

**Direct Energy  
IGS  
Constellation**

Direct Energy, IGS Energy and Constellation submit the attached comments and redlines to the proposed Code of Conduct rules. Given the new rules encompass a broader value-added services world beyond normal AES type services we attempted to capture other entities beyond an AES who could be impacted.

1. The term AES is used throughout the rules but at times it is unclear if the rule is referring to an affiliated AES or any AES. The redline attempts to clarify when the reference is to an affiliated AES or any AES.
2. In many places there is a reference to AES but it should be applied to any company within the industry of a particular value added service. Not claiming an advantage over an AES in the construct of an HVAC offering would still allow for some form of advantage in marketing compared to an HVAC company.
3. Rule 460.10110 creates almost a rubber stamp approval of the project. These projects should allow time for a review and intervention if a party could be harmed due to non-compliance with the rules. It is critical to ensure that no regulated assets are used in a manner that may undercut competitors in an industry. If there is no deficiency, then the program could go into effect in 60 days or some other time frame; however, the longer time frame with Staff review ensures a more thorough analysis.
4. Rule 460.10105 makes an exception for regulated offerings. However, it should also require that the costs to provide that value added product are fully embedded into the product to ensure there is no potential cross subsidization of a product simply because it is labelled a regulated product.

June 5, 2017

5. DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

PUBLIC SERVICE COMMISSION

CODE OF CONDUCT

Filed with the Secretary of State on

These rules take effect upon filing with the Secretary of State.

(By authority conferred on the public service commission by section 10ee(1) of 2016 PA 341, MCL 460.10ee(1))

R 460.10101, R 460.10102, R 460.10103, R 460.10104, R 460.10105, R 460.10106, R 460.10107, R 460.10108, R 460.10109, R 460.10110, R 460.10111, R 460.10112, and R 460.10113 are added to the Michigan Administrative Code as follows:

PART 1. GENERAL PROVISIONS

R 460.10101 Applicability.

Rule 1. These rules apply to all utilities that, through an affiliate or other entity within the corporate structure, provide regulated and unregulated services to regulated utility customers in Michigan, and to alternative electric suppliers where indicated.

R 460.10102 Definitions.

Rule 2. (1) As used in these rules:

(a) "Affiliate" means a person or entity that directly or indirectly through 1 or more intermediates, controls, is controlled by, or is under common control with another specified entity. As used in these rules, 'control' means, whether through an ownership, beneficial, contractual, or equitable interest, the possession, directly or indirectly, of the power to direct or to cause the direction of the management or policies of a person or entity or the ownership of at least 7% of an entity either directly or indirectly.

(b) "Alternative electric supplier" means a person selling electric generation service to retail customers in this state. Alternative electric supplier does not include a person who physically delivers electricity directly to retail customers in this state. An alternative electric supplier is not a public utility, but may be an affiliate of a public utility.

(c) "Commission" means the public service commission.

(d) "Other entity within the corporate structure" means a division, department, subsidiary, or similar entity within the corporate structure of a utility.

(e) "Utility" means an electric, steam, or natural gas utility regulated by the public service commission, and an electric or natural gas cooperative.

(f) "Value-added programs and services" means programs and services that are utility or energy related, including, but not limited to, home comfort and protection, appliance service, building energy performance, alternative energy options, or engineering and construction services. Value-added programs and services do not include energy optimization or energy waste reduction programs paid for by utility customers as part of the regulated rates.

PART 2. SEPARATION OF A UTILITY FROM ITS AFFILIATES AND ALTERNATIVE  
ELECTRIC SUPPLIERS

R 460.10103 Separation.

Rule 3. (1) A utility that offers both regulated and unregulated services shall do so with the structural or functional separation needed to prevent anticompetitive behavior. A utility shall be a separate, independent entity from any competitive affiliate.

(2) A utility shall not offer unregulated value-added programs and services except through an affiliate or other entity within the corporate structure.

(3) A utility's regulated services shall not subsidize in any manner, directly or indirectly, the business of its affiliates or other entities within the corporate structure offering unregulated value-added programs or services.

(4) A utility shall maintain its books and records separately from those of its affiliates or other entities within the corporate structure offering unregulated value-added programs and services.

R 460.10104 Records.

Rule 4. (1) The commission may review records relating to any transaction between a utility and an affiliate, or between a utility and other entities within the corporate structure offering unregulated value-added programs and services. At any time, the commission may initiate an investigation into transactions between the utility and its affiliates, or between the utility and other entities within the corporate structure offering value-added programs and services.

(2) A utility, its affiliates, and other entities within the corporate structure shall keep their books in a manner consistent with generally accepted accounting principles and, where applicable, with the Uniform System of Accounts.

R 460.10105 Sharing of facilities and employees.

Rule 5. (1) A utility, its affiliates, and other entities within the corporate structure shall not share facilities, equipment, or operating employees, but may share computer hardware and software with documented protection to prevent discriminatory access to competitively sensitive information. This restriction does not apply if a utility offers an unregulated value-added program or service as part of regulated service. However, such unregulated value – added program or service must fully embed all costs to provide such service in the unregulated value-added program or service and shall ensure no cross subsidization from other regulated services.

(2) A utility may transfer employees between the utility and an affiliate alternative electric supplier as long as the utility documents those transfers and files semi-annually with the commission a report of each occasion on which an employee of the utility became an employee of an affiliate alternative electric supplier and/or an employee of an affiliate alternative electric supplier became an employee of the utility.

R 460.10106 Marketing.

Rule 6. (1) A utility, its affiliates, and other entities within the corporate structure offering unregulated value-added programs or services, shall not engage in joint advertising, marketing, or other promotional activities related to the provision of unregulated services, nor shall they jointly sell services. The utility shall not give the appearance in any way that it speaks on behalf

of its affiliates or other entities within the corporate structure offering unregulated value-added programs or services, nor shall the utility permit an affiliate or other entity within the corporate structure offering unregulated value-added programs or services to give the appearance that it speaks on behalf of the utility.

(2) A utility or alternative electric supplier shall not suggest that it will provide any customer with preferential treatment or service by doing business with the utility, its affiliates, or other entities within the corporate structure offering unregulated value-added programs or services, nor shall the utility or affiliate alternative electric supplier suggest that any customer will receive inferior treatment or service by doing business with an unaffiliated supplier of a similar service.

(3) A utility shall not condition or otherwise tie the provision of a utility service or the availability of discounts, rates, other charges, fees, rebates, or waivers of terms and conditions to the taking of any goods or services from the utility, its affiliates, or other entities within the corporate structure offering unregulated value-added programs or services.

R 460.10107 Utility and affiliate or alternative electric supplier relationship.

Rule 7. (1) A utility shall not in any way interfere in the business operations of an alternative electric supplier. This provision includes, but is not limited to, all of the following:

(a) A utility shall not give the appearance in any way that it speaks on behalf of any alternative electric supplier or affiliate.

(b) A utility shall not interfere in any manner in the contractual relationship between the alternative electric supplier and its customers unless such involvement is clearly permitted in the contract between the customer and the alternative electric supplier or in tariffs approved by the commission.

(2) A utility shall not finance or co-sign loans, provide loan guarantees, provide collateral, or be encumbered or allow its assets to be encumbered by affiliates or other entities within the corporate structure. The utility and its assets shall not be the subject of recourse in the event of default by an affiliate or other entity within the corporate structure.

### PART 3. DISCRIMINATION

R 460.10108 Discrimination.

Rule 8. (1) A utility or affiliate alternative electric supplier shall not unduly discriminate in favor of or against any party, including its affiliates.

(2) A utility shall not provide any affiliate or other entity within the corporate structure offering unregulated value-added programs or services, or any customer of an affiliate or other entity within the corporate structure offering unregulated value-added programs or services, preferential treatment or any other advantages that are not offered under the same terms and conditions and contemporaneously to other suppliers offering programs or services within the same service territory or to customers of those suppliers.

(3) If a utility provides to any affiliate alternative electric supplier or customers of an affiliate alternative electric supplier a discount, rebate, fee waiver, or waiver of its regulated tariffed terms and conditions for services or products, it shall contemporaneously offer the same discount, rebate, fee waiver, or waiver to all alternative electric suppliers operating within the utility's service territory or all alternative electric suppliers' customers.

(4) If a utility provides services or products to any affiliate or other entity within the corporate structure, and the cost of the service or product is not governed by MCL 460.10ee(8),

compensation shall be based upon the higher of fully allocated embedded cost or market price. If an affiliate or other entity within the corporate structure provides services or products to a utility, and the cost of the service or product is not governed by MCL 460.10ee(8), compensation shall be at the lower of market price or 10% over fully allocated embedded cost. Asset transfers from a utility to an affiliate or other entity within the corporate structure for which the cost is not governed by MCL 460.10ee(8) shall be at the higher of cost or fair market value. Asset transfers from an affiliate or other entity within the corporate structure to a utility for which the cost is not governed by MCL 460.10ee(8) shall be at the lower of cost or fair market value.

#### PART 4. INFORMATION SHARING

R 460.10109 Disclosure of information.

Rule 9. (1) Utilities shall comply at all times with applicable data privacy tariffs.

(2) Every utility that does not have an approved data privacy tariff shall apply to the commission for a data privacy tariff within 90 days of the effective date of these rules, and shall comply with the approved tariff.

(3) Prior written approval of the customer is not required for the disclosure of a customer list to a competing provider of an unregulated value-added program or service in compliance with MCL 460.10ee(10)(a), or to otherwise comply with these rules. A customer list may include only the name and address of a customer.

(4) Information obtained by a utility in the course of conducting its regulated business shall not be shared directly or indirectly with its affiliates or other entities within the corporate structure offering unregulated value-added programs or services unless that same information is provided to competitors operating in the state on the same terms and conditions and contemporaneously.

(5) Customer specific consumption or billing data shall not be provided to any affiliate, other entity within the corporate structure offering unregulated value-added programs or services, or alternative electric supplier without prior written approval of the customer.

(6) If a utility provides non-customer specific, or aggregated, customer information to its affiliate or other entity within the corporate structure offering unregulated value-added programs or services, it must offer the same information on the same terms and conditions, in the same form and manner, and contemporaneously, to all competitors of that affiliate or other entity within the corporate structure. The provision of such data must comply with all applicable data privacy tariffs.

(7) A utility shall not provide its affiliates or other entities within the corporate structure offering unregulated value-added programs or services with information about the distribution system, including operation and expansion, without offering the same information under the same terms and conditions, in the same form and manner, and contemporaneously, to all licensed alternative electric suppliers or all competitors of the other entity within the corporate structure.

(8) A utility shall not provide any information received from or as a result of doing business with a competitor to the utility's affiliate or other entity within the corporate structure offering unregulated value-added programs or services without the written approval of the competitor.

#### PART 5. REPORTING, OVERSIGHT, AND PENALTIES

R 460.10110 Notification.

Rule 10. (1) Utilities that intend to offer a value-added program or service shall ~~notify file~~ with the commission no less than ~~630~~ 30 days prior to offering the new program or service. The commission shall provide a minimum of 7 days for staff or interested parties to dispute the compliance of the value-added program. Staff will review the filing and -issue a report within 30 days noting any deficiency or non-compliance. If none are found the utility shall consider the filing approved to implement. The ~~written notification filing~~ shall, at a minimum, provide all of the following:

- (a) A detailed description of the new value-added program or service and what it will offer.
  - (b) A list of the personnel responsible for management of the value-added program or service and their location within the utility, both physically and within the corporate structure.
  - (c) A detailed description of how costs will be allocated to the value-added program or service to ensure that there is no cross-subsidization between regulated and unregulated programs or services.
  - (d) A copy of the business plan for the value-added program or service.
  - (e) Pro forma financial statements that outline the expected financial performance for each value-added program or service for the next 12 months.
- (2) Utilities shall request a docket for the filing of the notification, and shall thereafter make all annual report filings in that docket.
- (3) A utility that intends to sell or transfer an asset with a market value of \$1,000,000 or more to any affiliate or other entity within the corporate structure shall notify the commission of the impending sale or transfer no less than 30 days before the sale or transfer. An affiliate or other entity within the corporate structure of a utility that intends to sell or transfer an asset with a market value of \$1,000,000 or more to a utility shall notify the commission of the impending sale or transfer no less than 30 days before the sale or transfer. Upon request, the utility, affiliate, or other entity within the corporate structure shall make available to the commission information that demonstrates how the sale or transfer price was determined. Notification shall be in the form of a letter to the director of the financial analysis and audit division of the commission.

#### R 460.10111 Oversight.

Rule 11. (1) A utility, its affiliates, and other entities within the corporate structure offering unregulated value-added programs or services ~~A utility or alternative electric supplier~~ shall maintain documentation needed to investigate compliance with these rules. All documentation shall be kept at a designated company office in Michigan. The utility or affiliate ~~alternative electric supplier~~ shall make this information available for review upon request by the commission or its staff.

(2) The utility, its affiliates, and other entities within the corporate structure offering unregulated value-added programs or services ~~utility or alternative electric supplier~~ shall use a documented dispute resolution process separate from any process that might be available from the commission. This dispute resolution process shall address complaints arising from application of these rules. The utility, its affiliates, and other entities within the corporate structure offering unregulated value-added programs or services ~~utility or alternative electric supplier~~ shall keep a log of all complaints, including the name of the person or entity filing the complaint, the date the complaint was filed, a written statement of the nature of the complaint, and the results of the resolution process.

(3) A utility, its affiliates, and other entities within the corporate structure offering unregulated value-added programs or services ~~A utility or alternative electric supplier~~ may request a waiver

from one or more provisions of these rules by filing an application with the commission. The utility, its affiliates, and other entities within the corporate structure offering unregulated value-added programs or services ~~utility or alternative electric supplier~~ carries the burden of demonstrating that such a waiver will not inhibit the development or functioning of the competitive market.

