Association of Businesses Advocating Tariff Equity

ABATE's Initial Thoughts on Staff's Draft Code of Conduct Rules

- The Draft Proposed Rules apply to all utilities (and affiliates) that provide regulated and unregulated services to regulated utility customers in Michigan. *Notably, the scope of the draft rules does not, on its face, seem to apply to utilities (and affiliates) providing unregulated services to non-utility customers or to other outside of Michigan.*

- The Draft Proposed Rules require the "structural or functional" separation between regulated and unregulated services needed to prevent anticompetitive behavior. They state that (i) a utility's provision of value added programs and services must be through an affiliate; (ii) a utility's regulated services shall not subsidize its affiliates offering of unregulated value added services; and (iii) a utility shall maintain its books and records separately from those of its affiliates offering unregulated value-added programs and services. But, notably, the phrase "value-added programs and services" is only defined to include "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." *As Michigan has effected corporate separation for transmission, this seems somewhat permissive. It could make anti-cross subsidization rules harder to follow.*

- The Draft Proposed Rules prohibit utilities and their affiliates from "sharing facilities, equipment, or operating employees" but allow the sharing of "computer hardware and software with documented protection to prevent discriminatory access to competitively sensitive information." *The word "sharing" is vague, and the restriction does not seem to apply if a utility offers an unregulated value-added program or service as part of regulated service. Further, the Rule seems to allow utilities to "transfer" employees between the utility and affiliate AES with limited disclosure requirements? Isn't that a giant loophole?*

- The Draft Proposed Rules prohibit utility affiliates that provided "unregulated value-added programs and services" from "engaging in joint advertising, marketing, and other promotional activities related to the provision of unregulated services" or jointly selling services with the utility. *The prohibition seems to be limited to value-added programs and services but does not encompass other ventures.*

- The Draft Proposed Rules prohibit a utility or alternative electric supplier from "unduly" discriminating in favor of or against any party, including its affiliates. *What is the difference between discriminating and unduly discriminating? Are utilities allowed to discriminate unless the discrimination rises to the level of unduly discrimination?*

- The Draft Proposed Rules do contain significant restrictions on data and information sharing with affiliates. *But utilities and affiliates are free to transfer key personal back and forth?*

- The Draft Proposed Rules do require detail annual reporting requirements. Moreover, they require certification of a corporate representative attesting to the accuracy of the information in the annual report and certifying that there is no cross-subsidization between regulated and nonregulated utility programs and services. *This is good policy. But, (i) the penalties need to be*

enough to effect deterrence and include repayment of damages to injured competitors and ratepayers; and (ii) there should be a mandatory audit every 2-3 years by an independent (i.e., no conflict) outside auditing firm.

- The Draft Proposed Rules allow the utility to request a waiver from one or more of these provision by filing an application with the Commission. *This is bad policy. It will encourage an unending string of new proceedings to try and water down whatever rules are promulgated.*

- Subsidies are prohibited from regulated to unregulated – but how are subsidies defined? Are they at fully allocated or incremental costs? This could be a big issue.

Michigan Electric Cooperative Association

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July 28, 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 Second Set of 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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MICHIGAN ELECTRIC COOPERATIVE ASSOCIATION

REPLY COMMENTS ON PROPOSED CODE OF CONDUCT

On June 5, 2017, the Michigan Electric Cooperative Association (MECA) submitted comments and suggested changes to the Draft Code of Conduct (Code of Conduct). Other parties also submitted comments and suggested changes to the Code of Conduct, to which MECA submits these limited replies.

Reply to Comments of Mr. Forner

Mr. Forner proposes to define "anticompetitive behavior" and suggests that a 10% market share limit should be imposed through rulemaking. As MECA addressed in its comments, adding to the Code of Conduct the concept of "anticompetitive behavior" is too broad and exceeds the statutory directive. Section 10ee defines the scope of the Code of Conduct and does not invite expanding the Code of Conduct to include ill-defined "anticompetitive behavior." Just because such a "bright line" may be easy to textually prohibit, as noted below, such a line is unworkable, untenable, and improper.

