJM Interconnection, L.L.C. (PJM), and that the utility is taking appropriate actions to minimize costs to ratepayers pursuant to Act 304. [41]

Similarly, in I&M's 2020 PSCR plan case, while addressing the ICPA, the Commission stated:

> . . . the Commission also has the duty under statute to continuously evaluate the reasonableness of the PSCR plan and factors, including the cost arising under the ICPA and its amendments. This is particularly true for cases involving affiliate transactions that implicate the Code of Conduct.
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> . . .
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> the Commission has previously held that a recognition of the benefits of long-term agreements does not absolve a utility from monitoring and responding to market conditions and system needs and making good faith efforts to manage existing contracts [including] meaningful attempts to renegotiate contract provisions to ensure continued value for ratepayers as market conditions change.
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> . . .
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> [O]n a going forward basis, the Commission , . . will look to comparisons with other long-term supply options as informative as to whether this particular contract adheres to the requirements of the Code of Conduct.'[42]

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[41] Case No. U-18404, Order, June 7, 2019, p. 7-8 (citations omitted).

[42] Case No. U-20529, Order, May 13, 2021, pp. 13-15, 18-19 (citations and quotations omitted). See, also, Case No. U-20530, Order, February 2, 2023, p. 10-11.

In that case, the Commission also stated that "because the ICPA contractual rates may vary from year to year, under Act 304, each PSCR case involves a new plan with appropriate PSCR factors in which the Commission determines the reasonableness and prudence of the PSCR plan."[43] The Commission also stated:

> Similarly, the Commission recently held that the additional scrutiny of the Code of Conduct compliance in the reconciliation proceedings is particularly applicable when the costs to be addressed have not been previously adjudicated by the Commission on the merits under the Code of Conduct or under Act 304, despite previous Commission approval for recovery of contract costs. The ICPA and amendments, in this case, have similarly not been subjected to scrutiny under the Code of Conduct, despite prior Commission approval for recovery of the associated costs.[44]

Finally, in I&M's 2019 PSCR reconciliation case, the Commission questioned whether the ICPA is in the best interests of I&M's customers.

> The Commission . . . reiterates that I&M remains under a continuing obligation to demonstrate the reasonableness and prudence of its power supply arrangements, especially when the transaction is between affiliates. This is particularly true given the evidence on the record that when considering total costs – and not just the variable energy costs – OVEC's costs will exceed revenues attributable to the plant for the foreseeable future, ultimately resulting in higher costs for I&M's customers. . . the Commission expresses its ongoing concern relating to the fundamental economics of the OVEC units and whether I&M's continuing participation in the ICPA is truly in the best interest of its customers.[45]

In I&M's 2020 PSCR reconciliation case, the Commission reiterated the applicability of the Code of Conduct here:

> The very purpose of the Commission's Code of Conduct is to protect customers from exactly this type of arrangement, namely where a utility contracts with an affiliate for above-market-cost power to the detriment of its customers. I&M, of course, remains free to continue to make whatever business decisions it wishes in terms of continuing to participate in the ICPA. What it cannot do is continue to

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[43] Id., p. 10. See, also, Case No. U-20530, Order, February 2, 2023, p. 10, 12.
[44] Case No. U-20529, Order, May 13, 2021, p. 17-18 (citations omitted). See, also, Case No. U-20530, Order, February 2, 2023, p. 10.
[45] Case No. U-20224, Order, June 23, 2021, p. 12.

> recover the costs of any unreasonable and imprudent decisions from its customers.[46]
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> . . .
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> The Commission agrees . . . that Act 304 and the Code of Conduct must be read in harmony, and the fact that I&M must meet the standards of Act 304 for all of its PSCR costs, and must meet Code of Conduct requirements for costs incurred with affiliates, does not mean that the Code of Conduct conflicts with PSCR statutes.[47]

A. The OVEC ICPA

Ms. Glick asserts that I&M estimates it will lose $83.7 million in energy market revenue and capacity value over the PSCR plan year (2022) and the five-year forecast period (2022-2026) (on a present value basis) by purchasing energy and capacity from OVEC under the ICPA.[48] As such, Sierra Club asserts that the OVEC costs that I&M proposes to recover are unreasonable under Act 304 standards and in excess of the market price cap in the Code of Conduct.[49] This PFD agrees.

