

State Budget Office
Office of Regulatory Reinvention
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**REGULATORY IMPACT STATEMENT
and COST-BENEFIT ANALYSIS (RISCBA)**

PART 1: INTRODUCTION

Under the Administrative Procedures Act (APA), 1969 PA 306, the agency that has the statutory authority to promulgate the rules must complete and submit this form electronically to the Office of Regulatory Reinvention (ORR) at orr@michigan.gov no less than 28 days before the public hearing.

1. Agency Information

Agency name:	Licensing and Regulatory Affairs (LARA)
Division/Bureau/Office:	Public Service Commission (PSC or Commission)
Name, title, phone number, and e-mail of person completing this form:	Lisa Gold, Administrative Law Specialist, 517-284-8084, goldl@michigan.gov
Name of Departmental Regulatory Affairs Officer reviewing this form:	Liz Arasim

2. Rule Set Information

ORR assigned rule set number:	2018-002 LR
Title of proposed rule set:	Code of Conduct

PART 2: KEY SECTIONS OF THE APA

24.207a “Small business” defined.

Sec. 7a. “Small business” means a business concern incorporated or doing business in this state, including the affiliates of the business concern, which is independently owned and operated, and which employs fewer than 250 full-time employees or which has gross annual sales of less than \$6,000,000.00.

24.240 Reducing disproportionate economic impact of rule on small business; applicability of section and MCL 24.245(3).

Sec. 40. (1) When an agency proposes to adopt a rule that will apply to a small business and the rule will have a disproportionate impact on small businesses because of the size of those businesses, the agency shall consider exempting small businesses and, if not exempted, the agency proposing to adopt the rule shall reduce the economic impact of the rule on small businesses by doing all of the following when it is lawful and feasible in meeting the objectives of the act authorizing the promulgation of the rule:

- (a) Identify and estimate the number of small businesses affected by the proposed rule and its probable effect on small businesses.
 - (b) Establish differing compliance or reporting requirements or timetables for small businesses under the rule after projecting the required reporting, record-keeping, and other administrative costs.
 - (c) Consolidate, simplify, or eliminate the compliance and reporting requirements for small businesses under the rule and identify the skills necessary to comply with the reporting requirements.
 - (d) Establish performance standards to replace design or operational standards required in the proposed rule.
- (2) The factors described in subsection (1)(a) to (d) shall be specifically addressed in the small business impact statement required under section 45.
- (3) In reducing the disproportionate economic impact on small business of a rule as provided in subsection (1), an agency shall use the following classifications of small business:

- (a) 0-9 full-time employees.
- (b) 10-49 full-time employees.
- (c) 50-249 full-time employees.
- (4) For purposes of subsection (3), an agency may include a small business with a greater number of full-time employees in a classification that applies to a business with fewer full-time employees.
- (5) This section and section 45(3) do not apply to a rule that is required by federal law and that an agency promulgates without imposing standards more stringent than those required by the federal law.

MCL 24.245 (3) Except for a rule promulgated under sections 33, 44, and 48, the agency shall prepare and include with the notice of transmittal a **regulatory impact statement** which shall contain specific information (information requested on the following pages).

[Note: Additional questions have been added to these statutorily-required questions to satisfy the **cost-benefit analysis** requirements of Executive Order 2011-5].

MCL 24.245b Information to be posted on office of regulatory reinvention website.

Sec. 45b. (1) The office of regulatory reinvention shall post the following on its website within 2 business days after transmittal pursuant to section 45:

- (a) The regulatory impact statement required under section 45(3).
 - (b) Instructions on any existing administrative remedies or appeals available to the public.
 - (c) Instructions regarding the method of complying with the rules, if available.
 - (d) Any rules filed with the secretary of state and the effective date of those rules.
- (2) The office of regulatory reinvention shall facilitate linking the information posted under subsection (1) to the department or agency website.

PART 3: AGENCY RESPONSE

Please provide the required information using complete sentences. **Do not answer any question with “N/A” or “none.”**

Comparison of Rule(s) to Federal/State/Association Standards:

1. Compare the proposed rule(s) to parallel federal rules or standards set by a state or national licensing agency or accreditation association, if any exist.

There is no federal code of conduct. There is likewise no code of conduct set by a national licensing agency or accreditation association. The Federal Energy Regulatory Commission (FERC) is the federal agency that regulates the transmission and wholesale sale of electricity and natural gas in interstate commerce and the transportation of oil by pipelines in interstate commerce. FERC provides a recommended industry accounting system that has been adopted by all state regulatory commissions as well as many foreign government regulatory boards, which is referred to as the Uniform System of Accounts (USoA). The PSC requires state regulated utilities to use the USoA. While this is not a code of conduct, it does regulate how accounts and records must be kept in order to separate the accounting of regulated utilities from the accounting for non-regulated entities that are subsidiaries, divisions, or affiliates of a regulated utility.