#### R 460.10112 Reporting.

Rule 12. (1) Utilities shall file the code of conduct annual report information required under MCL 460.10ee(6)(c) and MCL 460.10ee(15) no later than April 30 of each year in the docket in which the utility filed its notification for a new program or service, or in a new docket for an existing program or service. Code of conduct annual reports shall include all of the following:

- (a) Designation of a corporate officer of the utility who will oversee compliance with these rules and be available to serve as the commission's primary contact regarding compliance.
  - (b) An organizational chart of the parent or holding company showing all regulated entities and affiliates and a description of all programs and services provided between the regulated entity and its affiliates.
  - (c) An overview of the current year, expectations for the following year, and any five year projections available for each value-added program and service.
  - (d) A table illustrating the customer count, revenue, and expense of each value-added program and service.
  - (e) A balance sheet, where available, and income statement for each affiliate and value-added program and service, including revenues, less direct and indirect expenses broken out separately. Direct and indirect revenues and expenses shall be separated by category and then aggregated at the direct and indirect levels, and the report shall include gross income, amounts flowed back to ratepayers to reduce rates, and net income. Each category of indirect cost should be accompanied by formulas/calculations/allocations showing how they have been derived.
  - (f) General ledger and trial balance for each value-added program and service shall be provided to the commission staff separately on a USB thumb drive or other appropriate technological device with formulas intact.
  - (g) The number and type of complaints received in the prior calendar year regarding code of conduct issues from customers, alternative electric suppliers, or any other entity, and a summary of the resolution of any complaint that occurred during the calendar year.
  - (h) The number of times during the prior calendar year that customer information was provided to an affiliate or competing provider of an unregulated value-added program or service, the identity of the affiliate or competing provider, and a description of the information shared.
  - (i) A description of the nature of each transaction with an affiliate or other entity within the corporate structure and of the basis for the cost allocation and pricing established in each transaction.
  - (j) Annual balance sheets and income statements of the non-regulated subsidiaries, affiliates, and other entities within the corporate structure of the utility offering value-added programs or services.
  - (k) Reports of internal audits conducted by the utility regarding transactions between the utility and its affiliates, or transactions between the utility and other entities within the corporate structure offering value-added programs or services.
- (2) The annual report shall be signed by the designated corporate officer or a party responsible for each value-added program and service attesting to the accuracy of the information in the

annual report and certifying that there is no cross-subsidization between regulated and non-regulated utility programs and services.

(3) Copies of federal income tax returns for utilities, affiliates, and, where applicable, other entities within the corporate structure, shall be available to the Commission for inspection and review.

R 460.10113 Penalties.

Rule 13. Penalties for violations of these rules are as provided in MCL 460.10c and MCL 460.10ee(14).

**Michigan Electric Cooperative Association**



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July 14, 2017

Derrell Slaughter  
Michigan Public Service Commission  
Commission Analyst, Commission Office  
7109 W. Saginaw Highway  
Lansing, MI 48917

Re: MECA's Comments on Code of Conduct Rule

Dear Mr. Slaughter:

Enclosed please find The Michigan Electric Cooperative Association's Comments on Draft Code of Conduct Rule.

If you have any questions, feel free to contact me. Thank you.

Sincerely,

**DYKEMA GOSSETT PLLC**

Richard J. Aaron

Attachment

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**The Michigan Electric Cooperative Association's**  
**Comments on Draft Code of Conduct Rule**

The Michigan Electric Cooperative Association (MECA) submits these informal comments on draft code of conduct proposed MPSC rule (Proposed Rule) dated June 5, 2017 and presented by MPSC Staff on June 26, 2017.

**I. Background**

2016 PA 341 Section 10ee; MCL 460.10ee provides:

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.

Largely, this language is taken from previous Section 10a(4) of Act 3. The only changes are that the code of conduct (Code) shall apply to "all utilities" regarding "regulated electric, steam and natural gas services" and not just electric utilities and their services. Section 10ee also defines utility to mean "an electric, steam, or natural gas utility regulated by the commission."

While Section 10ee is focused on value added programs, the remaining provisions of Section 10ee are based on previous law applicable just to appliance

service programs offered by electric utilities. Former MCL 460.10a(5) – 460.10a(11) which were replaced by Section 10ee.

In its March 29, 2017 Order in Case No. U-18326, the Commission stated that it intended to commence a rulemaking proceeding pursuant to Section 10ee(1) and stated interim requirements to apply pending adoption of new rules, including continuation of the Code of Conduct established in Case No. U-12134.

A stakeholder meeting took place on June 26, 2017 and Staff reviewed the Proposed Rule and background information. Interested parties were invited to submit comments on the draft Proposed Rule by July 14, 2017 with reply comments by July 28, 2017.

## **II. Code of Conduct Background**

The existing Code was never adopted as an administrative rule, which makes the upcoming rulemaking the first of its kind in Michigan. The existing Code was adopted by orders in MPSC Case No. U-12134 in 2000-2001. The concept of code of conduct was developed in contested cases and associated with electric retail open access, to ensure fair treatment by utilities of unaffiliated providers of electric supply. At the same time, there was a general regulatory concern over potential harm to the utility business of utility nonregulated activity. Regulatory measures included gas standards of conduct, electric codes of conduct and affiliated transactions guidelines. When 2000 PA 141 required an electric utility code of conduct, the MPSC acted to adopt one in Case No. U-12134.

Court decisions have established that a generally applicable code of conduct must be adopted through formal rulemaking. MEGA v MPSC, 252 Mich App 254; 652 NW2d1 (2002) invalidated affiliated transaction guidelines adopted by order, for failure of the agency to comply with the procedural mandates of the state administrative procedures act. The Code orders in Case No. U-12134 were initially upheld by the Michigan Court of Appeals in Detroit Edison Co v MECA, \_\_\_ Mich App \_\_\_\_ (2004); however, the Supreme Court issued an order on May 6, 2005 (Case No. 125950-54-55) determining that a generally applicable industry code of conduct may not be promulgated through a contested case proceeding. The Court let the Code stand, finding that it was ratified by the legislature in 2004 PA 88. That act stated that a utility shall comply with the Code and included requirements for regulated utilities that offer appliance service programs.

### **III. General Comments**

Chapter 3 of the Administrative Procedures Act of 1969 (APA) governs the procedures for processing and publishing rules. MCL 24.231 – 24.264. A key guiding principle in rulemaking is that a rule shall not exceed the rulemaking delegation contained in the statute authorizing the rulemaking. MCL 24.232(7). Administrative agencies may not, under the guise of their rulemaking power, abridge or enlarge their authority or exceed the statutory powers. Coffman v State Board, 331 Mich 582;50 NW2d 322 (1951); LeDuc, Michigan Administrative Law, § 4.02-4.03. This guiding principle is backdrop for these general comments

Section 10ee, takes the requirements for appliance service plans of electric utilities and expands their applicability to many potential unregulated services that constitute VAPS. Clearly, any Code adopted by the Commission must address 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. Expanding a Code beyond those delineated items risks creating a Code which exceeds the Legislative delegation.

Based on the June 26, 2017 stakeholders meeting, the Proposed Rule is drafted from combining the previous Code, affiliated transaction guidelines and specific definitions in Section 10ee. The Proposed Rule does not clearly address non-VAPs and thus gets confusing if there are two sets of requirements on similar conduct, one for VAPS and the other for retail choice and other affiliate activity. If the AES provisions differ, that should be covered by having separate parts to the rule. What needs to be avoided is requiring a person to read the rule and then make a comparison to the statute to find out what measure applies.

The legislature, by expanding the appliance service plan provisions, to a broader group of unregulated services, has indicated a pro-competition view, with specified protections. The rules should be drafted in a manner consistent with that intent. Two major problem areas are: (1) many filing and reporting requirements<sup>1</sup> that seek to

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<sup>1</sup> By proposing such detailed filing requirements, the Proposed Rule sets up a claim that the Staff had information "and accepted programs" that are later being challenged.

create a detailed administrative record in every offering of a provider's VAPS competitive plans and projections; and (2) burdensome administrative provisions that provide a disincentive to offer VAPS. The MPSC should not be creating a public database for competitors to learn about a utility's VAPS business plans and projections. Those competitors would certainly oppose this type of access to their business plans.

See attached draft of the Proposed Rule with suggested changes and explanation.

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

PUBLIC SERVICE COMMISSION

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R 460.10101, R 460.10102, R 460.10103, R 460.10104, R 460.10105, R 460.10106, R 460.10107, R 460.10108, R 460.10109, R 460.10110, R 460.10111, R 460.10112, and R 460.10113 are added to the Michigan Administrative Code as follows:

PART 1. GENERAL PROVISIONS

R 460.10101 Applicability.

Rule 1. These rules apply to all utilities ~~that, through an affiliate or other entity within the corporate structure, provide regulated and unregulated services to regulated utility customers in Michigan,~~ and to alternative electric suppliers subject to the jurisdiction of the commission and the requirements of these rules under MCL 460.10ee. ~~where indicated~~

Section 10ee(1) defined the scope of rules with differences from the draft.  
Suggested changes use more general language.

R 460.10102 Definitions.

Rule 2. (1) As used in these rules:

(a) “Affiliate” means a person or entity that directly or indirectly through 1 or more intermediates, controls, is controlled by, or is under common control with another specified entity. As used in these rules, ‘control’ means, whether through an ownership, beneficial, contractual, or equitable interest, the possession, directly or indirectly, of the power to direct or to cause the direction of the management or policies of a person or entity or the ownership of at least 7% of an entity either directly or indirectly.

(b) “Alternative electric supplier” means a person selling electric generation service to retail customers in this state as licensed by the Commission under Section 10a of 2000 PA 141, as amended. Alternative electric supplier does not include a person who physically delivers electricity directly to retail customers in this state. An alternative electric supplier is not a public utility, but may be an affiliate of a public utility.

(c) “Commission” means the public service commission.

(d) “Other entity within the corporate structure” means a division, department, subsidiary, or similar entity within the corporate structure of a utility.

(e) “Utility” means an electric, steam, or natural gas utility regulated by the public service commission, ~~and an electric or natural gas cooperative.~~

Section 10ee (16)( 9a) states ““Utility” means an electric, steam, or natural gas utility regulated by the commission. (this change avoids enlargement issue.)

(f) “Value-added programs and services” means programs and services that are utility or energy related, including, but not limited to, home comfort and protection, appliance service, building energy performance, alternative energy options, or engineering and construction services. Value-added programs and services do not include energy optimization or energy waste reduction programs paid for by utility customers as part of the regulated rates.

## PART 2. SEPARATION OF A UTILITY FROM ITS AFFILIATES AND ALTERNATIVE ELECTRIC SUPPLIERS

R 460.10103 Separation.

Rule 3. (1) A utility that offers both regulated and unregulated services other than VAPS shall do so with the structural or functional separation needed to prevent ~~anticompetitive behavior~~ cross-subsidization, preferential treatment and information sharing prohibited by these rules. A utility shall be a separate, independent entity from any ~~competitive~~ affiliate providing unregulated programs and services.

~~(2) A utility shall not offer unregulated value added programs and services except through an affiliate or other entity within the corporate structure.~~

~~(3) A utility’s regulated services shall not subsidize in any manner, directly or indirectly, the business of its affiliates or other entities within the corporate structure offering unregulated value-added programs or services.~~

~~(4) A utility shall maintain its books and records separately from those of its affiliates or other entities within the corporate structure offering unregulated value added programs and services.~~

Changes to reflect VAP situation – separation not always required (statutory conflict). Anticompetitive behavior is broader than issues addressed in Section 10ee and implicates antitrust jurisdiction the Commission lacks.

R 460.10104 Records.

Rule 4. (1) A utility shall maintain its books and records separately from those of its affiliates, and shall also maintain separate books and records for unregulated value-added programs and services.

~~(2) The commission may review records relating to any transaction between a utility and an affiliate, or between a utility and other entities within the corporate structure, offering unregulated value-added programs and services. At any time, the commission may initiate an investigation into transactions between the utility and its affiliates, or between the utility and other entities within the corporate structure, offering value-added programs and services.~~

~~(3) A utility, its affiliates, and other entities within the corporate structure shall keep their books in a manner consistent with generally accepted accounting principles and, where applicable, with the Uniform System of Accounts.~~

R 460.10105 Sharing of facilities and employees.

Rule 5. (1) A utility, its affiliates, and other entities within the corporate structure shall not share facilities, equipment, or operating employees, but may share computer hardware and software with documented protection to prevent discriminatory access to competitively sensitive information. This restriction does not apply if a utility offers an unregulated value-added program or service as part of regulated service.

(2) A utility may transfer employees between the utility and an affiliate alternative electric supplier as long as the utility documents those transfers and files semi-annually with the commission a report of each occasion on which an employee of the utility became an employee of an affiliate alternative electric supplier and/or an employee of an affiliate alternative electric supplier became an employee of the utility.

(3) None of the provisions of this code shall be interpreted to require a utility with fewer than 60 employees to maintain separate facilities, operations or personnel, used to deliver regulated services and unregulated programs and services.

Operating employee should be a defined term. Does this mean non-executive? The section, as drafted is confusing. The law appears to allow sharing with appropriate compensation (proportional use). Among whom is the sharing prohibited?

In the prior the Code, the Commission recognized smaller utilities need not have separation.

R 460.10106 Marketing.

Rule 6. (1) A utility, its affiliates, and other entities within the corporate structure offering unregulated value-added programs or services, shall not engage in joint advertising, marketing, or other promotional activities related to the provision of unregulated services, nor shall they jointly sell services. ~~The utility shall not give the appearance in any way that it not speaks on behalf of its affiliates or other entities within the corporate structure offering unregulated value-added programs or services, nor shall the utility permit an affiliate or other entity within the corporate structure offering unregulated value-added programs or services to give the appearance that it speaks on behalf of the utility.~~

(2) A utility or alternative electric supplier shall not ~~offer suggest that it will to~~ provide any customer with preferential treatment or service by doing business with the utility, its affiliates, or other entities within the corporate structure offering unregulated value-added programs or services, nor shall the utility or alternative electric supplier ~~offer suggest that any customer will receive~~ inferior treatment or service by doing business with an unaffiliated supplier.

(3) A utility shall not condition or otherwise tie the provision of a utility service or the availability of discounts, rates, other charges, fees, rebates, or waivers of terms and conditions to the taking of any goods or services from the utility, its affiliates, or other entities within the corporate structure offering unregulated value-added programs or services.

Giving appearance is vague and ambiguous. Speaking on behalf of is a tangible event. Likewise suggesting is vague and ambiguous.

MCL 460.10ee(10) allows use of the utility logo for marketing VAPS which directly conflicts with the highlighted language in Rule 6(1). The legislature has determined that adequate protection exists in the marketing disclosure, compensation and cost allocation measures.

R 460.10107 Utility and affiliate or alternative electric supplier relationship.