Ms. Glick states that in 2021, I&M was billed $51,934,878 by OVEC for 794,000 MWh, which calculates to a cost of $65.41/MWh.[50] Ms. Glick adds that for the ICPA to be economical on a forward-going basis the capacity portion of OVEC's services would have to be valued at an average of $485/MW-Day over the PSCR forecast period (2022–2026), which is substantially higher than the PJM cost of new entry ("CONE") values calculated by Brattle Group in 2018. She asserts that it is not reasonable or prudent to assume capacity prices at this level will ever materialize, let alone be

[46] Case No. U-20530, Order, February 2, 2023, p. 12-13.
[47] Id., p. 18.
[48] 3 Tr 255.
[49] 3 Tr 256.
[50] 3 Tr 258-259, citing Ex. SC-3, Ex. SC-4, Ex. SC-5, Ex. SC-6, Ex. SC-7.

sustained over a period of time.[51] Ms. Glick adds that I&M tries to obscure the fact that the cost for power under the ICPA has been significantly above-market since 2017 by claiming that OVEC has been profitable on an energy-only basis in every year except 2020, but states that this ignores that over half of the charges billed by OVEC to I&M for demand charges, which are significantly larger than the associated capacity value.[52]

In support of her assertions, Ms. Glick states that there are several long-term supply comparisons which evaluate whether the costs charged under the ICPA are reasonable and compliant with the Code of Conduct, including: (1) the costs billed or paid by other entities for similar services provided under long-term PPAs; (2) the cost of replacement capacity resources as represented by the CONE; (3) the cost of replacement capacity and energy resources as represented by responses to requests for proposals (RFP) and other Company information; and (4) the PJM short-term capacity and energy market, which are summarized below:

> Consumers Energy's power purchase agreement (PPA) with the Midland Cogeneration Venture (MCV): $56.65/MWh
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> Purchase Price of Rockport 2: $40.34/MWh
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> Cost of new entry (CONE) for a natural gas combined-cycle (NGCC) plant: $62.14/MWh
>
> CONE for combustion turbine (CT) natural gas generator: $60.11/MWh
>
> PJM base residual auction (BRA): $45.69/MWh
>
> I&M's request for proposal (RFP) for new renewable wind and solar resources conducted for its 2021 IRP: $44.00-$50.00/MWh

[51] 3 Tr 262-263.
[52] 3 Tr 263.

> Northern Indiana Public Service Commission's (NIPSCO) renewable resource RFP results: $37.10/MWh for wind, $39.30/MWH for photovoltaic (PV) solar, and $43.30/MWh for combined PV solar and battery storage.[53]

Sierra Club argues that with a cost of $65.41/MWh in 2021, and I&M's projected cost of $63.91/MWh in 2022, the OVEC ICPA is more expensive than any of the identified alternative sources of supply.[54]

In addition, Ms. Glick states that several forward-looking analyses on the economics of maintaining and operating the OVEC units were conducted, with findings aligned with her findings from her analysis of the ICPA, including

> In March 2017, Duke Energy Ohio, an OVEC sponsor, hired ICF International to conduct forward-looking analysis which projected losses in the ICPA scaled to I&M's share of $67 million relative to market alternatives between 2020 and 2025.
>
> In April 2019, FirstEnergy Solutions, another OVEC sponsoring company, had a similar forward-looking analysis conducted through 2040 and found projected losses, scaled to I&M's share, of $267 million relative to market alternatives.
>
> In December 2018, Moody's Analytics conducted an assessment of the ICPA, and scaled to I&M's share, found annual losses of $16–$20 million.
>
> In 2015 and 2016, I&M's AEP affiliate AEPSC performed a forward looking analysis of the ICPA (Merchant Analysis), [redacted][55]

For its part, Staff determined that I&M's projected OVEC costs were reasonable. In that regard, Staff relied on I&M's comparison of I&M's embedded cost of capacity to the cost of capacity purchased through the ICPA – which showed the OVEC capacity costs significantly less than I&M's embedded capacity costs -- and I&M's comparison of net energy revenues from the sale of OVEC energy and the billing for OVEC energy

[53] 3 Tr 275.
[54] Sierra Club Initial Brief, p. 18.
[55] 3 Tr 265-267; 3 Tr 315-317 (confidential)

costs – which show that, except during the 2020 Covid year, OVEC has been profitable on an energy only basis.[56]

However, as Sierra Club argues, comparing OVEC capacity cost to the cost to the embedded cost of I&M's fleet of capacity resources is not an apt comparison as the Commission asked for a comparison of OVEC costs to other long-term supply benchmarks, and as I&M's embedded cost of capacity includes OVEC and thus is not a comparison of OVEC to something else.[57]

For its part, I&M offered numerous arguments against the recommendations proposed by Sierra Club.