The American Institute of Certified Public Accountants (AICPA) is the national professional organization of Certified Public Accountants (CPAs) that sets ethical standards for the profession, and auditing standards for audits of private companies, non-profit organization, and federal, state and local governments. The AICPA supports use of the USoA when conducting an audit of regulated utilities in order to render an opinion on the company's financial well-being.

The National Association of Regulatory Utility Commissioners (NARUC) represents the state public service commissioners who regulate essential utility services, including energy, telecommunications, and water utilities. NARUC urges its members to consider implementing regulatory tools, to allow for reasonable and appropriate continued regulation of monopoly utility services, including (1) policies to ensure non-discriminatory access to essential facilities, (2) financial controls to prevent cross-subsidies between regulated and competitive activities, and (3) policies to ensure non-discriminatory access to market information that are essential to the functioning of efficient markets. All state commissions are required to follow the USoA.

A. Are these rule(s) required by state law or federal mandate?

These rules are required by state law, MCL 460.10ee(1).

B. If these rule(s) exceed a federal standard, identify the federal standard or citation, describe why it is necessary that the proposed rule(s) exceed the federal standard or law, and specify the costs and benefits arising out of the deviation.

These rules do not exceed a federal standard.

2. Compare the proposed rule(s) to standards in similarly situated states, based on geographic location, topography, natural resources, commonalities, or economic similarities.

The Commission looked at the code of conduct or affiliate transaction regulations set in the four Midwestern states of Pennsylvania, Wisconsin, Illinois, and Indiana. See:

State of Indiana: IC8-1-2-49;

State of Illinois: PUA 98-0035, section 16-121;

State of Pennsylvania: 54.121-54.123 & 62.141-62.142; and

State of Wisconsin: 196.52 & 196.795.

The PSC found these four states to be engaged in regulatory activity very similar to what the PSC is trying to accomplish with the code of conduct rules.

A. If the rule(s) exceed standards in those states, explain why and specify the costs and benefits arising out of the deviation.

These rules do not exceed the standards set by these four states.

3. Identify any laws, rules, and other legal requirements that may duplicate, overlap, or conflict with the proposed rule(s).

The PSC is not aware of any laws, rules, or legal requirements that duplicate or conflict with these rules.

A. Explain how the rule has been coordinated, to the extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter. This section should include a discussion of the efforts undertaken by the agency to avoid or minimize duplication.

The PSC is not aware of any state or local laws applicable to the same activity or subject matter.

Purpose and Objectives of the Rule(s):

4. Identify the behavior and frequency of behavior that the proposed rule(s) are designed to alter.

Michigan Agency for Energy's *Roadmap to Implementing Michigan's New Energy Policy: Paths to the Future Report*, August 2015, p. 7, states as follows:

Why Codes of Conduct Matter

Capitalist theory states that competition will drive efficiency and lower prices to the benefit of all consumers. Where monopolies exist, regulation acts as a substitute for competition by

keeping prices in check and ensuring adequate service and consumer protections. Once a market is open, it is important that there be fair competition in order to create a robust market with many participants. Here, the role of the regulator shifts emphasis from prices to ensuring that the market structure is fair so that the market can function properly and clear at reasonable prices. Without proper controls, EDUs [electric distribution utilities] can achieve a competitive advantage, squeeze out competitors, and control the market. This will eliminate businesses and jobs and stifle innovation, as many would-be entrepreneurs may have otherwise developed new, cutting-edge technologies and services for customers. Having fewer competitors can translate into higher prices and less attention to quality of service, as dissatisfied customers will have fewer options. The worst outcome is for the EDU affiliate to be in a position to exercise market power, such that the public is left with a deregulated monopoly that can control prices and cut corners on service and quality.

Section 10ee(1) of 2016 PA 341 (Act 341), MCL 460.10ee(1), provides as follows:

The commission shall establish a code of conduct that applies to all utilities. 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. The code of conduct established under this section is also applicable to electric utilities and alternative electric suppliers consistent with sections 10 through 10cc.

Thus, the PSC is required by the new energy legislation to establish a code of conduct that will ensure that the unregulated affiliates, divisions, or departments of a regulated utility do not receive preferential treatment that could result in harm to the public interest by unduly restraining trade or competition in the unregulated market. Regulated utilities have monopoly power. In the absence of a code of conduct, a monopoly regulated utility could share, for example, assets, employees, facilities, and customer information with affiliates, divisions, or departments that are unregulated and that compete in the open market for customers, without sharing the same assets, employees, facilities, or customer information with other businesses offering the same service or program. This is the behavior that the rules are designed to deter.