Mr. Forner argues that a violation of the Code of Conduct occurs when a value-added program or service captures 10% of a market within a zip code area. This 10% market share is completely arbitrary when viewed in the context of Federal antitrust analyses. See, e.g., *Antitrust Market Definition: An Integrated Approach, Harris and Jorde, California Law Review, 72, 1, p 3 91984).* There is also no statutory basis for 10% as opposed to 5% or 25% and no clear basis within Mr. Forner's proposed changes to the Code of Conduct from which to determine what a "relevant market" is, or how a share of the market can be determined. Defining a market area based on a zip code for purposes of measuring market share is unrealistic. Large cities have multiple

zip codes and an 11% market share in only one zip code could be captured in a metropolitan area with proper marketing behavior in the metropolitan area generally served by competitors. Furthermore, the opposite problem would exist in rural areas where large swaths of land are covered by one zip code. Yet, Mr. Forner's proposal would have both be a violation of the code – regardless of such a rule's over-inclusiveness. The proper behavior and market share depend more on the actual nature and scope of activities including the degree of competition that exists – and less on arbitrary tests unsupported by statute. For example, a new value added service offering could produce 100% market share simply by being first to a narrowly defined market.

Mr. Forner proposes changes to R 460.10110 *et seq*. (Part 5) to have annual or advanced disclosure of value-added services by zip code, size of market, competitors, and financial projects. It is not clear how a utility would necessarily know all of this information. Based on how a market is defined, all competitors may not be known because there could be different services which compete with a particular value-added service or program. A zip code definition does not take into account, national programs and services for which competition may exist. Nor would providing the additional information sought by Mr. Forner's proposal be necessary when providing "notice" of a utility's plans to offer value added programs or services.

Mr. Forner also proposes to change a statutory notice requirement into an informal proceeding resulting in a Commission determination with regard to the value-added service. The Commission acts only through its orders and a determination as to whether a proposed value-added service is proper falls in the category of a contested

case contemplated under MCL 24.203(3). It appears that such an informal proceeding is to become a substitute for a complaint process. Such proposal unlawfully exceeds that which is required under MCL 460.10ee (4). MCL 460.10ee (4) directs notice by a utility and not a determination by the Commission after an "informal" proceeding.

Reply to Comments of Michigan Energy Innovative Business Council

The Michigan Energy Innovative Business Council recommends that the Code of Conduct include a cap on utility affiliate market share. There is simply no statutory basis (in MCL 460.10ee or elsewhere) for such action.

Reply to Comments of Direct Energy, IGS and Constellation

In the proposed changes to Rule R 460.10110 Notification, Direct Energy, IGS and Constellation likewise seek to turn a statutory notification requirement into a determination as to the lawfulness of a proposed value added program. Nothing in MCL 460.10ee provides for prior Commission or Staff approval of proposed value-added programs. Value-added programs are lawful under R 460.10110 and prior permission or authorization is not required or lawful

Direct Energy, IGS and Constellation also propose changes to R 460.10111 *et seq*. to remove from Commission oversight, reporting by and penalties on unaffiliated Alternative Energy Suppliers (AESs). The proposed changes make the Code of Conduct applicable only to utilities and affiliated AESs. The rule changes appear to be at odds with MCL 460.10ee(1)'s direction that the code of conduct established is to be applicable to electric utilities ***and*** alternative electric suppliers, consistent with sections 10 through 10cc. More important, Direct Energy's, IGS's, and Constellation's changes would also require utility obligations to also apply to affiliated AESs. The statute does

not grant the Commission this scope of direct regulatory authority over AESs, affiliated or not. These proposed changes must be rejected as exceeding the statute and common sense.

Conclusion

The scope of proposed changes to the Code of Conduct discussed above create practical problems in application making them unenforceable or rife with internal inconsistency and uncertainty. In addition, some of the proposed changes would create an ultra vires and, therefore unlawful, Code of Conduct. Given these problems, the final Code of Conduct should not incorporate the proposed changes discussed above.