In challenging Sierra Club's benchmarks, I&M asserts the Sierra Club's calculated cost of $65.41/MWh is not in I&M's PSCR forecast. Rather, I&M asserts that $51.9 million in total ICPA costs for approximately 812,647 MWh results in a cost of $63.91 MWh.[58] However, this PFD notes that even at I&M's calculated cost figure, the OVEC ICPA total costs are higher than all of the OVEC cost benchmarks provided by Sierra Club.[59]

I&M asserts that Ms. Glick's analysis of capacity costs is invalid as it is based on her valuation of the capacity purchased under the ICPA at RPM auction capacity prices when I&M is an FRR entity that does not participate in the RPM auctions.[60] This PFD notes that in I&M's 2019 PSCR reconciliation case, while the Commission was "unpersuaded" that "a comparison between the short-term PJM capacity market and the

[56] Staff brief, p. 4.
[57] Sierra Club Initial Brief, p. 14.
[58] 3 Tr 156.
[59] Sierra Club Initial Brief, p. 18.
[60] 3 Tr 149.

OVEC ICPA" was sufficient to warrant a disallowance, the Commission did find that the evidence in that case indicated that when considering total costs, OVEC's costs "will exceed revenues attributable to the plant for the foreseeable future, ultimately resulting in higher costs for I&M's customers."[61]

As its own market comparison in this case, Mr. Stegall states that Staff identified the 2022 transfer price to be $63.16 MWh, which I&M notes is slightly below I&M's $63.91 forecast price.[62] Sierra Club counters that this proposed market comparison is problematic. Sierra Club argues that this transfer price is based on the levelized cost of a new natural gas plant that began operating in 2022 rather than an existing plant which began operating in 1955.[63] Moreover, Sierra Club states that the Commission has recognized that the transfer price is not intended to reflect actual conditions. See Case No. U-15806, where the Commission noted that "[t]he transfer price is simply a mechanism for estimating and allocating the reasonable and prudent costs of renewable energy between the PSCR and the REP surcharge", and Case No. U-17302, where the Commission instructed that the transfer price schedule was appropriate "for planning purposes, such as the calculation of surcharges, only."[64]

I&M asserts that Ms. Glick's benchmarks do not include two additional PPAs referenced in Ms. Glick's exhibit -- Michigan Limited Power Partnership (MLPP) and North American Natural Resources, Inc. (NANRI) – on which I&M relies as its own

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[61] Case No. U-20224, Order, June 23, 2021, p. 7, 12. See, also, Case No. U-20529, Order, May 8, 2020, p. 14 ("[T]he comparison to the PLM capacity market is insufficient, on its own, to warrant a disallowance.").
[62] 3 Tr 161.
[63] 3 Tr 227-228; Ex. SC-2, Ex. SC-50, SC-51.
[64] Sierra Club Initial Brief, p. 23-24, quoting Case No. U-15806, Order, August 25, 2009, p. 12, and Case No. U-17302, Order, December 19, 2013, p. 18.

additional benchmarks. Mr. Stegall states that he calculated that if the ICPA was billed under the MPLP rate structure, it would cost $61.99 MWh and that if the ICPA was billed under the NANRI rate structure, it would cost $66.84 MWh.[65] However, as Sierra Club notes, Mr. Stegall testified that while both of these PPAs "are based on coal-fired generation," he clarified that his statement referred to how the PPAs were priced and not to the fact that MLPP and NANRI are coal-fired generators like OVEC's.[66] In addition, Mr. Stegall acknowledged that he did not know whether MLPP is a 125 MW natural gas generator and that NANRI is a 4.8 MW landfill gas facility.[67] Moreover, as Sierra Club notes, MLPP is lower priced than OVEC.[68]

I&M argues that the other analyses offered by Ms. Glick in support of her conclusions – the Merchant Analysis, the Duke analysis, FirstEnergy analysis and Moody's Analytics assessment – should be disregarded by the Commission as these involved information not known to I&M at the time of the ICPA extensions.[69] In addition, I&M notes that the Duke, FirstEnergy and Moody's analyses were previously considered by the Commission in Cas No. U-20529, with the Commission deciding that Sierra Club's case for disallowance of ICPA costs was insufficient, and that these analyses are offered to establish matters asserted by authors other than Ms. Glick and that I&M is unable to probe the accuracy and reliability of the factual claims included in these analyses.[70]

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[65] 3 Tr 156-157.
[66] 3 Tr 212-213.
[67] 3 Tr 215-216.
[68] Sierra Club brief, p. 22.
[69] I&M initial brief, p. 32, 33-34.
[70] Id., p. 33-34.