Though Act 341 is a new law, the PSC's history with this issue goes back much further. Originally, the targeted behavior was dealt with through Affiliate Transaction Guidelines (ATGs). For the PSC, ATGs go back as far as 1974. The Commission initially adopted guidelines in individual utility dockets. The guidelines imposed reporting requirements designed to provide the Commission with information about the parent company, and imposed accounting requirements. The Michigan Court of Appeals found support for the former, but not for the latter. *Midland Cogeneration Venture Ltd Partnership v Public Service Comm*, 199 Mich App 286, 296, 300; 501 NW2d 573 (1993) (“[W]e are unable to find any statutory grant of authority that would allow the PSC to impose accounting and bookkeeping requirements directly on MCV.”) Thereafter, the guidelines were tweaked and have remained essentially the same since then. In the October 28, 1993 order in Case Nos. U-10149 and U-10150, the Commission adopted model ATGs for use with all utilities for which guidelines were adopted.

Hoping to abandon the ad hoc approach, in the March 8, 1999 order in Case No. U-11916 the Commission opened a docket for examining whether the guidelines should be modified and to which entities they should apply, and invited intervention. In the May 3, 2000 order in that docket, the Commission adopted ATGs applicable to all electric and gas utilities. The Court of Appeals vacated that order on grounds that the Commission had failed to comply with the Administrative Procedures Act. *Michigan Elec and Gas Assn v Public Service Comm*, 252 Mich App 254; 652 NW2d 1 (2002). The court found that the Commission had not held a true contested case, because it had decided to

impose guidelines on unnamed parties in a proceeding that was neither a rate case nor an investigation of rates. *Id.* at 268 (“[T]he PSC culled elements of rulemaking, adjudication, and general policy formulation, with little regard for the dictates of the APA.”) After that, the Commission returned to adopting the guidelines in individual cases. They are applicable to both electric and gas utilities, and they have no exemption based on the size of the business.

The guidelines are primarily concerned with reporting and recordkeeping, and are much narrower than the code of conduct adopted later. In brief, they ensure that: (1) the Commission has access to the books and records of the holding company and each of its affiliates; (2) cross-subsidization is avoided; (3) generally accepted accounting principles (GAAP) and the Uniform System of Accounting (USoA) are used; (4) the Commission is furnished with reports such as 10Ks, annual reports, balance sheets, internal audits, and tax returns; (5) talent is not diverted; (6) the Commission is notified in advance of transfers of assets to affiliates; (7) the transfer of data from the utility to an affiliate is at the higher of cost or fair market value; and (8) the Commission is informed of credit arrangements.

Turning to the history of the code of conduct, Case No. U-11290 was a docket opened on the Commission’s own motion to consider restructuring the electric industry. On December 23, 1998, the Commission Staff filed a report entitled “Developing and Implementing Codes of Conduct for the Retail Electric Industry” in that docket. On March 8, 1999, in that docket, the Commission issued its first order determining the conditions for affiliate participation in the electric choice market. The Commission limited affiliate participation to one-third of eligible load in each bid cycle, and adopted a code of conduct almost identical to the ATGs that were in place at the time for electric and natural gas utilities and affiliates. March 8, 1999 order in Case No. U-11290 *et al*, pp. 29-39.

In a September 14, 1999 order in Case No. U-11290, the Commission addressed DTE’s request for a declaratory ruling that its affiliates would be permitted to participate in a retail open access program. DTE had filed a proposed code patterned after the approved one for Consumers, and it was approved also. On the same day, the Commission issued another order in Case Nos. U-11290 and U-12134, opening the latter docket as a contested case proceeding for the purpose of determining what modifications, if any, should be made to the code of conduct that had been approved for Consumers and DTE only, and invited intervention. Then, 2000 PA 141 was enacted, which contained a provision (Section 10a(4)) requiring the Commission to establish a code of conduct. MCL 460.10a(4). Case No. U-12134 concluded with the October 29, 2001 order on rehearing that adopted the final Code of Conduct (COC) that is in place now, and is applicable to all electric utilities regulated by the Commission and all alternative electric suppliers (AESs) who, together with their affiliates, provide regulated services and unregulated services in Michigan (including electric cooperatives). The Commission’s authority to adopt and implement the COC was upheld on appeal, essentially because the language of Section 10a(4) of Act 141 made the procedural issue moot, but the Supreme Court opined that the Commission should not have adopted the COC through an order. *Detroit Edison Co v Public Service Comm*, 261 Mich App 1; 680 NW2d 512 (2004), *vacated in part*, 472 Mich 897; 695 NW2d 336 (2005).