Rule 7. (1) A utility shall not ~~in any way~~ interfere in the business operations of an alternative electric supplier. ~~This provision includes, but is not limited to, all of the following:~~

~~(a) A utility shall not give the appearance in any way that it speaks on behalf of any alternative electric supplier or affiliate.~~

~~(b)(2) A utility shall not interfere in any manner~~ in the contractual relationship between the alternative electric supplier and its customers unless such involvement is clearly permitted in the contract between the customer and the alternative electric supplier or in tariffs approved by the ~~commission~~Commission.

~~(2) A utility shall not finance or co-sign loans, provide loan guarantees, provide collateral, or be encumbered or allow its assets to be encumbered by affiliates or other entities within the corporate structure. The utility and its assets shall not be the subject of recourse in the event of default by an affiliate or other entity within the corporate structure.~~

Proposed Rule 7(1)(a) is vague and overbroad and the point is already covered by more specific language in 7(1) and 7(1)(b). The language in Proposed Rule 7(3) is not contained in the statute or the existing Code. The MPSC has authority over utility mergers and asset transfers under MCL 460.6q and adopted rules in this area – R 460.301 et. seq that do not contain this provision.

### PART 3. DISCRIMINATION

R 460.10108 Discrimination.

Rule 8. (1) A utility ~~or alternative electric supplier~~ shall not unduly discriminate in favor of or against any party, including its affiliates.

(2) A utility shall not provide any affiliate alternative electric supplier or other entity within the corporate structure offering unregulated value-added programs or services, or any customer of an affiliate alternative electric supplier or other entity within the corporate structure offering unregulated value-added programs or services, preferential treatment or any other advantages that are not offered under the same terms and conditions and contemporaneously to other suppliers offering programs or services within the same service territory or to customers of those suppliers.

(3) If a utility provides to any affiliate alternative electric supplier or customers of an affiliate alternative electric supplier a discount, rebate, fee waiver, or waiver of its regulated tariffed terms and conditions for services or products, it shall contemporaneously offer the same discount, rebate, fee waiver, or waiver to all alternative electric suppliers operating within the utility's service territory or all alternative electric suppliers' customers.

(4) If a utility provides services or products to any affiliate alternative electric supplier or other entity within the corporate structure, and the cost of the service or product is not governed by MCL 460.10ee(8), compensation shall be based upon the higher of fully allocated embedded cost or market price. If an affiliate alternative electric supplier or other entity within the corporate

structure provides services or products to a utility, and the cost of the service or product is not governed by MCL 460.10ee(8), compensation shall be at the lower of market price or 10% over fully allocated embedded cost. Asset transfers from a utility to an affiliate [alternative electric supplier](#) or other entity within the corporate structure for which the cost is not governed by MCL 460.10ee(8) shall be at the higher of cost or fair market value. Asset transfers from an affiliate [alternative electric supplier](#) or other entity within the corporate structure to a utility for which the cost is not governed by MCL 460.10ee(8) shall be at the lower of cost or fair market value.

**Applying 8 (1) to an AES would require uniform contracts with customers much like a tariff. AES's can and should be free to price based on negotiation strength of customers and AES.**

#### PART 4. INFORMATION SHARING

R 460.10109 Disclosure of information.

Rule 9. (1) Utilities shall comply at all times with applicable data privacy tariffs.

(2) Every utility that does not have an approved data privacy tariff shall apply to the commission for a data privacy tariff within 90 days of the effective date of these rules, ~~and shall comply with the approved tariff.~~

(3) Prior written approval of the customer is not required for the disclosure of a customer list to a ~~competing~~ provider of an unregulated value-added program or service in compliance with MCL 460.10ee(10)(a), or to otherwise comply with these rules. A customer list may include only the name and address of a customer.

(4) Information obtained by a utility in the course of conducting its regulated business shall not be shared directly or indirectly with its affiliates [alternative electric supplier](#) or other entities within the corporate structure offering unregulated value-added programs or services unless that same information is provided to competitors operating in the state on the same terms and conditions and contemporaneously.

(5) Customer specific consumption or billing data shall not be provided to any affiliate [alternative electric supplier](#), or other entity within the corporate structure offering unregulated value-added programs or services, or [an](#) alternative electric supplier without prior written approval of the customer.

(6) If a utility provides non-customer specific, or aggregated, customer information to its affiliate [alternative electric supplier](#) or other entity within the corporate structure offering unregulated value-added programs or services, it must offer the same information on the same terms and conditions, in the same form and manner, and contemporaneously, to all competitors of that affiliate or other entity within the corporate structure. The provision of such data must comply with all applicable data privacy tariffs.

(7) A utility shall not provide its affiliate [alternative electric supplier](#)s or other entities within the corporate structure offering unregulated value-added programs or services with information about the distribution system, including operation and expansion, without offering the same information under the same terms and conditions, in the same form and manner, and contemporaneously, to ~~all licensed alternative electric suppliers~~ or all competitors of [its affiliate alternative electric supplier](#) or the other entity within the corporate structure.

(8) A utility shall not provide any information received from, or as a result of doing business with, a competitor to the utility's affiliate [alternative electric supplier](#) or other entity within the

corporate structure offering unregulated value-added programs or services without the written approval of the competitor.

Proposed Rule 9 raises a series of issues. How does a utility offering VAPS not have information from the regulated business? The requirement for contemporaneous disclosure in (4) and (6) presumes knowledge of all competitors that many not exist. The law indicates customer lists are provided on request.

## PART 5. REPORTING, OVERSIGHT, AND PENALTIES

### R 460.10110 Notification.

Rule 10. (1) Utilities that intend to offer a value-added program or service shall notify the commission no less than 30 days prior to offering the new program or service. The written notification shall, at a minimum, provide all of the following:

- (a) A detailed description of the new value-added program or service and what it will offer.
- (b) A list of the personnel responsible for management of the value-added program or service and their location within the utility, both physically and within the corporate structure.
- (c) A detailed description of how costs will be allocated to the value-added program or service to ensure that there is no cross-subsidization between regulated and unregulated programs or services.

~~(d) A copy of the business plan for the value-added program or service.~~  
~~(e) Pro forma financial statements that outline the expected financial performance for each value-added program or service for the next 12 months.~~

(2) Utilities shall request a docket for the filing of the notification, and shall thereafter make all annual report filings in that docket.

~~(3) A utility that intends to sell or transfer an asset with a market value of \$1,000,000 or more to any affiliate or other entity within the corporate structure shall notify the commission of the impending sale or transfer no less than 30 days before the sale or transfer. An affiliate or other entity within the corporate structure of a utility that intends to sell or transfer an asset with a market value of \$1,000,000 or more to a utility shall notify the commission of the impending sale or transfer no less than 30 days before the sale or transfer. Upon request, the utility, affiliate, or other entity within the corporate structure shall make available to the commission information that demonstrates how the sale or transfer price was determined. Notification shall be in the form of a letter to the director of the financial analysis and audit division of the commission.~~

There is no need for a docket for each VAPS because no specific regulatory action is requested. MCL 460.10ee(4) and (6) contemplate notice of the offering and a description. The information stricken goes far beyond the statutory requirement. R 460.301 addresses asset transfers.

### R 460.10111 Oversight.

Rule 11. (1) A utility or affiliate alternative electric supplier shall maintain documentation needed to investigate compliance with these rules. All documentation shall be kept at a designated company office in Michigan, unless the Commission by order has authorized a different location. The utility or affiliate alternative electric supplier shall make this information available for review upon request by the ~~commission~~ Commission or its staff.

(2) The utility or alternative electric supplier shall use a documented dispute resolution process separate from any process that might be available from the ~~commission~~Commission. This dispute resolution process shall address complaints arising from application of these rules. The utility or alternative electric supplier shall keep a log of all complaints, including the name of the person or entity filing the complaint, the date the complaint was filed, a written statement of the nature of the complaint, and the results of the resolution process.

(3) A utility or alternative electric supplier may request a waiver from one or more provisions of these rules by filing an application with the ~~commission~~Commission. The utility or alternative electric supplier carries the burden of demonstrating that such a waiver will not ~~inhibit-impair~~ the development or functioning of the competitive market.

#### R 460.10112 Reporting.

Rule 12. (1) Utilities shall file the code of conduct annual report information required under MCL 460.10ee(6)(c) and MCL 460.10ee(15) no later than April 30 of each year in the docket in which the utility filed its notification for a new program or service, or in a new docket for an existing program or service. Code of conduct annual reports shall include all of the following:

(a) Designation of a corporate officer of the utility who will oversee compliance with these rules and be available to serve as the ~~commission's~~Commission's primary contact regarding compliance.

(b) An organizational chart of the parent or holding company showing all regulated entities and affiliates and a description of all programs and services provided between the regulated entity and its affiliates.

~~(c) An overview of the current year, expectations for the following year, and any five year projections available for each value added program and service.~~

~~(d) A table illustrating the customer count, revenue, and expense of each value added program and service.~~

~~(e) A balance sheet, where available, and income statement for each affiliate and value added program and service, including revenues, less direct and indirect expenses broken out separately. Direct and indirect revenues and expenses shall be separated by category and then aggregated at the direct and indirect levels, and the report shall include gross income, amounts flowed back to ratepayers to reduce rates, and net income. Each category of indirect cost should be accompanied by formulas/calculations/allocations showing how they have been derived.~~

~~(f) General ledger and trial balance for each value added program and service shall be provided to the commission staff separately on a USB thumb drive or other appropriate technological device with formulas intact.~~

~~(g)~~ (gd) The number and type of complaints received in the prior calendar year regarding code of conduct issues from customers, alternative electric suppliers, or any other entity, and a summary of the resolution of any complaint that occurred during the calendar year.

~~(h)~~ (he) The number of times during the prior calendar year that customer information was provided to an affiliate or competing provider of an unregulated value-added program or service, the identity of the affiliate or competing provider, and a description of the information shared.

~~(i) A description of the nature of each transaction with an affiliate or other entity within the corporate structure and of the basis for the cost allocation and pricing established in each transaction.~~

~~(j) Annual balance sheets and income statements of the non-regulated subsidiaries, affiliates, and other entities within the corporate structure of the utility offering value-added programs or services.~~

~~(k) Reports of internal audits conducted by the utility regarding transactions between the utility and its affiliates, or transactions between the utility and other entities within the corporate structure offering value-added programs or services.~~

(2) The annual report shall be signed by the designated corporate officer or a party responsible for each value-added program and service attesting to the accuracy of the information in the annual report and certifying that there is no cross-subsidization between regulated and non-regulated utility programs and services.

(3) Copies of federal income tax returns for utilities, affiliates, and, where applicable, other entities within the corporate structure, shall be available to the Commission for inspection and review.

MCL 460.10ee(15) already specifies the requirements for an annual report. The Proposed Rule adds many provisions beyond the scope of the statute. The act allows the audit to ensure compliance, where relevant additional information may be obtained if needed on a case by case basis. R 460.301 already addresses affiliate transactions.

R 460.10113 Penalties.

Rule 13. Penalties for violations of these rules are as provided in MCL 460.10c and MCL 460.10ee(14).

**Michigan Electric and Gas Association**



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July 14, 2017

Mr. Derrell Slaughter  
Michigan Public Service Commission  
7019 W. Saginaw Highway  
Lansing, MI 48917

Via email to: [slaughterd@michigan.gov](mailto:slaughterd@michigan.gov)

Re: Code of Conduct Draft Rule Proposal

Dear Mr. Slaughter:

Accompanying this letter are joint comments of Consumers Energy Company, DTE Electric Company, DTE Gas Company and the Michigan Electric and Gas Association on the draft rules for code of conduct. These joint comments include two parts: (1) background and general comments, plus (2) a markup of the draft rule including additional explanatory comments.

Please contact us if you have any questions and thank you for your work and assistance in this matter.

Very truly yours,

MICHIGAN ELECTRIC AND GAS ASSOCIATION

James A. Ault  
President

cc: DTE Electric Company  
DTE Gas Company  
Consumers energy Company  
MEGA Member Companies

## **Comments of Michigan Regulated Energy Providers on Draft Code of Conduct Rule**

These informal comments apply to the draft code of conduct proposed MPSC rule (Proposed Rule) dated June 5, 2017 and presented by MPSC Staff on June 26, 2017.

These comments are submitted by the Michigan Regulated Energy Providers (Providers) including Consumers Energy Company, DTE Electric Company, DTE Gas Company and the Michigan Electric and Gas Association (MEGA) on behalf of its members.<sup>1</sup>

### **I. Introduction**

2016 PA 341, effective on April 20, 2017, added a new Section 10ee to the Public Service Commission Act, 1939 PA 3; MCL 460.1 *et. seq.* Section 10ee; MCL 460.10ee is mostly devoted to detailed requirements that apply if a utility offers “value-added programs and services” (VAPS) defined as utility or energy related programs or services. This section also contains the following directive in subsection (1):

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.

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<sup>1</sup> Alpena Power Company, Aurora Gas Company, Citizens Gas Fuel Company, Indiana Michigan Power Company, Michigan Gas Utilities, SEMCO Energy Gas Company, Upper Peninsula Power Company, We Energies, WEC Energy Group, Xcel Energy

With a few modifications, this language is taken from previous Section 10a(4) of Act 3, effective since the retail electric choice amendments to Act 3 were enacted in 2000. The only changes are that the code of conduct (Code) shall apply to “all utilities” regarding “regulated electric, steam and natural gas services” and not just electric utilities and their services.

Many of the remaining provisions of Section 10ee are based on previous law applicable just to appliance service programs offered by electric utilities. Former MCL 460.10a(5) – 460.10a(11) which were replaced by Section 10ee.

In an order issued on March 28, 2017 in Case No. U-18326, the Commission indicated its intent to commence a rulemaking proceeding pursuant to Section 10ee(1) and stated interim requirements to apply pending adoption of new rules, including continuation of the Code of Conduct established in Case No. U-12134.

At a stakeholder meeting on June 26, 2017, Staff reviewed the Proposed Rule and background information. Interested parties were invited to submit comments on the Proposed Rule by July 14, 2017 with reply comments by July 28, 2017. After that, in August 2017, the MPSC will commence formal rulemaking.

## **II. Code of Conduct Background**

The existing Code was never adopted as an administrative rule, which makes the upcoming rulemaking the first of its kind in Michigan. The existing Code was adopted by orders in MPSC Case No. U-12134 in 2000-2001. The concept of code of conduct was developed in regulatory proceedings before the MPSC in the late 1990s, associated

with electric retail open access, to ensure fair treatment by utilities of unaffiliated providers of electric supply versus the utility's own affiliates or business. At the same time, there was a general regulatory concern over potential harm to the utility business activity. Regulatory measures included gas standards of conduct, electric codes of conduct and affiliated transactions guidelines. When 2000 PA 141 required an electric utility code of conduct, the MPSC acted to adopt one in Case No. U-12134.