However, this PFD notes that I&M did not object to the admission into evidence of these analyses.[71] Moreover, this PFD notes that the Commission specifically relied on these analyses in issuing I&M a Section 7 warning that I&M may not be able to recover its full costs under the ICPA as part of its 2021 PSCR plan. See, Case No. U-20804, Order, November 18, 2021, p. 20:

> The record shows that independent analyses and those conducted by OVEC Sponsors demonstrate that on a forward-looking basis the operation of the OVEC units is uneconomical. . . . Based on the above analyses, the Commission finds that a Section 7 warning is appropriate in this case.

Ms. Glick references I&M's November 30, 2021 net present value (NPV) analysis filed pursuant to its IRP case (Case No. U-21189), asserting there are discrepancies between that analysis and the data I&M submitted in this case.[72] Mr. Stegall counters that the IRP case is the appropriate forum to address the NPV analysis.[73] This PFD agrees that the NPV analysis is not part of the evidentiary record in this case and was not considered by the Commission in the IRP case. This PFD notes that this IRP case was recently settled, with the Commission's order approving the settlement stating that the Commission was not approving any costs incurred pursuant to the ICPA. See, Case No. U-21189, Order, February 2, 2023, p. 101: ("The Commission notes that the settlement agreement results in no cost approvals of any kind with regard to the OVEC ICPA. . . . Costs will continue to be reviewed in other proceedings such as the PSCR plan and reconciliation proceedings, as will the reasonableness and prudence of the ICPA.")

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[71] 3 Tr 245-246.
[72] 3 Tr 267.
[73] 3 Tr 151.

Regarding I&M's challenges to Sierra Club's comparisons, this PFD concludes that while all the comparisons offered by Sierra Club may not be comparable to the OVEC ICPA in every respect for some of the reasons offered by I&M, these nevertheless provide general benchmarks showing that there are other, lower cost options of long-term supply that are less expensive than the ICPA. Moreover, the Commission recently recognized this point as well.[74] This PFD finds the comparison of the ICPA to the Consumers-MCV PPA particularly relevant given the Commission's most recent statement that comparisons with past power transactions "are the fairest benchmark" for calculating a disallowance.[75]

Ms. Glick asserts that I&M has the "authority" under the ICPA to "exercise control over at least some of the operational and management decisions at OVEC," and that instead of invoking that authority, I&M has passed increasing energy costs and demand charges on to I&M's customers without any documented effort to reduce costs through the "exercise of its ownership stake in OVEC."[76] Similarly, Sierra Club argues that I&M and its parent company AEP have "substantial control" over OVEC, that I&M and AEP have "more sway over OVEC" than any other entity, and that I&M and AEP "have voting control" of Indiana-Kentucky Electric Corporation (IKEC) which owns the Clifty Creek plant.[77] These assertions are unsupported by the record in this case.

First, I&M does not have an "ownership" interest in OVEC. The OVEC Annual Report 2020, p. 1 (Ex. SC-2, p. 2) lists those with an ownership interest ("current

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[74] Case No. U-20530, Order, February 2, 2023, p. 11 ("The Commission "notes that it would be difficult to produce comparisons that are 100% identical to the OVEC units", but that "comparisons can be made.")
[75] Case No. U-20530, Order, February 2, 2023, p. 11.
[76] 3 Tr 284.
[77] Sierra Club Initial Brief, p. 9-10.

Shareholders") and the extent of their ownership interest ("their respective percentages of equity") in OVEC, and I&M is not listed as having any ownership interest. (On that same page, I&M is included in the list of Sponsoring Companies which share the "OVEC power participation benefits and requirements" in the percentages listed, with a 7.85% beneficial interest.)

Second, I&M does not have authority to exercise control over the operational and management decisions at OVEC. As Mr. Stegall states – and for which as Sierra Club has failed to provide any contradictory evidence – OVEC is governed by an Operating Committee that includes only one representative for all AEP subsidiaries including I&M.[78]

Third, the fact that I&M and AEP may control the Board of Directors of IKEA is irrelevant regarding operational control of one (Clifty Creek) of two power plants. Again, as Mr. Stegall states – and as Sierra Club has failed to rebut – "the daily operations of the Clifty Creek and Kyger Creek are managed by OVEC."[79]

While I&M does not have the ability to affect the operational and management decisions of OVEC, I&M is obligated to "examin[e] its existing contracts as market conditions or other factors change over time" and to "pursue amendments or new contractual arrangements" including through "meaningful attempts to renegotiate contract provisions."[80] Ms. Glick states that there is "no evidence that I&M has

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[78] 3 Tr 133, 137. *See*, *also*, Case No. U-20530, PFD, April 18, 2022, p. 43-44 ("The ICPA provides that I&M and its AEP affiliates are allowed to appoint one member among them to OVEC's Operating Committee. The ICPA provides that the decisions of the Operating Committee 'must receive the affirmative vote of at least two-thirds of the members of the Operating Committee.' ")(citations omitted)
[79] 3 Tr 137.
[80] Case No. U-18404, Order, June 7, 2019, p. 7 (citations omitted); Case No. U-20529, Order, May 13, 2021, p. 18.

attempted to renegotiate terms of the ICPA."[81] Moreover, Mr. Stegall states that I&M is "evaluating options related to OVEC" and that "potential action under consideration with regard to renegotiation is being evaluated."[82]

Code of Conduct

I&M makes a series of arguments opposing the application of the Code of Conduct to the ICPA in this proceeding. These arguments are unsupported in law and fact.