The scope of the COC is much greater than that of the guidelines, but it does not apply to gas or steam utilities, and it exempts utilities with less than 60 employees from certain requirements contained in the COC that have to do with maintaining separate facilities, operations, or personnel used to deliver electricity (Section II.M. of the COC). This exemption was retained by the PSC in Proposed Rule 5(3). The COC addresses in some detail how the necessary separation between regulated and unregulated entities is to be achieved, and how a utility or AES must conduct business in order to show that it is not unduly discriminating in favor of an affiliate or against an unaffiliated entity. The COC is more detailed than the ATGs on the issues of recordkeeping, sharing of facilities and information, the transfer of employees, promotional activities, pricing, and the sharing of customer information. With regard to pricing, in particular, Section III.C. of the COC pertains to situations where the price of a service,

product, or property must be at the higher of fully allocated embedded cost or market price, or, conversely, the lower of market price or 10% over fully allocated embedded cost, depending upon who is selling/buying. The COC requires all electric utilities and AESs to file a COC compliance plan, and contains recordkeeping requirements sufficient to show compliance with the COC and the plan. It also requires a dispute resolution process specific to COC complaints. Act 141 provides penalties for failure to comply. Waivers from the COC are available.

Act 341 does not specify how the new code of conduct is to be established. However, the Michigan Supreme Court has previously ruled that it should not be established by order, but rather by rule. *Detroit Edison Co v Public Service Comm*, 261 Mich App 1; 680 NW2d 512 (2004), *vacated in part*, 472 Mich 897; 695 NW2d 336 (2005). The Michigan Supreme Court held “we VACATE only Part II(B) of the March 2, 2004 Court of Appeals opinion, in which the Court of Appeals erroneously concluded that a generally applicable industry code of conduct may be promulgated through a contested case proceeding. The conclusion by the Court of Appeals in Part II(B) is contrary to MCL secs. 24.203(3) and 24.207 as well as existing case law.” *Id.* Thus, the PSC will proceed through rulemaking, and not through a contested case as was previously done.

Previous authority to establish a code of conduct was contained in Section 10a(4) of 2000 PA 141, MCL 460.10a(4). The COC was thereafter established by the PSC in the October 29, 2001 order in Case No. U-12134. The old language in Section 10a(4) has been rescinded by Act 341, and the language in Section 10ee(1) was added. Section 10ee makes all utilities, including electric, natural gas, and steam utilities, subject to the COC, and it contains no exemption from any of its requirements based on the size of the utility.

These rules are largely identical to the existing COC adopted by the PSC in the October 29, 2001 order in Case No. U-12134, Attachment A. That COC has been in place for over 16 years. Thus, the PSC does not expect the frequency of the targeted behavior to change in any meaningful way as a result of the rulemaking because regulated electric utilities and cooperatives are already subject to the restrictions contained in the proposed rules, through an agency order issued in 2001 adopting the COC; and regulated electric and gas utilities are already subject to the ATGs. Once these rules are final, the PSC will rescind the COC established in Case No. U-12134.

Due to the fact that Section 10ee(1) makes all electric, gas, and steam utilities subject to the COC and has no exemption based on size, a few utilities will be newly subject to the COC. Electric utilities and cooperatives with less than 60 employees are still exempt from the requirements related to separate facilities, operations, or personnel. Natural gas utilities will be subject to the COC for the first time, but they have already been subject to the ATGs, which govern similar conduct. The single steam utility, Detroit Thermal, will be subject to the COC for the first time. Some of these entities are small businesses. Many of these small businesses have already been subject to either the COC or ATGs for many years, including small gas utilities (ATGs), and small electric utilities with less than 250 employees but greater than 60 employees (ATGs and COC). And even small electric utilities with fewer than 60 employees have been subject to all of the requirements of the COC with the exception of those dealing with physical separation.

On March 28, 2017 in Case No. U-18326, the PSC issued an order indicating that the agency would be pursuing a rulemaking proceeding to carry out the mandates of Section 10ee. The order informed the regulated community that the existing COC would remain in place during the interim, and provided information on how utilities may conduct themselves during the pendency of the rulemaking, noting that the new law would come into effect on April 20, 2017.

A. Estimate the change in the frequency of the targeted behavior expected from the proposed rule(s).

The PSC estimates no change in the frequency of the targeted behavior.

B. Describe the difference between current behavior/practice and desired behavior/practice.

There is no difference between current behavior and desired behavior, because most regulated electric utilities are already subject to the COC through an order issued in 2001, and gas utilities are subject to the ATGs.

C. What is the desired outcome?

Final rules, which will turn the existing Code of Conduct (promulgated by order) into a set of rules.

5. Identify the harm resulting from the behavior that the proposed rule(s) are designed to alter and the likelihood that the harm will occur in the absence of the rule.

The harm is unlikely to occur in the absence of the rules, because the PSC already has a Code of Conduct in place through issuance of an order in 2001. However, the Michigan Supreme Court has indicated to the PSC that the Code of Conduct should have been promulgated through rulemaking and not through a contested proceeding, and the Michigan Legislature has recently directed the PSC to establish a code of conduct.

A. What is the rationale for changing the rule(s) instead of leaving them as currently written?

These are new rules.

6. Describe how the proposed rule(s) protect the health, safety, and welfare of Michigan citizens while promoting a regulatory environment in Michigan that is the least burdensome alternative for those required to comply.