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Michigan Energy Innovation Business Council

July 28, 2017

Mr. Derrell Slaughter
Michigan Public Service Commission
7019 West Saginaw Highway
Lansing, MI 48917
By email: slaughterd@michigan.gov

Dear Mr. Slaughter:

The Michigan Energy Innovation Business Council (Michigan EIBC) respectfully submits these reply comments relating to the Michigan Public Service Commission's development of draft rules related to the Code of Conduct for utilities pursuant to Section 10ee of Public Act 341 of 2016, MCL 460.10ee.

As noted in our initial comments, Michigan EIBC believes that there is a role for utilities to play in offering value-added programs and services (VAPS). However, pursuant to both the language and structure of the statute, any such offering of VAPS by utilities or their affiliates should be limited in order to avoid the undue restraint of trade or competition in markets served by competitive providers. On that basis, we are concerned that comments from some utilities and utility groups in this matter would strike the wrong balance, tilting playing field in favor of monopoly interests.

Our concerns arise from both an understanding of the unique position regulated utilities play within our energy landscape and the statutory framework under which utilities may offer VAPS. A delicate balance exists between the monopoly powers granted by the state to regulated utilities and the need to limit such powers from negatively impacting the functioning of competitive markets.

In authorizing utilities to offer VAPS under certain conditions, both the language and the structure of the statute aim to preserve this balance. For example, Section 10ee(2) states that utilities may offer VAPS only "if those programs or services do not harm the public interest by unduly restraining trade or competition in an unregulated market." Section 10ee(2), MCL 460.10ee(2).

In requiring the MPSC to develop a Code of Conduct to govern utility activities in this space, the statute also identifies certain elements of particular concern, including cross-subsidization between regulated and unregulated activities, preferential treatment of unregulated utility affiliates by the regulated entity, and ensuring a level playing field in how information is shared between the utility and any affiliate and between the utility and

a non-affiliated entity. Each of these is central to the statutory objective of avoiding undue restraints on trade or competition. Notably, however, the statute is explicit that this is not an exhaustive list of items to be covered, thereby providing a strong statutory basis for the Commission to go further in promoting the pro-competition objectives of the statute. (See, *e.g.*, Section 10ee(1), MCL 460.10.ee(1), "The code of conduct shall include, *but is not limited to*, measures to prevent cross-subisidization…" (emphasis added).)

Indeed, the whole structure of Section 10ee evinces a desire to strike an appropriate balance between utilities and non-utility energy providers and promote the proper functioning of competitive markets for the provision of unregulated energy products and services.

Turning to specific provisions of the draft rules, Michigan EIBC offers these comments and reactions to the comments of other participants:

PART I. GENERAL PROVISIONS

Michigan EIBC agrees with the comment from the Michigan Electric and Gas Association (MEGA) that Rule 2(a) contains definitions for both "affiliate" and "control," and that it would be better to separate the definitions into separate provisions.

Michigan EIBC agrees with the Michigan Electric Cooperative Association (MECA) suggestion to clarify the definition of "Alternative electric supplier" in Rule 2(b) as referring to those AESs "licensed by the Commission under Section 10a of 2000 PA 141, as amended" in order to clarify that "alternative electric supplier" does not refer to those third-party providers of energy products and services operating in the unregulated market.