At the outset, for purposes of assessing the applicability of the Code of Conduct pricing provision (Rule 8(4)), this PFD notes that while I&M's witness asserts that I&M does not consider OVEC to be an affiliate, I&M does not directly argue in its briefs that the Code of Conduct does not apply because OVEC and I&M are not affiliates. Rather, I&M suggests as much, repeatedly referencing the "proposed application of the Code of Conduct."[83] Regardless, this PFD notes that the Commission has repeatedly found that I&M and OVEC are affiliates under Rule 8 such that the pricing provisions apply to the ICPA.[84]

I&M contends that applying the Code of Conduct's "price cap"[85] goes beyond the Legislature's intent and would be arbitrary and capricious. I&M asserts that applying the Code's price cap in PSCR proceedings impermissibly negates Act 304's framework for

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[81] 3 Tr 281.
[82] 3 Tr 137.
[83] See, I&M Initial Brief, p. 41, 42, 43, 45, 49.
[84] See, e.g., Case No. U-20529, Order, May 13, 2021, p. 16-17; Case No. U-20224, Order, June 23, 2021, p. 11; Case No. U-20530, Order, February 2, 2023, p. 18-19. See, also, Case No. U-20530, PFD, April 18, 2022, p. 49-54.
[85] See R 460.10108(4), also known as Rule 8(4) (Imposing a price cap on a utility's affiliate transactions).

evaluating power supply costs under the reasonableness and prudence standard.[86] The utility asserts that application of the Code of Conduct unlawfully supplants Act 304's legislative PSCR framework and arbitrarily and capriciously replaces it with comparisons of cost against market prices.[87]

This argument that the Code of Conduct vitiates legislative intent is unavailing because the Code of Conduct was itself implemented by the Commission pursuant to a legislative mandate; thus, the Code's heightened scrutiny for affiliate transactions is aligned with legislative intent. See *In re Application of Detroit Edison Company for 2012 Cost Recovery Plan*, 311 Mich App 204, 207 n 2; 874 NW2d 398 (2015) (Explaining that the Customer Choice and Electricity Reliability Act required the Commission to implement a code of conduct that included regulation of affiliate transactions); see also MCL 460.10ee(1) (Directing the Commission to create the Code of Conduct). Further, the Code of Conduct is to be interpreted consistently with statutory construction principles.[88] The principles of statutory construction dictate that if two statutes lend themselves to an interpretation that harmonizes their operation and avoids conflict, then that interpretation should control.[89] This PFD does not perceive any conflict between the Code of Conduct and Act 304 regarding the PSCR process;[90] instead, the Code of

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[86] I&M Initial Brief, p. 40.
[87] Id., p. 41.
[88] See *General Motors Corp v Bureau of Safety & Regulation*, 133 Mich App 284, 292; 349 NW2d 157 (1984)("In construing administrative rules, the rules of statutory construction apply.").
[89] See *Bauer v Saginaw Co*, 332 Mich App 174, 199; 955 NW2d 553 (2020).
[90] MCL 460.6j(6) itself provides that in evaluating the decisions underlying the PSCR, the Commission shall consider several items, including a catch-all for "other relevant factors." Compliance with the Code of Conduct for affiliate transactions is clearly a relevant factor when the PSCR plan includes the purchase of power from a utility's affiliate. Further, I&M's comparison to and reliance on *Ins Institute of Mich v Comm'r of Fin and Ins Servs*, 486 Mich 370; 785 NW2d 67 (2010) is misplaced because that case addressed a regulation that forbade a practice that was explicitly allowed by statute. Such a situation does not arise in this case.