Court decisions have established that a generally applicable code of conduct must be adopted through formal rulemaking. MEGA v MPSC, 252 Mich App 254; 652 NW2d1 (2002) invalidated affiliated transaction guidelines adopted by order, for failure of the agency to comply with the procedural mandates of the state administrative procedures act. The Code orders in Case No. U-12134 were initially upheld by the Michigan Court of Appeals in Detroit Edison Co v MECA, 261 Mich App 1; 680 NW2d 512 (2004); however, the Supreme Court issued an order on May 6, 2005 (Case No. 125950-54-55) determining that a generally applicable industry code of conduct may not be promulgated through a contested case proceeding. The Court let the Code stand, finding that it was ratified by the legislature in 2004 PA 88. That act stated that a utility shall comply with the Code and included requirements for regulated utilities that offer appliance service programs.

There was significant debate and controversy over the Code adopted in U-12134 and its scope. Regarding applicability, the MPSC determined:

- The Code must include, at a minimum, measures to prevent cross-subsidization, information sharing, and preferential treatment.

- The relationship that the Code must address is that between the utility's regulated and unregulated services, whether those services are provided by the utility or its affiliates.
- The Code must apply to both utilities and alternative electric suppliers.
- The Code should not apply to those relationships involving only regulated services or only unregulated services.
- The Code is not limited to retail open access.
- The waiver provision of the Code is sufficient to prevent unreasonable results.

October 29, 2001 order on rehearing, Case No. U-12134, pp 12-16.

The MPSC Code of Conduct covers matters within the scope of another state law, the Michigan Antitrust Reform Act; 1984 PA 274; MCL 445.771 et seq. (Act 274). That statute expressly prohibits contracts, combinations and conspiracies in restraint of or to monopolize, trade or commerce in a relevant market. MCL 445.772. Use of monopoly to limit competition, or engaging in price fixing, are also prohibited. MCL 445.773. Act 274 designates the circuit courts as the forum to address improper conduct within the scope of the act, authorizing actions by the Attorney General, prosecuting attorneys, governmental entities or persons for injunctive and other equitable relief and civil penalties. Although the legislature has also directed the MPSC to adopt a code of conduct, the relationship of such a code to Act 274 has not been addressed in formal rulemaking.

Another relevant development affecting codes of conduct arises from federal regulation aimed at appropriate functioning of the wholesale energy markets. This led to the adoption and refining of the FERC Standards of Conduct for Transmission

Providers, 18 CFR Part 358, to assure non-discriminatory practices between a provider's transmission and marketing functions and the use of independent market monitors for the MISO (Potomac Analytics) and PJM (Monitoring Analytics) electric power markets. Utilities have implemented the standards and typically designate compliance officers to oversee practices. The impact of these changes on the purpose of a code regarding affiliates should be addressed in the rulemaking proceeding.

### **III. Administrative Procedures Act**

Chapter 3 of the Administrative Procedures Act of 1969 (APA) governs the upcoming MPSC procedures for processing and publishing rules. MCL 24.231 – 24.264. The MPSC is familiar with the rulemaking procedures and requirements, including the fundamental principle that a rule shall not exceed the rulemaking delegation contained in the statute authorizing the rulemaking. MCL 24.232(7). Numerous matters must be addressed in the regulatory impact analysis, including cost, necessity and suitability, reasonable alternatives, targeted behavior and more. MCL 24.245(3). Administrative agencies may not, under the guise of their rulemaking power, abridge or enlarge their authority or exceed the statutory powers. Coffman v State Board, 331 Mich 582; 50 NW2d 322 (1951); LeDuc, Michigan Administrative Law, § 4.02-4.03.

### **IV. General Comments**

In MCL 460.10ee, the legislature has generally taken the requirements for appliance service plans of utilities and expanded their applicability to many potential unregulated services offered by a utility that constitute value added products and

service (VAPS). This is evidence of intent that the measures contained in MCL 460.10ee provide adequate protection to the public in a much broader sense, and these statutory measures should be applicable over similar but conflicting items from the earlier Code.

The Proposed Rule appears to have been drafted from the previous Code. Although the MPSC recognizes in the March 28, 2017 order (U-18326 p 2, fn1) that MCL 460.10ee prevails over the Code in case of conflict, the Proposed Rule becomes confusing if it results in two sets of requirements on similar conduct, one for VAPS and the other for retail choice and other affiliate activity. If the Alternative Energy Provider or affiliate code of conduct provisions differ from those for VAPS, the rule should address each provision separately. Rule design should avoid the need to compare the rule with the statute to determine what measure applies.

The legislature, by expanding the appliance service plan provisions to a broader group of unregulated services, has indicated its express intent to allow for regulated utilities to offer VAPS under the general terms and conditions which previously applied to appliance service plans. This legislative activity evidences an intent to allow more unregulated offerings by utilities, with specified protections. The rules should be drafted in a manner consistent with that legislative directive and intent. As proposed, the rules conflict with the legislative directive and intent in two major areas: (1) many filing and reporting requirements that seek to create a detailed administrative record in every offering of a provider's VAPS competitive plans and projections; and (2) burdensome administrative provisions that provide a disincentive for a utility to offer VAPS. The MPSC should not be creating a public database for competitors to learn

about a utility's VAPS business plans and projections. Those competitors would certainly oppose this type of access to their business plans. Although the Commission has authority to audit and examine utility VAPS records to ensure the programs are not subsidized by regulated services or harming competition in the relevant market, the act provides no authority to regulate the price of VAPS or the business plans for such offerings except as specified.

See attached draft of the Proposed Rule with suggested changes and explanations.

Dated: July 14, 2017

DTE Electric Company  
DTE Gas Company  
Consumer Energy Company  
Michigan Electric and Gas Association

Proposed Changes in Red  
Additional Comments in Blue

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

PUBLIC SERVICE COMMISSION

CODE OF CONDUCT

Filed with the Secretary of State on

These rules take effect upon filing with the Secretary of State.

(By authority conferred on the public service commission by section 10ee(1) of 2016 PA 341, MCL 460.10ee(1))

R 460.10101, R 460.10102, R 460.10103, R 460.10104, R 460.10105, R 460.10106, R 460.10107, R 460.10108, R 460.10109, R 460.10110, R 460.10111, R 460.10112, and R 460.10113 are added to the Michigan Administrative Code as follows:

PART 1. GENERAL PROVISIONS

R 460.10101 Applicability.

Rule 1. These rules apply to all utilities ~~that, through an affiliate or other entity within the corporate structure, provide regulated and unregulated services to regulated utility customers in Michigan, and to~~ alternative electric suppliers ~~where indicated~~ subject to the jurisdiction of the commission and the requirements of these rules under MCL 460.10ee.

Section 10ee(1) described the scope of the code of conduct rules with differences from the draft language. The above changes reflect applicability as indicated in the statute.

R 460.10102 Definitions.

Rule 2. (1) As used in these rules:

(a) "Affiliate" means a person or entity that directly or indirectly through 1 or more intermediates, controls, is controlled by, or is under common control with another specified entity. As used in these rules, 'control' means, whether through an ownership, beneficial, contractual, or equitable interest, the possession, directly or indirectly, of the power to direct or to cause the direction of the management or policies of a person or entity or the ownership of at least 7% of an entity either directly or indirectly.

This provision includes two separate defined terms, "affiliate" and "control". Suggest separate definitions – although the above is how it appears in MCL 460.10a(10).

(b) "Alternative electric supplier" means a person selling electric generation service to retail customers in this state as licensed by the commission under Section 10a of 2000 PA 141.

June 5, 2017

Alternative electric supplier does not include a person who physically delivers electricity directly to retail customers in this state. An alternative electric supplier is not a public utility, but may be an affiliate of a public utility.

(c) “Commission” means the public service commission.

(d) “Other entity within the corporate structure” means a division, department, subsidiary, or similar entity within the corporate structure of a utility.

(e) “Utility” means an electric, steam, or natural gas utility regulated by the public service commission, ~~and an electric or natural gas cooperative.~~

This change makes the definition the same as in the statute, MCL 460.10ee(16)(a), to avoid potential enlargement of authority issue.

(f) “Value-added programs and services” means programs and services that are utility or energy related, including, but not limited to, home comfort and protection, appliance service, building energy performance, alternative energy options, or engineering and construction services. Value-added programs and services do not include energy optimization or energy waste reduction programs paid for by utility customers as part of the regulated rates.

PART 2. ~~SEPARATION OF A UTILITY FROM ITS AFFILIATES AND ALTERNATIVE ELECTRIC SUPPLIERS~~  
~~CROSS-SUBSIDIZATION AND PREFERENTIAL TREATMENT~~

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R 460.10103 ~~Separation Preventive Measures.~~

Rule 3. (1) A utility that offers both regulated and unregulated services shall adopt measures do so with the structural or functional separation needed to prevent cross-subsidization and preferential treatment prohibited by law and these rules. ~~anticompetitive behavior. A utility shall be a separate, independent entity from any competitive affiliate.~~

~~(2) A utility shall not offer unregulated value added programs and services except through an affiliate or other entity within the corporate structure.~~

~~(3) A utility’s regulated services shall not financially subsidize in any manner, directly or indirectly, the business of its affiliates or other entities units or divisions within the corporate structure offering unregulated value-added programs or services.~~

~~(4) A utility shall maintain its books and records separately from those of its affiliates or other entities within the corporate structure offering unregulated value added programs and services.~~

Section 10ee does not require the degree of separation required in the draft rule proposal. See, for example, MCL 460.10ee(6)(b) regarding location of certain personnel in a separate department of the utility, and MCL 460.10ee(13) limiting separation requirements. Information sharing is addressed in Part 4 which is why it was not included in changes to Rule 3(1). The books and records language in (4) is moved to the next

rule where it fits the heading. Other changes proposed are to remain consistent with the statute.

R 460.10104 Records.

Rule 4. ~~(1) A utility shall maintain its books and records separately from those of its affiliates, and shall also maintain separate books and records for unregulated value-added programs and services.~~

~~(2)~~ The commission may review records relating to any transaction between a utility and an affiliate, or ~~relating to the between a utility and other entities within the corporate structure~~ offering of unregulated value-added programs and services. At any time, the commission may initiate an investigation into transactions between the utility and its affiliates, ~~or into its or between the utility and other entities within the corporate structure~~ offering of value-added programs and services.

~~(3)~~ A utility, its affiliates, and other entities within the corporate structure shall keep their books in a manner consistent with generally accepted accounting principles and, where applicable, with the Uniform System of Accounts.

Moved Proposed Rule 3(4) down to become Rule 4(1), as it applies to records. The others are clarifying changes concerning regulation of affiliate transactions versus VAPS.

R 460.10105 Sharing of facilities and employees.

Rule 5. (1) A utility, its affiliates, and other entities within the corporate structure ~~may shall not~~ share facilities, equipment, ~~or~~ operating employees, ~~but may share~~ computer hardware and software with documented protection to prevent discriminatory access to competitively sensitive information, provided that sharing is limited to comply with MCL 460.10ee and measures are adopted to prevent cross-subsidization or preferential treatment otherwise prohibited. This restriction does not apply if a utility offers an unregulated value-added program or service as part of regulated service. ~~Sharing of facilities, equipment, operating employees, computer hardware and/or software or personnel shall not occur between a utility and an affiliated alternate energy provider.~~

(2) A utility may transfer employees between the utility and an affiliate alternative electric supplier as long as providing the utility documents those transfers and files semi-annually with the commission a report of each occasion on which an employee of the utility became an employee of an affiliate alternative electric supplier and/or an employee of an affiliate alternative electric supplier became an employee of the utility.

The section, as drafted was confusing. The law allows sharing with appropriate compensation (proportional use) for VAPS. MCL 460.10ee(8)(13). Changes proposed are to remain consistent with the act.

## R 460.10106 Marketing.

Rule 6. (1) A utility, its affiliates, and other entities within the corporate structure offering unregulated value-added programs or services, shall not engage in joint advertising, marketing, or other promotional activities related to the provision of both regulated and unregulated services, nor shall they jointly sell services. ~~The utility shall not give the appearance in any way that it speaks on behalf of its affiliates or other entities within the corporate structure offering unregulated value-added programs or services, nor shall the utility permit an affiliate or other entity within the corporate structure offering unregulated value-added programs or services to give the appearance that it speaks on behalf of the utility.~~

(2) A utility or alternative electric supplier shall not suggest that ~~it will provide~~ any customer ~~will receive~~ ~~with~~ preferential treatment or service ~~for by~~ doing business with the utility, its affiliates, or other entities within the corporate structure offering unregulated value-added programs or services, nor shall the utility or alternative electric supplier suggest that any customer will receive inferior treatment or service ~~for by~~ doing business with an unaffiliated supplier.

(3) A utility shall not condition or otherwise tie the provision of a utility service or the availability of discounts, rates, other charges, fees, rebates, or waivers of terms and conditions to the taking of any goods or services from the utility, its affiliates, or other entities within the corporate structure offering unregulated value-added programs or services.

MCL 460.10ee(10) allows use of the utility logo for marketing VAPS which directly conflicts with the stricken language in Proposed Rule 6(1). The legislature has determined that adequate protection exists in the marketing disclosure, compensation and cost allocation measures. Other changes are for clarity.

## R 460.10107 Utility and affiliate or alternative electric supplier relationship.

Rule 7. (1) A utility shall not ~~in any way~~ interfere in the business operations of an alternative electric supplier. ~~This provision includes, but is not limited to, all of the following:~~  
~~(a) A utility shall not give the appearance in any way that it speaks on behalf of any alternative electric supplier or affiliate.~~

~~(b2) A utility shall not interfere in any manner~~ in the contractual relationship between the alternative electric supplier and its customers unless ~~the utility's action such involvement~~ is clearly permitted in the contract between the customer and the alternative electric supplier or in tariffs approved by the commission.