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

Michigan EIBC disagrees with MECA's revisions to the first sentence of Rule 3(1). MECA's first change – to require structural or financial separation only for utilities that offer both regulated and unregulated services other than VAPS – lacks any support in statute. Indeed, as noted above, the very purpose of this Code of Conduct is to govern the operations of those utilities that do offer VAPS. Applying the requirements only to those who offer unregulated services "other than VAPS" misreads the statute's meaning and objective. Furthermore, replacing the term "anticompetitive behavior" with the more specific listing of "cross-subsidization, preferential treatment and information sharing prohibited by these rules" ignores the statute's clear language that the Code of Conduct include, *but is not limited to,*

those items. Section 10ee(1), MCL 460.10ee(1) (emphasis added). While Michigan EIBC recognizes MECA's objection that "anticompetitive behavior" also implicates antitrust jurisdiction, we again highlight the statutory condition that utilities can offer VAPS only "if those programs or services do not harm the public interest by unduly restraining trade or competition in an unregulated market." Section 10ee(2), MCL 460.10ee(2). Thus, not only does the statute specifically contemplate elements beyond those specifically listed, the focus of the statutory requirement of a Code of Conduct to govern the offering of VAPS by utilities and their affiliates is to ensure the promotion of trade and competition in unregulated markets. For these same reasons, Michigan EIBC disagrees with the revisions to Rule 3(1) proposed by MEGA.

Michigan EIBC agrees with MECA's revision to the second sentence of Rule 3(1).

Michigan EIBC disagrees with the proposal by both MEGA and MECA to remove Rule 3(2). As we noted in our initial comments, "even implicit extension of [a utility's] monopoly position is inappropriate." Allowing a utility to offer VAPS directly, as opposed to through an affiliate, threatens to add confusion to the marketplace. Furthermore, the statute requires – not once, but twice – that a utility offering VAPS inform potential customers that such VAPS are not regulated by the Commission. *See* Section 10ee(10)(c)(ii) and 100ee(10(d)(ii), MCL 460.10ee(10)(c)(ii), 460.10ee(10)(d)(ii). It is unrealistic to expect the typical utility customer to identify which services provided by the utility are and are not regulated. Within a utility's monopoly service territory, some form of structural separation is therefore necessary to avoid the confusion that is likely to result from a utility offering both regulated and unregulated services to the same customers within the same service territory.

Michigan EIBC disagrees with MEGA and MECA's proposed revisions to Rule 3(3). Adding the word "financially" as a qualifier, while striking the phrase "in any manner, directly or indirectly," significantly weakens the protections against cross-subsidization that are at the very heart of this Code of Conduct. As noted previously, there are a number of ways that utilities can misuse their unique position to restrain trade or competition in the unregulated market; ensuring robust protections against such infringement should be maintained.

Michigan EIBC believes that the requirement that a utility shall maintain its books and records separately from other entities offering VAPS is best left in the section dealing with corporate separation (Rule 3(4)), as opposed to the section on corporate records (Rule 4).

Michigan EIBC agrees with the change to Rule 5 proposed Direct Energy, IGS Energy, and Constellation (AES Commenters) to require that all costs to provide VAPS be fully embedded to ensure no cross-subsidization.

Michigan EIBC disagrees with the proposed changes by MEGA to Rule 6(1). Again, the whole rationale for a utility Code of Conduct governing the offering of VAPS is to ensure appropriate separation of regulated and unregulated functions, and not to allow a utility to use its position to impair the proper functioning of competitive markets. Requiring that the utility and its affiliates not speak for one another, or to give the appearance of speaking for one another, is central to this concept.

Michigan EIBC disagrees with the proposed changes by both MECA and MEGA to Rule 7. The proposed removal of the clauses "in any way" in Rule 7(1) and "in any manner" in Rule 7(1)(b) weaken the protections against cross-subsidization in the same manner as the proposed changes to Rule 3(3) above. Similarly, the proposed removal of Rule 7(2) seriously undermines the statutory prohibition against cross-subsidization. Non-utility market participants lack the ability to have their financial obligations guaranteed or otherwise supported by utilities (and ultimately, utility ratepayers); allowing for utilities to perform these functions on behalf of affiliates participating in the unregulated market risks seriously distorting the marketplace and providing utilities with an unfair competitive advantage, all while increasing the risk assumed by utility ratepayers. Michigan EIBC suggests add a provision preventing utilities from offering financing or other terms to customers procuring unregulated services that are not available to customers of non-affiliated providers of unregulated energy products and services, consistent with the statutory requirement that the Code of Conduct include measures to prevent preferential treatment. Section 10ee(1), MCL 4601.10ee(1).