Conduct simply provides additional, stricter rules for a specific subset of transactions, i.e. affiliate transactions. Indeed, as indicated, supra, the Commission agrees that "Act 304 and the Code of Conduct must be read in harmony, and the fact that I&M must meet the standards of Act 304 for all of its PSCR costs, and must meet Code of Conduct requirements for costs incurred with affiliates, does not mean that the Code of Conduct conflicts with PSCR statutes."[91]

I&M further argues that evaluating PSCR transactions under the Code of Conduct is arbitrary and capricious because it pits I&M's costs against "an undefined market."[92] However, "[i]f a rule is rationally related to the purpose of the statute, it is neither arbitrary nor capricious."[93] The Code of Conduct, including its provisions addressing affiliate transactions, were mandated by the Legislature when it passed the Customer Choice and Electricity Reliability Act, MCL 460.10 *et seq*.[94] The purpose of that act includes ensuring competitive rates and competitive utilities, and the act directed the creation of rules to govern affiliate transactions and prevent preferential treatment or discrimination.[95] The Code of Conduct's limitations on compensation for affiliate transactions are rationally related to those purposes because they prevent discrimination in favor of or against affiliates; thus, the Code of Conduct is not arbitrary and capricious. The fact that the Code of Conduct's price cap references market prices, see Rule 8(4), simply does not render it arbitrary or capricious.

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[91] Case No. U-20530, Order, February 2, 2023, p. 18.
[92] I&M Initial Brief, p. 41.
[93] *Dykstra v Director of Dep't of Natural Resources*, 198 Mich App 482, 491; 499 NW2d 367 (1993).
[94] See *In re Application of Detroit Edison Company for 2012 Cost Recovery Plan*, 311 Mich App 204, 207 n 2; 874 NW2d 398 (2015); See also MCL 460.10ee(1).
[95] See MCL 460.10(a) and (b); *In re Application of Detroit Edison Company for 2012 Cost Recovery Plan*, 311 Mich App at 207 n 2.

I&M also argues that MCL 460.10ee, which empowered and directed the Commission to create the Code of Conduct, is an unlawful delegation of legislative authority to the Commission.[96] I&M contends that the delegation impermissibly lacks a precise standard and challenges the idea that the Legislature intended the Commission to adopt a pricing rule that would supplant the reasonableness and prudence standard of Act 304.[97] I&M's reliance on this argument is misplaced for three reasons.

First, I&M's argument interprets the Code of Conduct as supplanting Act 304 rather than merely supplementing it with respect with affiliate transactions. Again, consistent with the principles of interpretation, this PFD finds, and the Commission has stated that, the Code of Conduct and Act 304 are to be interpreted in harmony, with the Code of Conduct simply providing for heightened scrutiny for affiliate transactions.

Second, the Legislature provided a goal and a standard for the Commission regarding the creation of the Code of Conduct, including the specific direction to create measures to prevent preferential treatment of a utility's affiliates. See MCL 460.10ee(1).[98] A price cap is just such a measure that reasonably achieves that goal.

Third, the Code of Conduct has previously survived legal challenges regarding the manner in which it was promulgated, with the Michigan Supreme Court determining that a challenge addressing the promulgation of the Code of Conduct was "moot in light of 2004 P.A. 88, in which the Legislature amended MCL 460.10a(5) and ratified the code of conduct established by the Public Service Commission." *Detroit Edison Co v*

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[96] I&M Initial Brief, p. 43.
[97] Id., p. 44.
[98] "The code of conduct shall include, but is not limited to, measures to prevent cross-subsidization, preferential treatment, and, except as otherwise provided under this section, information sharing, between a utility's regulated electric, steam, or natural gas services and unregulated programs and services, whether those services are provided by the utility or the utility's affiliated entities." MCL 460.10ee(1).

Michigan Pub Serv Com'n, 472 Mich 897; 695 NW2d 336 (2005). This PFD concludes that the Legislature's subsequent ratification of the Code of Conduct, as noted by the Michigan Supreme Court, renders moot any claim of improper delegation because the ratification essentially operates as the Legislature's affirmance of the Code of Conduct.

Next, I&M asserts that the ICPA predates the Code of Conduct and that the Commission cannot apply the Code of Conduct retroactively because retroactive application is not specifically authorized by any statute.[99] However, the Commission has already stated that decisions made in a PSCR case are "applied prospectively to inform reconciliations and not retroactively to PSCR factors set in earlier plan years, and as such it is appropriate to apply the Code of Conduct to the case at hand."[100] In other words, the Commission already applies the Code of Conduct prospectively rather than retroactively.