~~(2) A utility shall not finance or co-sign loans, provide loan guarantees, provide collateral, or be encumbered or allow its assets to be encumbered by affiliates or other entities within the corporate structure. The utility and its assets shall not be the subject of recourse in the event of default by an affiliate or other entity within the corporate structure.~~

Proposed Rule 7(1)(a) is vague and overbroad and the point is already covered by more specific language in 7(1) and 7(1)(b). The language in

Proposed Rule 7(2) is not contained in the statute or the existing Code. The MPSC has authority over utility mergers and asset transfers under MCL 460.6q and adopted rules in this area – R 460.301 et seq that do not contain this provision.

### PART 3. DISCRIMINATION

R 460.10108 Discrimination.

Rule 8. (1) A utility or alternative electric supplier shall not unduly discriminate in favor of or against any person party, including its affiliates.

(2) A utility shall not provide any affiliate, alternative electric provider or other entity within the corporate structure offering unregulated value-added programs or services, or any customer of an affiliate, alternative electric provider or other entity within the corporate structure offering unregulated value-added programs or services, preferential treatment or any other advantages that are not offered under the same terms and conditions and contemporaneously to other suppliers offering programs or services within the same service territory or to customers of those suppliers.

(3) If a utility provides to any affiliate alternative electric supplier or customers of an affiliate alternative electric supplier a discount, rebate, fee waiver, or waiver of its regulated tariffed terms and conditions for services or products, it shall contemporaneously offer the same discount, rebate, fee waiver, or waiver to all alternative electric suppliers operating within the utility's service territory or all alternative electric suppliers' customers.

(4) If a utility provides services or products to any affiliate, alternative electric provider or other entity within the corporate structure, and the cost of the service or product is not governed by MCL 460.10ee(8), compensation shall be based upon the higher of fully allocated embedded cost or fair market price. If an affiliate, alternative electric provider or other entity within the corporate structure provides services or products to a utility, and the cost of the service or product is not governed by MCL 460.10ee(8), compensation shall be at the lower of market price or 10% over fully allocated embedded cost. Asset transfers from a utility to an affiliate, alternative electric provider or other entity within the corporate structure for which the cost is not governed by MCL 460.10ee(8) shall be at the higher fully allocated embedded of cost or fair market value. Asset transfers from an affiliate, alternative electric provider or other entity within the corporate structure to a utility for which the cost is not governed by MCL 460.10ee(8) shall be at the lower of fully allocated embedded cost or fair market value.

These changes are primarily editorial and develop consistency in the use of terms such as fair market price and fully allocated embedded cost. These are known terms per application of the previous code. An additional point to consider as to Proposal Rule 8(1) is that an AES may have price variances among similar customers based on negotiation, and these prices are unregulated. The proposal may conflict with AES practices.

## PART 4. INFORMATION SHARING

R 460.10109 Disclosure of information.

Rule 9. (1) Utilities shall comply at all times with applicable data privacy tariffs.

(2) Every utility that does not have an approved data privacy tariff shall apply to the commission for a data privacy tariff within 90 days of the effective date of these rules, ~~and shall comply with the approved tariff.~~

(3) Prior written approval of the customer is not required for the disclosure of a utility's customer list to a competing service provider requesting it under of an unregulated value added program or service in compliance with MCL 460.10ee(10)(a), or to otherwise comply with these rules. A customer list may include only the name and address of a customer.

~~(4) Information obtained by a utility in the course of conducting its regulated business shall not be shared directly or indirectly with its affiliates or other entities within the corporate structure offering unregulated value added programs or services unless that same information is provided to competitors operating in the state on the same terms and conditions and contemporaneously.~~

~~(5) Customer specific consumption or billing data shall not be provided to any affiliate, other entity within the corporate structure offering unregulated value added programs or services, or alternative electric supplier without prior written approval of the customer.~~

~~(6) If a utility provides non customer specific, or aggregated, customer information to its affiliate or other entity within the corporate structure offering unregulated value added programs or services, it must offer the same information on the same terms and conditions, in the same form and manner, and contemporaneously, to all competitors of that affiliate or other entity within the corporate structure. The provision of such data must comply with all applicable data privacy tariffs.~~

~~(7) To the extent allowed by law, Commission order or tariffs, upon request a utility shall provide information about the distribution system or other relevant information to a licensed alternative electric or gas provider, or to a provider of a program or service similar to the utility's value-added program or service, that is provided for the utility's program or service offering. The utility shall keep a record of requests for such information. A utility shall not provide its affiliates or other entities within the corporate structure offering unregulated value added programs or services with information about the distribution system, including operation and expansion, without offering the same information under the same terms and conditions, in the same form and manner, and contemporaneously, to all licensed alternative electric suppliers or all competitors of the other entity within the corporate structure.~~

~~(8) A utility shall not provide any information received from or as a result of doing business with a competitor to the utility's affiliate, alternative electric provider or other entity within the corporate structure offering unregulated value-added programs or services without the written approval of the competitor.~~

The statute requires a request by the competitor for information, not automatic advance disclosure. For VAPS, the utility would not necessarily know the identity of all competitors. The statute only addresses customer lists and includes a 5-business day response time. The data privacy tariffs restrict

customer information sharing for secondary purposes.

## PART 5. REPORTING, OVERSIGHT, AND PENALTIES

### R 460.10110 Notification.

Rule 10. (1) Utilities that intend to offer a value-added program or service shall notify the commission no less than 30 days prior to offering the new program or service. The written notification shall, at a minimum, provide all of the following:

- (a) A detailed description of the new value-added program or service and what it will offer.
- ~~(b) A list of the personnel responsible for management of the value added program or service and their location within the utility, both physically and within the corporate structure.~~
- (eb) A detailed description of how costs will be allocated to the value-added program or service to ensure that there is no cross-subsidization between regulated and unregulated programs or services.
- ~~(d) A copy of the business plan for the value added program or service.~~
- ~~(e) Pro forma financial statements that outline the expected financial performance for each value added program or service for the next 12 months.~~
- ~~(2) Utilities shall request a docket for the filing of the notification, and shall thereafter make all annual report filings in that docket.~~
- ~~(3) A utility that intends to sell or transfer an asset with a market value of \$1,000,000 or more to any affiliate or other entity within the corporate structure shall notify the commission of the impending sale or transfer no less than 30 days before the sale or transfer. An affiliate or other entity within the corporate structure of a utility that intends to sell or transfer an asset with a market value of \$1,000,000 or more to a utility shall notify the commission of the impending sale or transfer no less than 30 days before the sale or transfer. Upon request, the utility, affiliate, or other entity within the corporate structure shall make available to the commission information that demonstrates how the sale or transfer price was determined. Notification shall be in the form of a letter to the director of the financial analysis and audit division of the commission.~~

Changes are consistent with the statutory requirements for annual reports in MCL 460.10ee(15): list of VAPS + market share estimate + accounting for costs. The measures proposed in Rule 10(1)(b), (d), and (e) go beyond the statutory requirements. The MPSC is given audit authority to further investigate compliance. Creating a regulatory database of utility competitive business plans and pro-formas, subject to FOIA disclosure, places the MPSC in the role of engaging in the competitive market by dispensing access to competitive information.

A docket for each VAPS is not appropriate because the act does not contemplate a regulatory proceeding just for filing the notice; further, posting

competitive information on the e-dockets board is not appropriate. The asset transfer notice provision is beyond the scope of the statute and needs to be justified for present rulemaking by evidence indicating that there is justification for this form of prior notice.

#### R 460.10111 Oversight.

Rule 11. (1) A utility or alternative electric supplier shall maintain documentation needed to investigate compliance with these rules. All documentation shall be kept at a designated company office in Michigan. The utility or alternative electric supplier shall make this information available for review upon request by the commission or its staff.

(2) The utility or alternative electric supplier shall use a documented dispute resolution process separate from any process that might be available from the commission. This dispute resolution process shall address complaints arising from application of these rules. The utility or alternative electric supplier shall keep a log of all complaints, including the name of the person or entity filing the complaint, the date the complaint was filed, a written statement of the nature of the complaint, and the results of the resolution process.

(3) A utility or alternative electric supplier may request a waiver from one or more provisions of these rules by filing an application with the commission. The utility or alternative electric supplier carries the burden of demonstrating that such a waiver will not unreasonably impair ~~inhibit~~ the development or functioning of the competitive market.

#### R 460.10112 Reporting.

Rule 12. (1) Utilities shall file the code of conduct annual report information required under MCL 460.10ee(6)(c) and MCL 460.10ee(15) no later than April 30 of each year ~~in the docket in which the utility filed its notification for a new program or service, or in a new docket for an existing program or service.~~ Code of conduct annual reports shall include all of the following:

(a) Designation of a corporate officer of the utility who will oversee compliance with these rules and be available to serve as the commission's primary contact regarding compliance.

(b) An organizational chart of the parent or holding company showing all regulated entities and affiliates and a description of all programs and services provided between the regulated entity and its affiliates.

(c) An overview of the report current year, including a detailed accounting of how the costs for the CAPS were apportioned between the utility and the VAPS. ~~expectations for the following year, and any five year projections available for each value added program and service.~~

~~-(d) A table illustrating the customer count, revenue, and expense of each value added program and service.~~

~~-(e) A balance sheet, where available, and income statement for each affiliate and value added program and service, including revenues, less direct and indirect expenses broken out separately. Direct and indirect revenues and expenses shall be separated by category and then aggregated at the direct and indirect levels, and the report shall include gross income, amounts flowed back to ratepayers to reduce rates, and net income. Each category of indirect cost should be accompanied by formulas/calculations/allocations showing how they have been derived.~~

- ~~—(f) General ledger and trial balance for each value added program and service shall be provided to the commission staff separately on a USB thumb drive or other appropriate technological device with formulas intact.~~
- ~~—(g) The number and type of complaints received in the prior calendar year regarding code of conduct issues from customers, alternative electric suppliers, or any other entity, and a summary of the resolution of any complaint that occurred during the calendar year.~~
- ~~—(h) The number of times during the prior calendar year that customer information was provided to an affiliate or competing provider of an unregulated value added program or service, the identity of the affiliate or competing provider, and a description of the information shared.~~
- ~~—(i) A description of the nature of each transaction with an affiliate or other entity within the corporate structure and of the basis for the cost allocation and pricing established in each transaction.~~
- ~~—(j) Annual balance sheets and income statements of the non-regulated subsidiaries, affiliates, and other entities within the corporate structure of the utility offering value added programs or services.~~
- ~~—(k) Reports of internal audits conducted by the utility regarding transactions between the utility and its affiliates, or transactions between the utility and other entities within the corporate structure offering value added programs or services.~~
- ~~—(2) The annual report shall be signed by the designated corporate officer or a party responsible for each value added program and service attesting to the accuracy of the information in the annual report and certifying that there is no cross-subsidization between regulated and non-regulated utility programs and services.~~
- ~~—(3) Copies of federal income tax returns for utilities, affiliates, and, where applicable, other entities within the corporate structure, shall be available to the Commission for inspection and review.~~

Changes to remain consistent with the VAPS statute. MCL 460.10ee(15) already specifies the requirements for an annual report. The Proposed Rule adds many provisions beyond the scope of the statute. The act allows the audit to ensure compliance, where relevant additional information may be obtained if needed.

#### R 460.10113 Penalties.

Rule 13. Penalties for violations of these rules are as provided in MCL 460.10c and MCL 460.10ee(14).

**Michigan Energy Innovation Business  
Council**



July 14, 2017

Derrell Slaughter  
Michigan Public Service Commission  
7109 W Saginaw Hwy,  
Lansing, MI 48917  
By email: slaughterd@michigan.gov

Dear Mr. Slaughter:

The Michigan Energy Innovation Business Council (Michigan EIBC), a business association of companies engaged in Michigan's advanced energy industry, is pleased to provide comments to aide the Michigan Public Service Commission in developing draft rules for the Code of Conduct rulemaking process.

Michigan EIBC urges the Commission to ensure that any unregulated value-added programs and services governed by the code of conduct maintain the appropriate market and regulatory structures. The MPSC should ensure that the structure of the programs function independently, that utilities share information in a manner to ensure fair and transparent competition for customers and 3rd parties, and that any new services avoid creating conflicts of interest and the potential for companies to exercise market power.

The statute states, and Michigan EIBC agrees, that there is a role for utilities in value-added programs and services that they can uniquely provide. Those programs and services should be independent including a separation of accounts, offices, employees and other resources, including the use of the utility brand.

When the regulated utilities operate with their affiliates in the competitive market, the information they utilize should also be available to other market participants in the same timeframe, form and substance. There should be a clear sales referral neutrality by the utility and no interconnection preferences for the utility affiliate.

To ensure competition in the unregulated space, the utility must pay fully loaded prices for utility resources and there should be no favorable pricing or terms for affiliates.

If an affiliate offers competitive services within its monopoly utility territory, there must be a cap on affiliate market share for the utility territory - and possibly on a circuit level - as well as no preferential access to data to avoid market power conflicts. Our preference is that affiliates should not be allowed to participate in RFP solicitations by the utility or if a procurement involving an affiliate is allowed, an independent party must select the winning bids to avoid self-dealing.

Transparency requires a complaint process, similar to the existing processes at the MPSC,



as well as a robust oversight process. Officers of the utility affiliate should file annual affidavits of compliance with the Code of Conduct.

Finally, we urge the Commission to keep in mind while developing these rules the essential purpose of the utility compact under which unique monopoly powers are granted in a regulated context to achieve specific societal objectives. In cases where competitive markets are functioning and/or could be developed, even implicit extension of this monopoly position is inappropriate. Therefore, the Commission should ensure limits for utility participation under strict codes of conduct in order to foster competition in developing solutions as a baseline principle in formation of these rules.

We look forward to continued participation and engagement with the Commission, staff and other stakeholders in the promulgation of these rules.

Thank you for your attention to this important issue. Please let me know if you would like any additional information or to discuss any of the issues raised.

Sincerely,

Liesl Eichler Clark  
President  
Michigan Energy Innovation Business Council

# **Detroit Thermal**

ARTHUR J. LeVASSEUR  
MATTHEW M. PECK  
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July 14, 2017

VIA EMAIL ONLY  
Slaughterd@michigan.gov

Mr. Derrell Slaughter  
Michigan Public Service Commission  
Commission Analyst, Commission Office  
7109 West Saginaw Highway  
Lansing, MI 48917

RE: **MPSC Code of Conduct Draft Rules**

Dear Mr. Slaughter:

Attached are Detroit Thermal, LLC's Initial Comments on MPSC Proposed Code of Conduct Rules.

If you have any questions, please do not hesitate to call.