The PSC is required by the new energy legislation to establish a code of conduct that will ensure that the unregulated affiliates, divisions, or departments of a regulated utility do not receive preferential treatment that could result in harm to the public interest by unduly restraining trade or competition in the unregulated market. Regulated utilities have monopoly power. In the absence of a code of conduct, a monopoly regulated utility could share, for example, assets, employees, facilities, and customer information with affiliates, divisions, or departments that are unregulated and that compete in the open market for customers, without sharing the same assets, employees, facilities, or customer information with other businesses offering the same service or program. This is the behavior that the rules are designed to deter. In the absence of a code of conduct, the exercise of monopoly power interferes with natural competition, and provides a significant advantage to the company with the monopoly. For example, if a monopoly regulated utility decides to go into the heating, ventilation, and air conditioning (HVAC) business, it potentially has an insurmountable economic competitive advantage over an individual who decides to go into the HVAC business, due to the fact that the utility already has extensive data about, and access to, customers in the utility's service territory. Prevention of the exercise of monopoly power protects the health, safety, and welfare of Michigan citizens.

7. Describe any rules in the affected rule set that are obsolete or unnecessary and can be rescinded.

These are new rules.

Fiscal Impact on the Agency:

Fiscal impact is an increase or decrease in expenditures from the current level of expenditures, i.e. hiring additional staff, higher contract costs, programming costs, changes in reimbursement rates, etc. over and above what is currently expended for that function. It does not include more intangible costs or benefits, such as opportunity costs, the value of time saved or lost, etc., unless those issues result in a measurable impact on expenditures.

8. Describe the fiscal impact on the agency (an estimate of the cost of rule imposition or potential savings).

There will be no fiscal impact on the PSC, because the PSC is already enforcing the same standards through the code of conduct promulgated by order in 2001. The frequency of the targeted behavior is already monitored through annual filings, rate cases, requests for waivers, and other proceedings. This monitoring will not change as a result of rule promulgation.

9. Describe whether or not an agency appropriation has been made or a funding source provided for any expenditures associated with the proposed rule(s).

No appropriate or funding source is associated with the proposed rules.

10. Describe how the proposed rule(s) is necessary and suitable to accomplish its purpose, in relationship to the burden(s) it places on individuals. Burdens may include fiscal or administrative burdens, or duplicative acts.

The PSC is required by the new energy legislation to establish a code of conduct that will ensure that the unregulated affiliates, divisions, or departments of a regulated utility do not receive preferential treatment that could result in harm to the public interest by unduly restraining trade or competition in the unregulated market. Regulated utilities have monopoly power. In the absence of a code of conduct, a monopoly regulated utility could share, for example, assets, employees, facilities, and customer information with affiliates, divisions, or departments that are unregulated and that compete in the open market for customers, without sharing the same assets, employees, facilities, or customer information with other businesses offering the same service or program. This is the behavior that the rules are designed to deter. In the absence of a code of conduct, the exercise of monopoly power interferes with natural competition, and provides a significant advantage to the company with the monopoly. For example, if a monopoly regulated utility decides to go into the heating, ventilation, and air conditioning (HVAC) business, it potentially has an insurmountable economic competitive advantage over an individual who decides to go into the HVAC business, due to the fact that the utility already has extensive data about, and access to, customers in the utility's service territory. Prevention of the exercise of monopoly power protects the health, safety, and welfare of Michigan citizens. The PSC is already enforcing the standards laid out in the proposed rules through a code of conduct promulgated by order in 2001. Thus, the rules do not add to the burden of either the PSC or the regulated utilities.

- A. Despite the identified burden(s), identify how the requirements in the rule(s) are still needed and reasonable compared to the burdens.

Regulated utilities have monopoly power. In the absence of a code of conduct, a monopoly regulated utility could share, for example, assets, employees, facilities, and customer information with affiliates, divisions, or departments that are unregulated and that compete in the open market for customers, without sharing the same assets, employees, facilities, or customer information with other businesses offering the same service or program. This is the behavior that the rules are designed to deter. In the absence of a code of conduct, the exercise of monopoly power interferes with natural competition, and provides a significant advantage to the company with the monopoly. For example, if a monopoly regulated utility decides to go into the HVAC business, it potentially has an insurmountable economic competitive advantage over an individual who decides to go into the HVAC business, due to the fact that the utility already has extensive data about, and access to, customers in the utility's service territory.

Impact on Other State or Local Governmental Units:

11. Estimate any increase or decrease in revenues to other state or local governmental units (i.e. cities, counties, school districts) as a result of the rule. Estimate the cost increases or reductions for such other state or local governmental units as a result of the rule. Include the cost of equipment, supplies, labor, and increased administrative costs in both the initial imposition of the rule and any ongoing monitoring.

The PSC estimates no increase or decrease in revenues to other state or local governmental units.

A. Estimate the cost increases or reductions for other state or local governmental units (i.e. cities, counties, school districts) as a result of the rule. Include the cost of equipment, supplies, labor, and increased administrative costs in both the initial imposition of the rule and any ongoing monitoring.