Also, I&M argues that a disallowance based on the Code of Conduct would violate the respective Contract Clauses of the Michigan and United States Constitutions[101] by impairing I&M's rights or obligations under the ICPA.[102] The Michigan and U.S. Constitution's Contract Clauses generally prohibit laws from impairing the obligations of contracts, but courts have long held that the prohibition is not absolute because it must be "accommodated to the inherent police power of the State to safeguard the vital interest of its people."[103] The three-prong test to determine if

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[99] I&M Initial Brief, p. 46 (Citing *Lafontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26; 852 NW2d 78 (2014) for the factors addressing retroactive application of statutes).
[100] Case No. U-20804, Order, November 18, 2021, p. 17.
[101] See US Const, art I, §10; Const 1963, art 1, §10.
[102] I&M Initial Brief, p. 50-52.
[103] *Romein v Gen Motors Corp*, 436 Mich 515, 534; 462 NW2d 555 (1990) quoting *Energy Reserves Group, Inc v Kansas Power & Light Co*, 459 US 400, 410; 103 S Ct 697, 704; 74 L Ed 2d 569 (1983).

a law violates the state or federal Contract Clauses is: (1) whether the state law has in fact operated as a substantial impairment of a contractual relationship; (2) whether the law has a legitimate public purpose; and (3) whether the means adopted to implement the law are reasonably related to the public purpose.[104] The Code of Conduct passes all three prongs. First, any disallowance from rate recovery does not impair -- let alone substantially impair -- the ICPA because I&M's rights and obligations under the ICPA remain the same; the only change would be the amount of money related to the ICPA that I&M can recover through the PSCR process.[105] Second, even if there were a substantial impairment, the Code of Conduct serves a legitimate public purpose because it prevents preferential treatment among utilities and their affiliates.[106] Third, the Code of Conduct's price cap is reasonably related to the proffered public purpose because it effectively prevents a utility from collecting excessive amounts under an affiliate contract. Accordingly, any potential disallowance under the Code of Conduct does not violate the Contracts Clause.

I&M also argues that the application of the Code of Conduct would violate the respective Takings Clauses of the Michigan and United States Constitutions.[107] Questions regarding the Takings Clause have developed a special analysis in the field of utility regulation: "[t]he guiding principle has been that the Constitution protects

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[104] See *Romein*, 436 Mich at 534-536.

[105] Pertinent to the degree of impairment, courts have recognized that parties that form contracts relating to highly regulated industries cannot shield themselves from state law merely by making a contract, and parties in heavily regulated industries should also know that their rights are subject to some alteration by evolving laws and regulations. See *Romein*, 436 Mich at 535. Few industries are more highly regulated than public utilities.

[106] See also MCL 460.10ee(1) (directing the Commission to create a Code of Conduct that prevents cross-subsidization, preferential treatment, and certain types of information sharing among utilities and affiliate entities).

[107] I&M Initial Brief, p. 53-56; see also US Const, Amend V; Mich Const 1963, art X, § 2.

utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory."[108] A rate is confiscatory if it is so low that it destroys the value of the property for all the purposes for which it was acquired and practically deprives the owner of the property without due process of the law.[109] Further, it is the overall effect of the rate order that is evaluated in this analysis,[110] and the Commission has previously recognized this fact.[111] As Sierra Club points out, I&M fails to argue that any potential disallowance under the Code of Conduct would render the overall PSCR plan or factors so low as to be confiscatory, and the utility thereby fails to provide an argument that addresses the pertinent analysis. Instead, I&M takes an impermissible piecemeal approach by focusing narrowly on a potential disallowance related solely to the ICPA rather than to the overall PSCR plan or factors.[112] Thus, I&M fails to adequately support this argument.

I&M next argues that the Commission's own August 28, 2018 Order in Case No. U-18361 suggests that the Code of Conduct does not apply to federally regulated wholesale service agreements such as the ICPA.[113] I&M contends that wholesale power purchase agreements like the ICPA do not give rise to an affiliate transaction subject to the Code of Conduct, and that the Code cannot be used to set pricing for FERC-

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[108] *Duquesne Light Co v Barasch*, 488 US 299, 307; 109 S Ct 609; 102 L Ed 2d 646 (1989).
[109] *Id*.; see also *Covington & Lexington Turnpike Rd Co v Sandford*, 164 US 578, 597; 17 S Ct 198, 205–206; 41 L Ed 560 (1896).
[110] See *Michigan Bell Tel Co v Michigan Pub Serv Comm*, 332 Mich 7, 37; 50 NW2d 826 (1952); see also *Duquesne Light Co*, 488 US at 312.
[111] See e.g. Case No. U-17680, Order, July 12, 2017, p. 16-18, rev'd in part on other grounds by *In re Application of DTE Electric Co for 2015 Reconciliation*, unpublished per curiam opinion of the Court of Appeals, issued December 6, 2018 (Docket No. 339557).
[112] Even if the Commission were to take this narrow approach, a disallowance under Rule 8(4) of the Code of Conduct would cap compensation under the ICPA at the market price, making it difficult to argue that such compensation is confiscatory.
[113] I&M Initial Brief, p. 56.