PART 3. DISCRIMINATION

Michigan EIBC agrees with the clarification to Rule 8(1) proposed by the AES Commenters (as well as the similar clarification in Rule 6(2)).

Michigan EIBC disagrees with the changes to Rule 8 proposed by MEGA as unnecessary and potentially confusing. Alternative electric suppliers within the utility structure would already be covered by reference to "other entity within the corporate structure." Specifically listing "alternative electric supplier," therefore, could be misread as alternative electric suppliers *not* in the utlity's corporate structure, which is not the intent of either the statute or the draft rule.

PART 4. INFORMATION SHARING

Michigan EIBC restates its comment that the information utilized by utility affiliates offering VAPS should also be available to other market participants in the same timeframe, form, and substance. On this basis, Michigan EIBC disagrees with the deletions and other changes proposed by MEGA to Rules 9(4), 9(5), 9(6), and 9(7). To the extent that the Commission limits disclosure to requests from third-parties, the rules should maintain the same timeframe, form, and substance for information sharing within the utility's corporate structure. For example, if the Commission adopts the five-day timeframe contemplated in Section 10ee(10)(a), the rules should call for a five-day "waiting period" for the internal sharing of that information within the utility's corporate structure to ensure that utilities are not unduly advantaging their affiliates through instantaneous sharing of customer lists where non-affiliates have to wait for up to five days.

Michigan EIBC also disagrees with the change to Rule 9(3) proposed by MEGA.

PART 5. REPORTING, OVERSIGHT, AND PENALTIES

Michigan EIBC disagrees with the proposal from MEGA to eliminate Rule 10(1)(b).

Michigan EIBC disagrees with the proposal from both MEGA and MECA to eliminate Rule 10(3). Indeed, to ensure a fair playing field and eliminate the possibility of market distortions between a utility and its affiliates, Michigan EIBC would propose that any move to sell or transfer an asset with a market value of $1,000,000 or more connected with the offering of VAPS should allow other, non-affiliated entities to bid on the asset. Such a requirement would ensure accurate accounting of the value of assets, and allow for other market participants to have the same access to utility assets as utility affiliates.

Michigan EIBC agrees with the AES Commenters on the clarification to the Oversight provisions of Rule 11.

Michigan EIBC disagrees with MECA and MEGA's proposed eliminations and revisions to the reporting requirements contained in Rule 12. Ensuring full reporting of utility VAPS is essential to maintaining competition and avoiding the improper extension of a utility's monopoly position into the unregulated market.

Michigan EIBC restates its original comment that utility officer should be required to file annual affidavits of compliance with the Code of Conduct.

Michigan EIBC thanks the Michigan Public Service Commission for its thoughtful process relating to the development of formal rules to implement the Code of Conduct governing utilities offering VAPS. We look forward to continued engagement on this issue, and to working to meet the statutory objective of promoting trade and competition in the unregulated markets for energy products and services.

Sincerely,

Liesl Eichler Clark
President
Michigan Energy Innovation Business Council

Michigan Electric and Gas Association

MICHIGAN ELECTRIC AND GAS ASSOCIATION

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July 28, 2017

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

Via email to: slaughterd@michigan.gov

Re: Code of Conduct Draft Rule Proposal

Dear Mr. Slaughter:

Accompanying this letter are joint reply 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.

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

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

REPLY COMMENTS OF MICHIGAN
REGULATED ENERGY PROVIDERS

The Providers, as described in their initial comments on the draft code of conduct (Proposed Rule), reply to comments submitted by other interested parties, through these joint reply comments.

Some of the comments and changes to the Proposed Rule of other interested parties go right to the heart of the legal and practical limits applicable to administrative rules, discussed in the Providers' initial comments. Adopting the proposals challenged below will create legal uncertainty as to the validity of the final rules and give rise to more controversy and possible challenges.