Sincerely,

Matthew M. Peck

MMP:dmm

Enclosure

## **DETROIT THERMAL, LLC'S INITIAL COMMENTS TO THE MICHIGAN PUBLIC SERVICE COMMISSION'S PROPOSED CODE OF CONDUCT RULES**

The Michigan Legislature via MCL 460.10ee directed the Michigan Public Service Commission ("MPSC" or "Commission") to establish a code of conduct that applies to all regulated utilities and includes, but is not limited to, measures to prevent cross-subsidization, preferential treatment and information sharing between a utility's regulated and unregulated services. The Commission Staff ("Staff") published its draft Code of Conduct ("Draft Code") and during a meeting of utility stakeholders on June 26, 2017 asked interested parties to submit comments. In response to Staff's request Detroit Thermal, LLC ("Detroit Thermal") respectfully submits these initial comments on Staff's Draft Code.

### **1. Proposed Rule 1**

Proposed Rule 1 concerning the applicability of the rules to utilities and alternative electric suppliers is confusing as it is currently drafted. The Commission should consider revising the rule as follows:

Rule 1. These rules apply to all utilities that provide regulated and unregulated services to regulated utility customers in Michigan through an affiliate or other entity within the utility's corporate structure. These rules shall also apply to alternative electric suppliers where indicated.

### **2. Proposed Rule 2**

The term "Other entity within the corporate structure" should be revised to "Other entity within the utility's corporate structure". This revision adds a little more clarity as to the entity being discussed. This revision should be applied to the term throughout the other portions of the Draft Code.

The definition of "value-added programs and services" is vague and ambiguous. While this definition is a verbatim recitation of the statute, the Commission should endeavor to provide

clarity as to the types of programs and services it intends to regulate via its Code of Conduct. Specifically, the Commission should state that the programs and services it intends to regulate are those that are offered to regulated customers, not programs and services that are performed internally or constitute an allocation of managerial functions provided by a utility's affiliate.

### **3. Proposed Rule 3**

The first sentence of Subsection 1 of Proposed Rule 3 states:

- (1) A utility that offers both regulated and unregulated services shall do so with the structural or functional separation needed to prevent anticompetitive behavior.

The above portion of Subsection 1 of Proposed Rule 3 is vague, ambiguous and goes beyond the scope the Michigan Legislature set forth in MCL 460.10ee. The proposed rule provides no guidance on the level of separation needed to prevent anticompetitive behavior. The proposed rule also fails to address the types of anticompetitive behavior being regulated. The lack of specificity in this proposed rule will lead to needless complaints wasting both utility and Commission resources while the intention and limits of the rule are established through litigation. Moreover, the inclusion of "anticompetitive behavior" raises anti-trust issues which exceed the matters the Michigan Legislature intended the Commission to regulate via the Code of Conduct.

The first sentence of Subsection 1 of Proposed Rule 3 should be deleted. The structural and functional separation of a utility's regulated and unregulated value-added programs and services are addressed by the remaining portion of Subsection 1 and Subsections 2-4 of Proposed Rule 3 and the elimination of this portion of the rule will not prejudice the rights of any party claiming such behavior as the aggrieved party will still have all the other legal remedies currently available to them.

#### **4. Proposed Rule 4**

For the purposes of clarity, Subsection 1 of Proposed Rule 4 should be rewritten as follows:

Rule 4. (1) The commission may review records relating to or initiate an investigation into any transaction between:

- (a) a utility and an affiliate offering unregulated value-added programs and services, or
- (b) a utility and other entities within the utility's corporate structure offering unregulated value-added programs and services.

#### **5. Proposed Rule 5**

##### **a. Subsection 1**

Subsection 1 of Proposed Rule 5 is confusing and over-reaching in its current scope. As it is currently drafted this subsection states:

A utility, its affiliates, and other entities within the corporate structure shall not share facilities, equipment, or operating employees, but may share computer hardware and software with documented protection to prevent discriminatory access to competitively sensitive information. This restriction does not apply if a utility offers an unregulated value-added program or service as part of regulated service.

As drafted this rule prohibits a utility from using the corporate resources of a parent company (or other affiliate) or providing corporate resources to a subsidiary or even another department within its own corporate structure. This rule prohibits the use of in-house accounting or management services and other corporate resources that are routinely shared across entities under common control and ownership to reduce costs and improve efficiency. Moreover, this rule prohibits a utility from housing different departments at the same facility, necessitating the procurement of needless and expensive additional office space and equipment.

The use of corporate-wide accounting and management services and sharing of resources also fall outside of the sole exception to this rule which states, “[t]his restriction does not apply if a utility offers an unregulated value-added program or service as part of regulated service.”

Proposed Rule 5(1). Corporate-wide accounting or similar in-house corporate-wide services do not fall under the definition of unregulated value-added programs and services and thus are not exempted from the operation of this rule even if their costs are included in a utility's regulated service. This rule must be revised to clarify that it does not apply to the allocation of corporate-wide managerial tasks between a utility and its affiliates or other entity's within a utility's corporate structure.

In addition to the confusion caused by the lack of specificity discussed above, the proposed restrictions conflict with MCL 460.10ee(3), which specifically authorizes the use of utility assets in the operation of an unregulated value-added program and service provided the utility is compensated for the use of its assets. As such, an additional exception should be added to the proposed rule stating that the restrictions do not apply to utility assets used by an affiliate or other entity within the utility's corporate structure for which the affiliate or other entity within the corporate structure compensates the utility in accordance with MCL 460.10ee.

The Commission should consider the following revised Subsection 1:

Rule 5. (1) A utility shall not share facilities, equipment or operating employees with an affiliate or other entity within the utility's corporate structure offering unregulated value-added programs and services. This restriction shall not apply to managerial, financial and all other services that are allocated between a utility, its affiliates or other entity within the utility's corporate structure that do not pertain to a value-added program or service. This restriction shall not apply to utility assets used by its affiliate or other entity within a utility's corporate structure for which the utility's affiliate or other entity within the utility's corporate structure compensates the utility in accordance with MCL 460.10ee. A utility may share computer hardware and software with an affiliate or other entity within the utility's corporate structure offering unregulated value-added programs and services provided that there is documented protection to prevent discriminatory access to competitively sensitive information between the applicable entities.

**b. Subsection 2**

Subsection 2 of Proposed Rule 5 is also confusing. This rule addresses the transfer of employees between a utility and an affiliate alternative electric supplier. Given its placement in Proposed Rule 5, it seems that this rule was in fact intended to apply to a utility transferring an employee to an affiliate or other entity within the utility's corporate structure. If that is the case, then this subsection should be limited to apply only to transfers to an affiliate or other entity within the utility's corporate structure offering unregulated value-added programs and services. This section should not apply to any other transfer of employees between a utility and its affiliates and other entities within the utility's corporate structure. Likewise, a utility should have no separate obligation to report to the Commission on the tasks each of its employees performs regarding matters that do not pertain to a value-added program or service.

**6. Proposed Rule 6**

The restrictions on marketing set forth in Proposed Rule 6 substantially exceed the limitations promulgated by the Michigan Legislature in MCL 460.10ee. Subsection 1 of Proposed Rule 6 states:

Rule 6. (1) A utility, its affiliates, and other entities within the utility's corporate structure offering unregulated value-added programs or services, shall not engage in joint advertising, marketing, or other promotional activities related to the provision of unregulated services, nor shall they jointly sell services. The utility shall not give the appearance in any way that it speaks on behalf of its affiliates or other entities within the utility's corporate structure offering unregulated value-added programs or services, nor shall the utility permit an affiliate or other entity within the corporate structure offering unregulated value-added programs or services to give the appearance that it speaks on behalf of the utility.

The only marketing restriction set forth in MCL 460.10ee states, “[a] utility offering an unregulated value-added program or service under this section shall not promote or market the program or service through the use of utility billing inserts, printed messages on the utility's billing

materials, or other promotional materials included with customers' utility bills.” MCL 460.10ee(7). Proposed Rule 6’s marketing restrictions are further called into question in light of the fact that MCL 460.10ee(10) sets forth rules a utility must follow in marketing an unregulated value-added program and service. Nowhere in MCL 460.10ee(10) did the Michigan Legislature prohibit a utility from participating in joint marketing or other promotional activities or jointly selling services.

Proposed Rule 6 adds needless complexity to the marketing of unregulated value-added programs and services and should be revised to prohibit only those marketing activities specifically prohibited by MCL 460.10ee(7).

#### **7. Proposed Rule 10**

The requirement that a utility provide pro forma financial statements as specified in Subsection 1(e) of Proposed Rule 10 should be revised to state that those documents only need to be provided to the extent that they exist. A utility should not have to create these statements simply to comply with the requirement to notify the Commission that the utility will be implementing a value-added program and service.

Subsection 3 of Proposed Rule 10 should only apply to a sale or transfer of an asset to be used in a value-added program or service.

#### **8. Proposed Rule 11**

Subsection 2 of Proposed Rule 11 lacks clarity. The provision discusses a documented dispute resolution process to address complaints regarding the application of the Code of Conduct. The provision fails to address any specifics on how this resolution process is to be conducted or specify where the dispute resolution process is to be documented. Is this process something that must be set forth in a utility’s tariff or can it be documented solely on the utility’s website?

Additionally, given the requirement the utility must develop a dispute resolution procedure addressing the Code of Conduct, the Commission should adopt an additional rule requiring that a complaint involving a violation must be raised with the utility prior to being raised with the Commission.

**9. Proposed Rule 12**

**a. Subsection 1(e)**

The addition of the word affiliate in the first sentence of this section is confusing as drafted and is likely the result of a typographical error. A utility should only be required to provide financial statements for a value-added program or service. This provision should be revised to read as follows:

(e) A balance sheet, where available and income statement for each value-added program and service, including revenues, less direct and indirect expenses broken out separately. Direct and indirect revenues and expenses shall be separated by category and then aggregated at the direct and indirect levels, and the report shall include gross income, amounts flowed back to ratepayers to reduce rates, and net income. Each category of indirect cost should be accompanied by formulas/calculations/allocations showing how they have been derived.

**b. Subsection 3**

A utility should not have to make the tax returns of an unregulated affiliate available for review if that affiliate does not offer an unregulated value-added program or service. This section should be revised accordingly.

A red-lined copy of the Draft Code incorporating Detroit Thermal's comments to the extent practicable is attached hereto as Attachment A

Dated: July 14, 2017

Respectfully submitted,

FISCHER, FRANKLIN & FORD

By: \_\_\_\_\_

Arthur J. LeVasseur (P29394)

Matthew M. Peck (P66361)

Attorneys for Detroit Thermal, LLC

500 Griswold Street, Suite 3500

Detroit, MI 48226-3808

(313) 962-5210

# Attachment A

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

PUBLIC SERVICE COMMISSION

CODE OF CONDUCT

Filed with the Secretary of State on

These rules take effect upon filing with the Secretary of State.

(By authority conferred on the public service commission by section 10ee(1) of 2016 PA 341, MCL 460.10ee(1))

R 460.10101, R 460.10102, R 460.10103, R 460.10104, R 460.10105, R 460.10106, R 460.10107, R 460.10108, R 460.10109, R 460.10110, R 460.10111, R 460.10112, and R 460.10113 are added to the Michigan Administrative Code as follows:

PART 1. GENERAL PROVISIONS

R 460.10101 Applicability.

Rule 1. These rules apply to all utilities that provide regulated and unregulated services to regulated utility customers in Michigan through an affiliate or other entity within the utility's corporate structure. These rules shall also apply to alternative electric suppliers where indicated. ~~These rules apply to all utilities that, through an affiliate or other entity within the corporate structure, provide regulated and unregulated services to regulated utility customers in Michigan, and to alternative electric suppliers where indicated.~~

R 460.10102 Definitions.

Rule 2. (1) As used in these rules:

(a) "Affiliate" means a person or entity that directly or indirectly through 1 or more intermediates, controls, is controlled by, or is under common control with another specified entity. As used in these rules, 'control' means, whether through an ownership, beneficial, contractual, or equitable interest, the possession, directly or indirectly, of the power to direct or to cause the direction of the management or policies of a person or entity or the ownership of at least 7% of an entity either directly or indirectly.

(b) "Alternative electric supplier" means a person selling electric generation service to retail customers in this state. Alternative electric supplier does not include a person who physically delivers electricity directly to retail customers in this state. An alternative electric supplier is not a public utility, but may be an affiliate of a public utility.

(c) "Commission" means the public service commission.

(d) "Other entity within the utility's corporate structure" means a division, department, subsidiary, or similar entity within the corporate structure of a utility.

(e) "Utility" means an electric, steam, or natural gas utility regulated by the public service commission, and an electric or natural gas cooperative.

(f) "Value-added programs and services" means programs and services that are utility or energy related, including, but not limited to, home comfort and protection, appliance service,

building energy performance, alternative energy options, or engineering and construction services. Value-added programs and services do not include energy optimization or energy waste reduction programs paid for by utility customers as part of the regulated rates. Value-added programs and services do not include programs and services that are performed internally or constitute an allocation of managerial or other corporate functions provided by a utility's affiliate.

## PART 2. SEPARATION OF A UTILITY FROM ITS AFFILIATES AND ALTERNATIVE ELECTRIC SUPPLIERS

### R 460.10103 Separation.

Rule 3. (1) ~~A utility that offers both regulated and unregulated services shall do so with the structural or functional separation needed to prevent anticompetitive behavior.~~ A utility shall be a separate, independent entity from any competitive affiliate.

(2) A utility shall not offer unregulated value-added programs and services except through an affiliate or other entity within the utility's corporate structure.

(3) A utility's regulated services shall not subsidize in any manner, directly or indirectly, the business of its affiliates or other entities within the utility's corporate structure offering unregulated value-added programs or services.

(4) A utility shall maintain its books and records separately from those of its affiliates or other entities within the utility's corporate structure offering unregulated value-added programs and services.

### R 460.10104 Records.

~~Rule 4. (1) The commission may review records relating to or initiate an investigation into any transaction between:~~

~~(a) a utility and an affiliate offering unregulated value-added programs and services, or~~

~~(b) a utility and other entities within the utility's corporate structure offering unregulated value-added programs and services. The commission may review records relating to any transaction between a utility and an affiliate, or between a utility and other entities within the corporate structure offering unregulated value-added programs and services. At any time, the commission may initiate an investigation into transactions between the utility and its affiliates, or between the utility and other entities within the corporate structure offering value-added programs and services.~~

(2) A utility, its affiliates, and other entities within the utility's corporate structure shall keep their books in a manner consistent with generally accepted accounting principles and, where applicable, with the Uniform System of Accounts.