The PSC estimates no cost increases or reductions for other state or local governmental units.

12. Discuss any program, service, duty or responsibility imposed upon any city, county, town, village, or school district by the rule(s).

There are no such duties or responsibilities imposed on these governmental units by the rules.

A. Describe any actions that governmental units must take to be in compliance with the rule(s). This section should include items such as record keeping and reporting requirements or changing operational practices.

There are no actions that governmental units must take to be in compliance with the rules.

13. Describe whether or not an appropriation to state or local governmental units has been made or a funding source provided for any additional expenditures associated with the proposed rule(s).

No such appropriation to state or local governmental units has been made.

Rural Impact:

14. In general, what impact will the rule(s) have on rural areas?

The rules will have no special impact on rural areas. Residents of rural areas will be protected by the rules in the same way that all Michigan citizens are protected.

A. Describe the types of public or private interests in rural areas that will be affected by the rule(s).

Regulated utilities operating in rural areas will be affected by the rules. These utilities, note, are also already subject to the same standards via PSC order issued in 2001.

Environmental Impact:

15. Do the proposed rule(s) have any impact on the environment? If yes, please explain.

The proposed rules have no impact on the environment.

Small Business Impact Statement:

16. Describe whether and how the agency considered exempting small businesses from the proposed rule(s).

Pursuant to MCL 460.36(2), all electric and gas cooperatives are subject to the COC, even if they are member regulated, and their size does not matter. The PSC regulates 10 natural gas utilities and cooperatives, and 6 of these are small based on employee number. The PSC regulates 19 electric utilities and cooperatives, and 14 are small based on employee number. The PSC regulates 1 steam utility, and it is a small business based on employee number.

Due to the fact that Section 10ee(1) makes all electric, gas, and steam utilities subject to the COC and has no exemption based on size, a few utilities will be newly subject to the COC. Utilities and cooperatives with less than 60 employees will still be exempt from the requirements related to separate facilities, operations, or personnel. Natural gas utilities will be subject to the COC for the first time (including the 6 small businesses), but they have already been subject to the ATGs, which govern similar conduct. The steam utility, Detroit Thermal, will be subject to the COC for the first time. All of the electric utilities, small and large, have already been subject to the COC and the ATGs.

Because the rules address the problems associated with monopoly power, and because these problems exist whether the utility is small or large, the PSC decided not to exempt small businesses from the

proposed rules, with the exception of the physical separation rules. This exemption is based upon the hardship that would accrue to small businesses if they were required to provide separate physical facilities. They are still subject to the requirement that relates to separate accounting. If you are an individual hoping to compete in the market with your HVAC business, you should not be subject to unfair competition and a closed market in your service area, whether the unfair competition comes from a small utility or a large one.

17. If small businesses are not exempt, describe (a) how the agency reduced the economic impact of the proposed rule(s) on small businesses, including a detailed recitation of the efforts of the agency to comply with the mandate to reduce the disproportionate impact of the rule(s) upon small businesses as described below, per MCL 24.240(1)(a)-(d), or (b) the reasons such a reduction was not lawful or feasible.

The PSC did not exempt small businesses from any of the requirements, except that Rule 5(3) imposes different requirements for physical separation on utilities with fewer than 60 employees.

- A. Identify and estimate the number of small businesses affected by the proposed rule(s) and the probable effect on small business.

Approximately 20 small businesses will be covered by the proposed rules – 6 gas utilities, 13 electric utilities, and 1 steam utility. Of these 20 businesses, 13 of them have already been subject to the existing COC for many years, and 19 of them have been subject to the ATGs for many years, thus the PSC believes that the COC will have little if any effect on these businesses, which are used to having to comply with these requirements. **The PSC believes that Detroit Thermal, the lone steam utility, is the only business, small or large, that is newly-regulated by the COC with regard to the type of activity that is targeted by the rules; and it does not appear that, at this, time, Detroit Thermal has any subsidiaries, divisions, or affiliates. However, the Legislature explicitly chose to include steam utilities in the code of conduct requirement under MCL 460.10ee(16)(a).** All of the small businesses will be exempt from the requirements related to physical separation under Rule 5(3).

- B. Describe how the agency established differing compliance or reporting requirements or timetables for small businesses under the rule after projecting the required reporting, record-keeping, and other administrative costs.

The PSC did not exempt small businesses from any of the requirements, except that Rule 5(3) imposes different requirements for physical separation on utilities with fewer than 60 employees.

- C. Describe how the agency consolidated or simplified the compliance and reporting requirements for small businesses and identify the skills necessary to comply with the reporting requirements.

The PSC did not exempt small businesses from any of the requirements, except that Rule 5(3) imposes different requirements for physical separation on utilities with fewer than 60 employees. The reporting requirements require skills associated with writing annual reports and accounting skills.