Rubber Stamp Approval: Direct Energy/IGS/Constellation (AES Group) propose a 60-day advance filing and Staff approval process in changes to Rule 10(1). There are multiple problems with this proposal:

- The statute does not contemplate MPSC "prior approval" of VAPS at all, let alone any "rubber stamp". The statute imposes specific requirements on the utility's VAPS program and authorizes MPSC enforcement of the requirements. VAPS are allowed to proceed, subject to the statutory restrictions and possible enforcement review. This comment also applies to Mr. Philip Forner's proposed changes to Rule 10(2) which appears to request a regulatory determination as an automatic requirement for each noticed offering.

- The 60-day delay is not authorized by the statute and creates an arbitrary limit. There could be no comprehensive or meaningful agency review of issues within that short span of time. The limit would, in effect, grant equitable power to the MPSC Staff to halt a program before it begins. This comment also applies to Mr. Philip Forner's proposal for a 90-day advance notification requirement.

- The change assigns a prior review and approval function to the agency staff, without the MPSC making any determination. This is unlawful as contrary to the

statute, which does not require an advance review and compliance process at the agency. The Staff does not have legal authority to act for the MPSC.

Affiliate Regulation: The AES Group proposes multiple changes to Rule 11 on oversight, regarding documents, complaints and dispute resolution, to make the requirements for utilities also applicable directly to unregulated affiliates providing unregulated products or services. The statute does not give the MPSC this degree of authority over the unregulated utility affiliates. Provisions in MCL 460.10ee(1) are aimed at preventing cross-subsidization, preferential treatment and certain information sharing between a utility and an affiliate offering VAPS. The proposed change goes too far by incorporating direct regulation of the affiliates.

Anticompetitive Behavior: Mr. Forner proposes a definition of anticompetitive behavior added to Rule 2 which is too broad, enlarges the statutory limits and is unworkable, for these reasons:

- The first sentence is unnecessary because the statute adequately describes the limits on cross-subsidization or preferential treatment regarding VAPS.
- The phrase "any activity or result that leads to" in that first sentence is overly broad, vague and ambiguous. Such language could lead to pointless litigation and fails to adequately describe the scope of limitation.
- The second sentence also unlawfully expands the statutory restrictions by creating an arbitrary 10% market share cap and defining the relevant market as a zip code area. Such a market share could, in a given situation, be captured by entirely appropriate competitive actions. Why is a zip code area the relevant market, versus, say the State of Michigan, or Ingham County or Greater Lansing? These matters will vary based on the nature and scope of a VAPS offering and the degree of competition that exists.
- Further comment on the proposed 10% limit: such a market share and more might be obtained if a specific offering has few or no competitors. These

matters should be addressed in specific cases and lack uniformity justifying an advance rule limit.

New Rule on Bills and Call Centers: Mr. Forner's proposed new Rule 7 would add unnecessary new reporting requirements regarding use of utility billing and call centers. The statute already requires, directly, that costs be proportionately allocated between the utility and the VAPS. MCL 460.10ee(8). Annual, not semi-annual, reporting on cost allocation is directed by the statute. MCL 460.10ee(6)(c). Mr. Forner's proposal here is redundant and changes the statutory reporting schedule.

Market Information and Other Proposals: In several proposed changes in Part 5 rules, Mr. Forner seeks annual or advance disclosure of VAPS offering zip code areas, size of market, competitors and financial projections. Advance knowledge of much of this will not exist for a new VAPS offering. Markets might not be determined by zip codes. Identity and number of all competitors in a market area might not be known in advance. These matters are likely to vary case-by-case and are more appropriately determined in specific proceedings initiated due to claimed violation of the code of conduct.