approved contracts like the ICPA.[114] The Commission has previously addressed and rejected this argument factually distinguishing the circumstances in Case No. U-18361 from I&M's situation and concluding that the Code of Conduct applies because I&M is an investor-owned utility, and the power it purchases through the ICPA is used to serve I&M's retail customers.[115] Additionally, the Commission has also previously concluded that contrary to I&M's assertions, the ICPA remains unapproved by FERC.[116] Further, even if the ICPA were approved by FERC, the Commission would retain authority to enforce the Code of Conduct in relation to the ICPA. This is true because the Commission has the authority to assess the prudence of purchasing decisions, and the Commission would not be passing judgment on the reasonableness of a FERC-approved rate but would instead be evaluating the reasonableness and prudence of I&M's decision to purchase from OVEC, an affiliate.[117]

As an affiliate contract, the Code of Conduct applies to the ICPA, and the ICPA costs exceed the market price cap in Rule 8(4) of the Code of Conduct.

B. Rockport

Ms. Glick asserts that while I&M models the Rockport units as committed and dispatched economically into the market and thus are operating only when market revenue exceeds unit costs, her analysis in the most recent reconciliation case (Case No. U-20530) found that I&M regularly self-commits Rockport units 1 and 2, and does not economically commit the units.[118] Indeed, she asserts that the units were committed

[114] Id., p. 56-57.
[115] Case No. U-20804, Order, November 18, 2021, p. 16.
[116] Id., p. 18.
[117] See Case No. U-20529, Order, May 13, 2021, p. 20-21.
[118] 3 Tr 288, citing Glick testimony filed in Case No. U-20530.

on a must-run basis the majority of the time they were available in 2020.[119] She adds that these Rockport units are projected to incur $483 million (present value) in excess costs relative to the market value of energy and capacity based on unit cost data over the next five years.[120]

I&M counters that Ms. Glick's assessment does not take I&M's operational decisions into account, and that her reliance on extrapolating I&M's operations during the Covid pandemic is unreasonable. I&M asserts that its generating units are operated to meet the total PJM load requirements on the most economical basis.[121] I&M argues that in developing the generational forecast its operation was simulated by a simulation model which commits units in PJM based on variable energy costs and which model will not dispatch or run Rockport units uneconomically.[122] Mr. Stegall adds that Ms. Glick's recommendation that the Commission "indicate it will disallow recovery in future fuel cost reconciliation dockets" for imprudent commitment decisions is unnecessary because I&M recognizes its obligation to operate the Rockport units in customers' best interests and I&M's annual reconciliation filings are the appropriate forum to address this issue.[123]

For its part, Staff largely agrees with I&M that there is no need for a warning in relation to the Rockport units.[124] Staff contends that the utility asserts that it has been documenting its self-commitment decisions since May of 2021 in accordance with the

[119] Id.
[120] 3 Tr 289, citing Ex. SC-34, SC-35.
[121] I&M Initial Brief, p. 65, citing 3 Tr 71.
[122] Id., p. 65-66.
[123] 3 Tr 163-164.
[124] Staff brief, p. 8.

Commission's orders, and reconciliation proceedings are the appropriate venue to examine any ostensibly imprudent operational decisions.[125]

This PFD agrees with I&M and Staff. This PFD notes that the Commission previously directed I&M to document the reasons for its decision to designate a generating unit as "must run" when such a decision would cause the marginal cost of operating the unit to exceed the revenue generated from its operation.[126] As such, this PFD does not find it appropriate to assume before the fact that I&M will necessarily make imprudent commitment decisions going forward contrary to the forecasted economical dispatch from the Rockport units.

VI.

CONCLUSION

Sierra Club's requests that the Commission should amend I&M's plan by removing the costs of the OVEC ICPA from the maximum PSCR factor for the plan year. This PFD disagrees. This PFD notes that while the Commission has previously sustained challenges to I&M's PSCR plans based on the same general assertions as Sierra Club makes in this case, the Commission has refrained from amending I&M's PSCR plans. However, this PFD agrees with Sierra Club that a Section 7 warning is warranted and thus recommends that the Commission issue a warning that the Commission is unlikely to permit I&M to recover any uneconomic costs as set forth in

[125] Id., p. 9.
[126] Case No. U-20224, Order, June 23, 2021, p. 16.

I&M's plan and forecast without good faith efforts to manage the ICPA and renegotiate contract provisions to ensure continued value for ratepayers.

MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
For the Michigan Public Service Commission

Jonathan F. Thoits

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Administrative Law Judge

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