- D. Describe how the agency established performance standards to replace design or operation standards required by the proposed rule(s).

There are no performance standards in these rules.

18. Identify any disproportionate impact the proposed rule(s) may have on small businesses because of their size or geographic location.

The PSC is unaware of any.

19. Identify the nature of any report and the estimated cost of its preparation by small businesses required to comply with the proposed rule(s).

Proposed Rule 12 contains annual reporting requirements. Most of the requested information is of the type that any company would gather in the normal course of business in order to compile an annual report, and includes things like a balance sheet and income statement. Where it seeks specific information, the information relates to complaints received from customers regarding COC issues. The PSC is not aware of the cost of preparation, but is aware that most of the requested information is already compiled in the normal course of business.

20. Analyze the costs of compliance for all small businesses affected by the proposed rule(s), including costs of equipment, supplies, labor, and increased administrative costs.

The PSC believes that compliance does not involve any increased costs. Even the reporting requirements that are specific to the COC are already contained in the existing COC. That is, utilities covered by the COC or the ATGs already have to furnish the PSC with annual reports containing this information, and utilities covered by the COC already have to furnish the PSC with information annually on the number and types of complaints filed by customers during the year.

21. Identify the nature and estimated cost of any legal, consulting, or accounting services that small businesses would incur in complying with the proposed rule(s).

The PSC does not believe that any of these services are required – at least not as outside services. The accounting information that is sought is typically already kept in the normal course of business.

22. Estimate the ability of small businesses to absorb the costs without suffering economic harm and without adversely affecting competition in the marketplace.

The PSC believes the ability to absorb the costs is 100%.

23. Estimate the cost, if any, to the agency of administering or enforcing a rule that exempts or sets lesser standards for compliance by small businesses.

There would be no cost.

24. Identify the impact on the public interest of exempting or setting lesser standards of compliance for small businesses.

If small business utilities are not subject to the COC rules, they may choose to abuse their market power in their service territory with respect to any service that is offered by the utility that is also offered by competing entities or members of the public. In that scenario, those who want to compete with small utilities in, for example, the HVAC business, would be at an extreme disadvantage compared to those who want to compete with large utilities in that business, because the large utilities would be required to compete fairly while the small utilities would not be so required. Thus, small utilities could provide benefits to their own affiliates that would likely drive any competition out of the market.

25. Describe whether and how the agency has involved small businesses in the development of the proposed rule(s).

Draft rules were presented to stakeholders in a series of meetings which took place at the PSC in June and August of 2017, and stakeholders were invited to provide oral and written comments and suggested revisions. Meeting attendees and commenters included the Michigan Electric and Gas Association (MEGA), Consumers Energy Company, Mr. Phil Forner, DTE Electric Company, DTE Gas Company, the Michigan Electric Cooperative Association (MECA), Direct Energy, IGS Energy, Constellation NewEnergy, the Michigan Energy Efficiency Contractors Association, Detroit Thermal, the Association of Businesses Advocating Tariff Equity, and the Michigan Energy Innovation Business Council. The rules incorporate changes made as a result of comments made during this stakeholder process. MEGA and MECA have member companies which are small businesses, and, on information and belief, Mr. Forner represents a small HVAC business.

A. If small businesses were involved in the development of the rule(s), please identify the business(es).

MEGA and MECA have member companies which are small businesses, and, on information and belief, Mr. Forner represents a small HVAC business.

Cost-Benefit Analysis of Rules (independent of statutory impact):

26. Estimate the actual statewide compliance costs of the rule amendments on businesses or groups.

The PSC has no estimate of compliance costs, because regulated utilities are already complying with the same standards as are contained in the rules through a code of conduct promulgated by PSC order in 2001.

A. Identify the businesses or groups who will be directly affected by, bear the cost of, or directly benefit from the proposed rule(s).

Regulated electric, gas, and steam utilities will be affected by, and bear the cost of, the proposed rules. Entities or individuals that offer services that compete with services offered by an affiliate, division, or department of a regulated utility will benefit from the proposed rules. In the absence of a code of conduct, a monopoly regulated utility could share, for example, assets, employees, facilities, and customer information with affiliates, divisions, or departments that are unregulated and that compete in the open market for customers, without sharing the same assets, employees, facilities, or customer information with other businesses offering the same service or program. This would restrain trade and cause economic harm to competitors.

B. What additional costs will be imposed on businesses and other groups as a result of these proposed rules (i.e. new equipment, supplies, labor, accounting, or recordkeeping)? Identify the types and number of businesses and groups. Be sure to quantify how each entity will be affected.

The PSC has no estimate of additional costs to businesses or other groups, because regulated utilities are already complying with the same standards as are contained in the rules through a code of conduct promulgated by PSC order in 2001.

27. Estimate the actual statewide compliance costs of the proposed rule(s) on individuals (regulated individuals or the public). Include the costs of education, training, application fees, examination fees, license fees, new equipment, supplies, labor, accounting, or recordkeeping.