### R 460.10105 Sharing of facilities and employees.

Rule 5. (1) A utility shall not share facilities, equipment or operating employees with an affiliate or other entity within the utility's corporate structure offering unregulated value-added programs and services. This restriction shall not apply to managerial, financial and all other services that are allocated between a utility, its affiliates or other entity within the utility's corporate structure that do not pertain to a value-added program or service. This restriction shall

not apply to utility assets used by its affiliate or other entity within a utility's corporate structure for which the utility's affiliate or other entity within the utility's corporate structure compensates the utility in accordance with MCL 460.10ee. A utility may share computer hardware and software with an affiliate or other entity within the utility's corporate structure offering unregulated value-added programs and services provided that there is documented protection to prevent discriminatory access to competitively sensitive information between the applicable entities.~~A utility, its affiliates, and other entities within the corporate structure shall not share facilities, equipment, or operating employees, but may share computer hardware and software with documented protection to prevent discriminatory access to competitively sensitive information. This restriction does not apply if a utility offers an unregulated value-added program or service as part of regulated service.~~

(2) A utility may transfer employees between the utility and an affiliate alternative electric supplier as long as the utility documents those transfers and files semi-annually with the commission a report of each occasion on which an employee of the utility became an employee of an affiliate alternative electric supplier and/or an employee of an affiliate alternative electric supplier became an employee of the utility.

#### R 460.10106 Marketing.

Rule 6. (1) A utility offering an unregulated value-added program or service under this section shall not promote or market the program or service through the use of utility billing inserts, printed messages on the utility's billing materials, or other promotional materials included with customers' utility bills.~~A utility, its affiliates, and other entities within the corporate structure offering unregulated value-added programs or services, shall not engage in joint advertising, marketing, or other promotional activities related to the provision of unregulated services, nor shall they jointly sell services. The utility shall not give the appearance in any way that it speaks on behalf of its affiliates or other entities within the corporate structure offering unregulated value-added programs or services, nor shall the utility permit an affiliate or other entity within the corporate structure offering unregulated value-added programs or services to give the appearance that it speaks on behalf of the utility.~~

(2) A utility or alternative electric supplier shall not suggest that it will provide any customer with preferential treatment or service by doing business with the utility, its affiliates, or other entities within the utility's corporate structure offering unregulated value-added programs or services, nor shall the utility or alternative electric supplier suggest that any customer will receive inferior treatment or service by doing business with an unaffiliated supplier.

(3) A utility shall not condition or otherwise tie the provision of a utility service or the availability of discounts, rates, other charges, fees, rebates, or waivers of terms and conditions to the taking of any goods or services from the utility, its affiliates, or other entities within the utility's corporate structure offering unregulated value-added programs or services.

#### R 460.10107 Utility and affiliate or alternative electric supplier relationship.

Rule 7. (1) A utility shall not in any way interfere in the business operations of an alternative electric supplier. This provision includes, but is not limited to, all of the following:

(a) A utility shall not give the appearance in any way that it speaks on behalf of any alternative electric supplier or affiliate.

(b) A utility shall not interfere in any manner in the contractual relationship between the alternative electric supplier and its customers unless such involvement is clearly permitted in the

contract between the customer and the alternative electric supplier or in tariffs approved by the commission.

(2) A utility shall not finance or co-sign loans, provide loan guarantees, provide collateral, or be encumbered or allow its assets to be encumbered by affiliates or other entities within the utility's corporate structure. The utility and its assets shall not be the subject of recourse in the event of default by an affiliate or other entity within the utility's corporate structure.

### PART 3. DISCRIMINATION

R 460.10108 Discrimination.

Rule 8. (1) A utility or alternative electric supplier shall not unduly discriminate in favor of or against any party, including its affiliates.

(2) A utility shall not provide any affiliate or other entity within the utility's corporate structure offering unregulated value-added programs or services, or any customer of an affiliate or other entity within the utility's corporate structure offering unregulated value-added programs or services, preferential treatment or any other advantages that are not offered under the same terms and conditions and contemporaneously to other suppliers offering programs or services within the same service territory or to customers of those suppliers.

(3) If a utility provides to any affiliate alternative electric supplier or customers of an affiliate alternative electric supplier a discount, rebate, fee waiver, or waiver of its regulated tariffed terms and conditions for services or products, it shall contemporaneously offer the same discount, rebate, fee waiver, or waiver to all alternative electric suppliers operating within the utility's service territory or all alternative electric suppliers' customers.

(4) If a utility provides services or products to any affiliate or other entity within the utility's corporate structure, and the cost of the service or product is not governed by MCL 460.10ee(8), compensation shall be based upon the higher of fully allocated embedded cost or market price. If an affiliate or other entity within the utility's corporate structure provides services or products to a utility, and the cost of the service or product is not governed by MCL 460.10ee(8), compensation shall be at the lower of market price or 10% over fully allocated embedded cost. Asset transfers from a utility to an affiliate or other entity within the utility's corporate structure for which the cost is not governed by MCL 460.10ee(8) shall be at the higher of cost or fair market value. Asset transfers from an affiliate or other entity within the utility's corporate structure to a utility for which the cost is not governed by MCL 460.10ee(8) shall be at the lower of cost or fair market value.

### PART 4. INFORMATION SHARING

R 460.10109 Disclosure of information.

Rule 9. (1) Utilities shall comply at all times with applicable data privacy tariffs.

(2) Every utility that does not have an approved data privacy tariff shall apply to the commission for a data privacy tariff within 90 days of the effective date of these rules, and shall comply with the approved tariff.

(3) Prior written approval of the customer is not required for the disclosure of a customer list to a competing provider of an unregulated value-added program or service in compliance with MCL 460.10ee(10)(a), or to otherwise comply with these rules. A customer list may include only the name and address of a customer.

(4) Information obtained by a utility in the course of conducting its regulated business shall not be shared directly or indirectly with its affiliates or other entities within the utility's corporate structure offering unregulated value-added programs or services unless that same information is provided to competitors operating in the state on the same terms and conditions and contemporaneously.

(5) Customer specific consumption or billing data shall not be provided to any affiliate, other entity within the utility's corporate structure offering unregulated value-added programs or services, or alternative electric supplier without prior written approval of the customer.

(6) If a utility provides non-customer specific, or aggregated, customer information to its affiliate or other entity within the utility's corporate structure offering unregulated value-added programs or services, it must offer the same information on the same terms and conditions, in the same form and manner, and contemporaneously, to all competitors of that affiliate or other entity within the utility's corporate structure. The provision of such data must comply with all applicable data privacy tariffs.

(7) A utility shall not provide its affiliates or other entities within the utility's corporate structure offering unregulated value-added programs or services with information about the distribution system, including operation and expansion, without offering the same information under the same terms and conditions, in the same form and manner, and contemporaneously, to all licensed alternative electric suppliers or all competitors of the other entity within the utility's corporate structure.

(8) A utility shall not provide any information received from or as a result of doing business with a competitor to the utility's affiliate or other entity within the utility's corporate structure offering unregulated value-added programs or services without the written approval of the competitor.

## PART 5. REPORTING, OVERSIGHT, AND PENALTIES

### R 460.10110 Notification.

Rule 10. (1) Utilities that intend to offer a value-added program or service shall notify the commission no less than 30 days prior to offering the new program or service. The written notification shall, at a minimum, provide all of the following:

- (a) A detailed description of the new value-added program or service and what it will offer.
- (b) A list of the personnel responsible for management of the value-added program or service and their location within the utility, both physically and within the utility's corporate structure.
- (c) A detailed description of how costs will be allocated to the value-added program or service to ensure that there is no cross-subsidization between regulated and unregulated programs or services.
- (d) A copy of the business plan for the value-added program or service.
- (e) Pro forma financial statements that outline the expected financial performance for each value-added program or service for the next 12 months to the extent that they are available.

(2) Utilities shall request a docket for the filing of the notification, and shall thereafter make all annual report filings in that docket.

(3) A utility that intends to sell or transfer an asset with a market value of \$1,000,000 or more to any affiliate or other entity within the utility's corporate structure shall notify the commission of the impending sale or transfer no less than 30 days before the sale or transfer. An affiliate or other entity within the utility's corporate structure of a utility that intends to sell or transfer an

asset with a market value of \$1,000,000 or more to a utility shall notify the commission of the impending sale or transfer no less than 30 days before the sale or transfer. Upon request, the utility, affiliate, or other entity within the utility's corporate structure shall make available to the commission information that demonstrates how the sale or transfer price was determined. Notification shall be in the form of a letter to the director of the financial analysis and audit division of the commission.

#### R 460.10111 Oversight.

Rule 11. (1) A utility or alternative electric supplier shall maintain documentation needed to investigate compliance with these rules. All documentation shall be kept at a designated company office in Michigan. The utility or alternative electric supplier shall make this information available for review upon request by the commission or its staff.

(2) The utility or alternative electric supplier shall use a documented dispute resolution process separate from any process that might be available from the commission. This dispute resolution process shall address complaints arising from application of these rules. The utility or alternative electric supplier shall keep a log of all complaints, including the name of the person or entity filing the complaint, the date the complaint was filed, a written statement of the nature of the complaint, and the results of the resolution process.

(3) A utility or alternative electric supplier may request a waiver from one or more provisions of these rules by filing an application with the commission. The utility or alternative electric supplier carries the burden of demonstrating that such a waiver will not inhibit the development or functioning of the competitive market.

#### R 460.10112 Reporting.

Rule 12. (1) Utilities shall file the code of conduct annual report information required under MCL 460.10ee(6)(c) and MCL 460.10ee(15) no later than April 30 of each year in the docket in which the utility filed its notification for a new program or service, or in a new docket for an existing program or service. Code of conduct annual reports shall include all of the following:

- (a) Designation of a corporate officer of the utility who will oversee compliance with these rules and be available to serve as the commission's primary contact regarding compliance.
- (b) An organizational chart of the parent or holding company showing all regulated entities and affiliates and a description of all programs and services provided between the regulated entity and its affiliates.
- (c) An overview of the current year, expectations for the following year, and any five year projections available for each value-added program and service.
- (d) A table illustrating the customer count, revenue, and expense of each value-added program and service.

(e) A balance sheet, where available and income statement for each value-added program and service, including revenues, less direct and indirect expenses broken out separately. Direct and indirect revenues and expenses shall be separated by category and then aggregated at the direct and indirect levels, and the report shall include gross income, amounts flowed back to ratepayers to reduce rates, and net income. Each category of indirect cost should be accompanied by formulas/calculations/allocation showing how they have been derived.~~A balance sheet, where available, and income statement for each affiliate and value-added program and service, including revenues, less direct and indirect expenses broken out separately. Direct and indirect revenues and expenses shall be separated by category and then aggregated at the direct and~~

~~indirect levels, and the report shall include gross income, amounts flowed back to ratepayers to reduce rates, and net income. Each category of indirect cost should be accompanied by formulas/calculations/allocations showing how they have been derived.~~

(f) General ledger and trial balance for each value-added program and service shall be provided to the commission staff separately on a USB thumb drive or other appropriate technological device with formulas intact.

(g) The number and type of complaints received in the prior calendar year regarding code of conduct issues from customers, alternative electric suppliers, or any other entity, and a summary of the resolution of any complaint that occurred during the calendar year.

(h) The number of times during the prior calendar year that customer information was provided to an affiliate or competing provider of an unregulated value-added program or service, the identity of the affiliate or competing provider, and a description of the information shared.

(i) A description of the nature of each transaction with an affiliate or other entity within the utility's corporate structure and of the basis for the cost allocation and pricing established in each transaction.

(j) Annual balance sheets and income statements of the non-regulated subsidiaries, affiliates, and other entities within the utility's corporate structure of the utility offering value-added programs or services.

(k) Reports of internal audits conducted by the utility regarding transactions between the utility and its affiliates, or transactions between the utility and other entities within the utility's corporate structure offering value-added programs or services.

(2) The annual report shall be signed by the designated corporate officer or a party responsible for each value-added program and service attesting to the accuracy of the information in the annual report and certifying that there is no cross-subsidization between regulated and non-regulated utility programs and services.

(3) Copies of federal income tax returns for utilities, affiliates, and, where applicable, other entities within the utility's corporate structure offering value-added programs and services, shall be available to the Commission for inspection and review.

R 460.10113 Penalties.

Rule 13. Penalties for violations of these rules are as provided in MCL 460.10c and MCL 460.10ee(14).

**Mr. Phil Forner**

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

PUBLIC SERVICE COMMISSION

CODE OF CONDUCT

Filed with the Secretary of State on

These rules take effect upon filing with the Secretary of State.

(By authority conferred on the public service commission by section 10ee(1) of 2016 PA 341, MCL 460.10ee(1))

R 460.10101, R 460.10102, R 460.10103, R 460.10104, R 460.10105, R 460.10106, R 460.10107, R 460.10108, R 460.10109, R 460.10110, R 460.10111, R 460.10112, and R 460.10113 are added to the Michigan Administrative Code as follows:

PART 1. GENERAL PROVISIONS

R 460.10101 Applicability.

Rule 1. These rules apply to all utilities that, itself or through an affiliate or other entity within the corporate structure, provide regulated and unregulated services to regulated utility customers in Michigan, and to alternative electric suppliers where indicated.

R 460.10102 Definitions.

Rule 2. (1) As used in these rules:

(a) “Affiliate” means a person or entity that directly or indirectly through 1 or more intermediates, controls, is controlled by, or is under common control with another specified entity. As used in these rules, ‘control’ means, whether through an ownership, beneficial, contractual, or equitable interest, the possession, directly or indirectly, of the power to direct or to cause the direction of the management or policies of a person or entity or the ownership of at least 7% of an entity either directly or indirectly.

(b) “Alternative electric supplier” means a person selling electric generation service to retail customers in this state. Alternative electric supplier does not include a person who physically delivers electricity directly to retail customers in this state. An alternative electric supplier is not a public utility, but may be an affiliate of a public utility.

(c) “Anticompetitive behavior” means any activity or result that leads to a utility value-added program or service receiving from a utility cross-subsidization or preferential treatment.

Anticompetitive behavior also is when a utility value-added program or service captures more than ten percent (10%) of that value-added program or service market share in a zip code area.

(ed) “Commission” means the public service commission.

(de) “Other entity within the corporate structure” means a division, department, subsidiary, or similar entity within the corporate structure of a utility.

(ef) “Utility” means an electric, steam, or natural gas utility regulated by the public service commission, and an electric or natural gas cooperative.

(fg) “Value-added programs and services” means programs and services that are utility or energy related, including, but not limited to, home comfort and protection, appliance service, building energy performance, alternative energy options, or engineering and construction services. Value-added programs and services do not include energy optimization or energy waste reduction programs paid for by utility customers as part of the regulated rates.

## PART 2. SEPARATION OF A UTILITY FROM ITS AFFILIATES AND ALTERNATIVE ELECTRIC SUPPLIERS

### R 460.10103 Separation.

Rule 3. (1) A utility that offers both regulated and unregulated services shall do so with the structural or functional separation needed to prevent anticompetitive behavior, cross-subsidization, preferential treatment, and information sharing beyond what is provided for in MCL 460.10ee. A utility shall be a separate, independent entity from any competitive affiliate.

(2) A utility shall not offer unregulated value-added programs and services except through an affiliate or other entity within the corporate structure.

(3) A utility’s regulated services shall not subsidize in any manner, directly or indirectly, the business of its affiliates or other entities within the corporate structure offering unregulated value-added programs or services.

(4) A utility shall maintain its books and records separately from those of its affiliates or other entities within the corporate structure offering unregulated value-added programs and services.

### R 460.10104 Records.

Rule 4. (1) The commission may review records relating to any transaction between a utility and an affiliate, or between a utility and other entities within the corporate structure offering unregulated value-added programs and services. At any time, the commission may initiate an investigation into transactions between the utility and its affiliates, or between the utility and other entities within the corporate structure offering value-added programs and services.

(2) A utility, its affiliates, and other entities within the corporate structure shall keep their books in a manner consistent with generally accepted accounting principles and, where applicable, with the Uniform System of Accounts.

### R 460.10105 Sharing of facilities and employees.

Rule 5. (1) A utility, its affiliates, and other entities within the corporate structure shall not share facilities, equipment, or operating employees, but may share computer hardware and software with documented protection to prevent discriminatory access to competitively sensitive information. This restriction does not apply if a utility offers an unregulated value-added program or service as part of regulated service provided MCL 460.10ee is complied with.

(2) A utility may transfer employees between the utility and an affiliate alternative electric supplier or other entity within the corporate structure as long as the utility documents those transfers and files semi-annually with the commission a report of each occasion on which an employee of the utility became an employee of an affiliate alternative electric supplier and/or an employee of an affiliate alternative electric supplier became an employee of the utility.

### R 460.10106 Marketing.

Rule 6. (1) A utility, its affiliates, and other entities within the corporate structure offering unregulated value-added programs or services, shall not engage in joint advertising, marketing, or other promotional activities related to the provision of unregulated services, nor shall they jointly sell services. The utility shall not give the appearance in any way that it speaks on behalf of its affiliates or other entities within the corporate structure offering unregulated value-added programs or services, nor shall the utility permit an affiliate or other entity within the corporate structure offering unregulated value-added programs or services to give the appearance that it speaks on behalf of the utility.

(2) A utility or alternative electric supplier shall not provide or suggest that it will provide any customer with preferential treatment or service by doing business with the utility, its affiliates, or other entities within the corporate structure offering unregulated value-added programs or services, nor shall the utility or alternative electric supplier suggest that any customer will receive inferior treatment or service by doing business with an unaffiliated supplier.

(3) A utility shall not condition or otherwise tie the provision of a utility service or the availability of discounts, rates, other charges, fees, rebates, or waivers of terms and conditions to the taking of any goods or services from the utility, its affiliates, or other entities within the corporate structure offering unregulated value-added programs or services.

R 460.10107 Use of the monthly utility bill and call centers.

Rule 7. (1) If a utility chooses to include charges for value added programs or services on the monthly utility bill, the utility shall file semi-annually with the Commission a report showing the total costs associated with the monthly billing process, how the proportional costs were allocated between any utility charges and all other value-added program and services.

(2) If a utility chooses to use its call centers for utility and value added programs or services, the utility shall file semi-annually with the Commission a report showing the total costs associated with the call centers, how the proportional costs were allocated between any utility and all other value-added program and services.

R 406.10108 Utility and affiliate or alternative electric supplier relationship.

Rule ~~78~~. (1) A utility shall not in any way interfere in the business operations of an alternative electric supplier. This provision includes, but is not limited to, all of the following:

(a) A utility shall not give the appearance in any way that it speaks on behalf of any alternative electric supplier or affiliate.

(b) A utility shall not interfere in any manner in the contractual relationship between the alternative electric supplier and its customers unless such involvement is clearly permitted in the contract between the customer and the alternative electric supplier or in tariffs approved by the commission.

(2) A utility shall not finance or co-sign loans, provide loan guarantees, provide collateral, or be encumbered or allow its assets to be encumbered by affiliates or other entities within the corporate structure. The utility and its assets shall not be the subject of recourse in the event of default by an affiliate or other entity within the corporate structure.

PART 3. DISCRIMINATION

R 460.~~10108~~-10109 Discrimination.

Rule ~~89~~. (1) A utility or alternative electric supplier shall not ~~unduly~~-discriminate in favor of or against any party or person, including its affiliates and other entity within the corporate structure.

(2) A utility shall not provide any affiliate or other entity within the corporate structure offering unregulated value-added programs or services, or any customer of an affiliate or other entity within the corporate structure offering unregulated value-added programs or services, preferential treatment or any other advantages that are not offered under the same terms and conditions and contemporaneously to other suppliers offering programs or services within the same service territory or to customers of those suppliers.

(3) If a utility provides to any affiliate alternative electric supplier or customers of an affiliate alternative electric supplier a discount, rebate, fee waiver, or waiver of its regulated tariffed terms and conditions for services or products, it shall contemporaneously offer the same discount, rebate, fee waiver, or waiver to all alternative electric suppliers operating within the utility's service territory or all alternative electric suppliers' customers.

(4) If a utility provides services or products to any affiliate or other entity within the corporate structure, and the cost of the service or product is not governed by MCL 460.10ee(8), compensation shall be based upon the higher of fully allocated embedded cost or market price. If an affiliate or other entity within the corporate structure provides services or products to a utility, and the cost of the service or product is not governed by MCL 460.10ee(8), compensation shall be at the lower of market price or 10% over fully allocated embedded cost. Asset transfers from a utility to an affiliate or other entity within the corporate structure for which the cost is not governed by MCL 460.10ee(8) shall be at the higher of cost or fair market value. Asset transfers from an affiliate or other entity within the corporate structure to a utility for which the cost is not governed by MCL 460.10ee(8) shall be at the lower of cost or fair market value.

#### PART 4. INFORMATION SHARING

R 460.~~10109-101010~~ Disclosure of information.

Rule ~~910~~. (1) Utilities shall comply at all times with applicable data privacy tariffs.

(2) Every utility that does not have an approved data privacy tariff shall apply to the commission for a data privacy tariff within 90 days of the effective date of these rules, and shall comply with the approved tariff.

(3) Prior written approval of the customer is not required for the disclosure of a customer list to a competing provider of an unregulated value-added program or service in compliance with MCL 460.10ee(10)(a), or to otherwise comply with these rules. A customer list may include only the name and address of a customer.

(4) Information obtained by a utility in the course of conducting its regulated business shall not be shared directly or indirectly with its affiliates or other entities within the corporate structure offering unregulated value-added programs or services unless that same information is provided to competitors operating in the state on the same terms and conditions and contemporaneously.

(5) Customer specific consumption or billing data shall not be provided to any affiliate, other entity within the corporate structure offering unregulated value-added programs or services, or alternative electric supplier without prior written approval of the customer.

(6) If a utility provides non-customer specific, or aggregated, customer information to its affiliate or other entity within the corporate structure offering unregulated value-added programs or services, it must offer the same information on the same terms and conditions, in the same form and manner, and contemporaneously, to all competitors of that affiliate or other entity

within the corporate structure. The provision of such data must comply with all applicable data privacy tariffs.

(7) A utility shall not provide its affiliates or other entities within the corporate structure offering unregulated value-added programs or services with information about the distribution system, including operation and expansion, without offering the same information under the same terms and conditions, in the same form and manner, and contemporaneously, to all licensed alternative electric suppliers or all competitors of the other entity within the corporate structure.

(8) A utility shall not provide any information received from or as a result of doing business with a competitor to the utility's affiliate or other entity within the corporate structure offering unregulated value-added programs or services without the written approval of the competitor.

## PART 5. REPORTING, OVERSIGHT, AND PENALTIES

R 460.~~10110~~-10111 Notification.

Rule ~~4011~~. (1) Utilities that intend to offer a value-added program or service shall notify the commission no less than ~~30-90~~ days prior to offering the new program or service. The written notification shall, at a minimum, provide all of the following:

- (a) A detailed description of the new value-added program or service and what it will offer.
- (b) A list of the personnel responsible for management of the value-added program or service and their location within the utility, both physically and within the corporate structure.
- (c) A detailed description of how all utility costs, including but not limited to billing, postage, and call center, -will be allocated to the value-added program or service to ensure that there is no cross-subsidization between regulated and unregulated programs or services.
- (d) A copy of the business plan for the value-added program or service.
- (e) Pro forma financial statements that outline the expected financial performance for each value-added program or service for the next 12 months.
- (f) A list of the zip codes in which the new value-added program or service will be offered and the overall financial size of the market and number of competitors in each zip code area in which the new value-added program or service will be offered.

(2) Utilities shall request a docket for the filing of the notification, and shall thereafter make all annual report filings in that docket. Public notice of such waiver filing shall be provided in the zip codes in which the new value-added program or service will be offered. The Commission will initiate an informal proceeding to determine if the proposed new value-added program or service will not be subsidized by the utility, provided with preferential treatment, will not harm the public interest by unduly restraining trade or competition in an unregulated market, and any utility asset used for the new value-added program or service is proportionally compensated for in accordance with MCL 460.10ee(8)

(3) A utility that intends to sell or transfer an asset with a market value of \$1,000,000 or more to any affiliate or other entity within the corporate structure shall notify the commission of the impending sale or transfer no less than 30 days before the sale or transfer. An affiliate or other entity within the corporate structure of a utility that intends to sell or transfer an asset with a market value of \$1,000,000 or more to a utility shall notify the commission of the impending sale or transfer no less than 30 days before the sale or transfer. Upon request, the utility, affiliate, or other entity within the corporate structure shall make available to the commission information

that demonstrates how the sale or transfer price was determined. Notification shall be in the form of a letter to the director of the financial analysis and audit division of the commission.

R 460.~~10111~~-~~10112~~ Oversight.

Rule ~~412~~. (1) A utility or alternative electric supplier shall maintain documentation needed to investigate compliance with MCL 460.10ee and these rules. All documentation shall be kept at a designated company office in Michigan. The utility or alternative electric supplier shall make this information available for review upon request by the commission or its staff.

(2) The utility or alternative electric supplier shall use a documented dispute resolution process separate from any process that might be available from the commission. This dispute resolution process shall address complaints arising from application of these rules. The utility or alternative electric supplier shall keep a log of all complaints, including the name of the person or entity filing the complaint, the date the complaint was filed, a written statement of the nature of the complaint, and the results of the resolution process. This dispute resolution process is not required as a prerequisite to a formal complaint.

(3) A utility or alternative electric supplier may request a waiver from one or more provisions of these rules by filing an application with the commission. The utility or alternative electric supplier carries the burden of demonstrating that such a waiver will not inhibit the development or functioning of the competitive market. The utility or alternative electric supplier requesting a waiver shall provide public notice in the zip codes where it intends to offer its value-added program or service.

R 460.~~10112~~-~~10113~~ Reporting.

Rule ~~4213~~. (1) Utilities shall file the code of conduct annual report information required under MCL 460.10ee(6)(c) and MCL 460.10ee(15) no later than April 30 of each year in the docket in which the utility filed its notification for a new program or service, or in a new docket for an existing program or service. Code of conduct annual reports shall include all of the following:

(a) Designation of a corporate officer of the utility who will oversee compliance with these rules and be available to serve as the commission's primary contact regarding compliance.

(b) An organizational chart of the parent or holding company showing all regulated entities and affiliates and a description of all programs and services provided between the regulated entity and its affiliates.

(c) An overview of the current year, financial and market share expectations for the following year, and any five year projections available for each value-added program and service.

(d) A table illustrating the customer count, market share per zip code, revenue, and expense of each value-added program and service.

(e) A balance sheet, ~~where available~~, and income statement for each affiliate and value-added program and service, including revenues, less direct and indirect expenses broken out separately. Direct and indirect revenues and expenses shall be separated by category and then aggregated at the direct and indirect levels, and the report shall include gross income, categorized amounts flowed back to ratepayers to reduce rates, and net income. Each category of indirect cost should be accompanied by formulas/calculations/allocations showing how they have been derived.

(f) General ledger and trial balance for each value-added program and service shall be provided to the commission staff separately on a USB thumb drive or other appropriate technological device with formulas intact.

(g) The number and type of complaints received in the prior calendar year regarding code of conduct issues from customers, alternative electric suppliers, person, or any other entity, and a summary of the resolution of any complaint that occurred during the calendar year.

(h) The number of times during the prior calendar year that customer information was provided to an affiliate or competing provider of an unregulated value-added program or service, the identity of the affiliate or competing provider, and a description of the information shared.

(i) A description of the nature of each transaction with an affiliate or other entity within the corporate structure and of the basis for the cost allocation and pricing established in each transaction.

(j) Annual balance sheets and income statements of the non-regulated subsidiaries, affiliates, and other entities within the corporate structure of the utility offering value-added programs or services.

(k) Reports of internal audits conducted by the utility regarding transactions between the utility and its affiliates, or transactions between the utility and other entities within the corporate structure offering value-added programs or services.

(2) The annual report shall be signed by the designated corporate officer or a party person responsible for each value-added program and service attesting to the accuracy of the information in the annual report and certifying that there is no cross-subsidization between regulated and non-regulated utility programs and services.

(3) Copies of federal income tax returns for utilities, affiliates, and, where applicable, other entities within the corporate structure, shall be available to the Commission for inspection and review.

R 460.~~10113~~-10114 Penalties.

Rule ~~1314~~. Penalties for violations of these rules are as provided in MCL 460.10c and MCL 460.10ee(14).