No compliance costs are imposed on individuals or the public as a result of the proposed rules.

A. How many and what category of individuals will be affected by the rules?

The general public is protected by the rules from monopoly power and restraint of trade.

B. What qualitative and quantitative impact does the proposed change in rule(s) have on these individuals?

These are new rules, not proposed changes.

28. Quantify any cost reductions to businesses, individuals, groups of individuals, or governmental units as a result of the proposed rule(s).

The PSC sees no cost reductions to any of these entities.

29. Estimate the primary and direct benefits and any secondary or indirect benefits of the proposed rule(s). Provide both quantitative and qualitative information, as well as your assumptions.

The PSC has no quantitative information respecting direct or indirect benefits of the proposed rules. Fostering competition in order to create fair, functioning markets free of cross-subsidization from captive customers should lead to qualitative benefits.

30. Explain how the proposed rule(s) will impact business growth and job creation (or elimination) in Michigan.

Fostering competition in order to create fair, functioning markets free of cross-subsidization from captive customers should lead to business growth and job creation.

31. Identify any individuals or businesses who will be disproportionately affected by the rules as a result of their industrial sector, segment of the public, business size, or geographic location.

Regulated electric, gas, and steam utilities will be affected.

32. Identify the sources the agency relied upon in compiling the regulatory impact statement, including the methodology utilized in determining the existence and extent of the impact of a proposed rule(s) and a cost-benefit analysis of the proposed rule(s).

The history and performance of the existing Code of Conduct promulgated by order in 2001.

A. How were estimates made, and what were your assumptions? Include internal and external sources, published reports, information provided by associations or organizations, etc., which demonstrate a need for the proposed rule(s).

Michigan Agency for Energy's *Roadmap to Implementing Michigan's New Energy Policy: Paths to the Future Report*, August 2015, p. 7, states as follows:

Why Codes of Conduct Matter

Capitalist theory states that competition will drive efficiency and lower prices to the benefit of all consumers. Where monopolies exist, regulation acts as a substitute for competition by keeping prices in check and ensuring adequate service and consumer protections. Once a market is open, it is important that there be fair competition in order to create a robust market with many participants. Here, the role of the regulator shifts emphasis from prices to ensuring that the market structure is fair so that the market can function properly and clear at reasonable prices. Without proper controls, EDUs [electric distribution utilities] can achieve a competitive advantage, squeeze out competitors, and control the market. This will eliminate businesses and jobs and stifle innovation, as many would-be entrepreneurs may have otherwise developed new, cutting-edge technologies and services for customers. Having fewer competitors can translate into higher prices and less attention to quality of service, as dissatisfied customers will have fewer options. The worst outcome is for the EDU affiliate to be in a position to exercise market power, such that the public is left with a deregulated monopoly that can control prices and cut corners on service and quality.

Section 10ee(1) of 2016 PA 341 (Act 341), MCL 460.10ee(1), provides as follows:

The commission shall establish a code of conduct that applies to all utilities. 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. The code of conduct established under this section is also applicable to electric utilities and alternative electric suppliers consistent with sections 10 through 10cc.

The PSC's assumptions are based on these principles and mandates.

Alternatives to Regulation:

- 33.** Identify any reasonable alternatives to the proposed rule(s) that would achieve the same or similar goals. Include any statutory amendments that may be necessary to achieve such alternatives.

The PSC is unaware of any reasonable alternatives. In the absence of regulation, market competitors are likely to use whatever advantages they have available to them in order to dominate the market.

- A.** In enumerating your alternatives, include any statutory amendments that may be necessary to achieve such alternatives.

The PSC is unaware of any reasonable alternatives.

- 34.** Discuss the feasibility of establishing a regulatory program similar to that in the proposed rule(s) that would operate through private market-based mechanisms. Include a discussion of private market-based systems utilized by other states.

Private market-based mechanisms actually represent the targeted behavior. In the absence of regulation, market competitors are likely to use whatever advantages they have available to them in order to dominate the market.

- 35.** Discuss all significant alternatives the agency considered during rule development and why they were not incorporated into the rule(s). This section should include ideas considered both during internal discussions and discussions with stakeholders, affected parties, or advisory groups.

The PSC did not consider any significant alternatives during rule development, largely because the agency has an existing Code of Conduct, which regulated utilities have been subject to since 2001. Regulated utilities have been subject to Affiliate Transaction Guidelines as well, since about 1974, in various forms.

Additional Information:

- 36.** As required by MCL 24.245b(1)(c), describe any instructions on complying with the rule(s), if applicable.

The PSC is not aware of any instructions.

↓ To be completed by the ORR ↓

PART 4: REVIEW BY THE ORR

Date RISCBA received:	4-17-2018
Date RISCBA approved:	4/30/18
Date of disapproval:	
Explanation:	