Dated: July 28, 2017

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

Detroit Thermal

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July 28, 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 is Detroit Thermal, LLC's Response to the Initial Comments on the MPSC's 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 RESPONSE TO THE INITIAL COMMENTS REGARDING 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 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 several interested parties submitted comments to the Draft Code, including Detroit Thermal, LLC ("Detroit Thermal"). Staff also asked for interested parties to respond to the initial comments. Accordingly, Detroit Thermal respectfully submits these response comments to the initial comments to Staff's Draft Code.

I. DIRECT ENERGY, IGS ENERGY, CONSTELLATION

Direct Energy, IGS Energy and Constellation ("Direct") collectively filed several comments and submitted a red-lined copy of the Draft Code containing revised language based on its comments.

Direct fist contends that the Draft Code's references to an Alternative Electric Supplier ("AES") are unclear. Direct states that the rules need to be clarified with respect to whether the rule is intended to reference any AES in general or a utility's affiliated AES. However, Direct's revisions on this point add ambiguity and seem to contradict the intent of the original draft. For instance, the revision to paragraph 2 of Rule 6 results in two competing references; one to an AES and another to an affiliate AES. It is unclear how this section should be applied as a result of the revision. Moreover, it seems the original rule was drafted to encompass a utility and an AES, not a utility and its affiliate AES. Likewise, Direct's edits to paragraph 1 of Rule 8 seem to alter the intent of the rule by limiting the rule to a utility and its affiliate AES. Direct has also rewritten

Rule 11 to change the Draft Code's references from AES to an affiliate AES. Again, this seems contrary to the rule's intent and effectively exculpates an AES from having to abide by the oversight rules. The ambiguities claimed by Direct should be clarified, however, they should not be rewritten to eliminate their applicability to an AES.

Direct's revision to Rule 5 is unnecessary and addressed by other rules. There is simply no need to add language to paragraph 1 regarding embedding costs to avoid subsidization when Rule 3 specifically requires that regulated services shall not subsidize unregulated services. This revision is duplicative and should not be adopted. Moreover, Direct's revision to Rule 5 fails to address corporate-wide accounting or similar in-house corporate-wide services that do not fall under the definition of unregulated value-added programs and services. This rule must be revised to clarify that it does not apply to the allocation of such corporate-wide services between a utility and its affiliates or other entities within a utility's corporate structure.

Finally, Direct seeks to revise draft Rule 10 to require a utility to institute a process akin to a contested case to implement a new value-added program or service. Direct's proposed revision lacks necessary detail and exceeds the scope of the legislature's intent to only require a utility to notify the Commission of a new value-added program or service. Indeed, MCL 460.10ee(6)(a) states: "A utility offering a value-added program or service under this section shall do all of the following … (a) [p]rovide the commission with written notice and a description of any newly offered value-added program or service." Direct's revision is unnecessary as there are already procedures in the Draft Code that address its compliance concerns and the statute allows an interested party to file a complaint with the Commission if it believes that a proposed value-added program or service fails to comply with the Code of Conduct.

II. MICHIGAN ELECTRIC COOPERATIVE ASSOCIATION

The Commission should not adopt Michigan Electric Cooperative Association's ("MECA") revision to Rule 1. Instead, the Commission should adopt the applicability clause in the Draft Code, as revised in Detroit Thermal's initial comments, as it provides necessary clarification as to the applicability of the rules to utilities or alternative electric suppliers offering unregulated value-added programs and services.

MECA's revision to paragraph 1 of Rule 3 regarding regulation for programs other than value-added programs and services exceeds the statutory framework set forth in MCL 460.10ee and as such should be disregarded by the Commission. However, Detroit Thermal does concur with MECA's revisions regarding the elimination of the phrase of anti-competitive behavior from this rule as it is vague and ambiguous.

Detroit Thermal concurs with MECA's comment that smaller utilities should be exempt from the Code of Conduct, however, the definition of smaller utilities should be altered to be 80-100 employees or less.

MECA's revision to paragraph 1 of Rule 8 to eliminate the reference to an alternative electric supplier should be disregarded. The Code of Conduct is intended to apply to both utilities and alternative electric suppliers. Likewise, MECA's revisions throughout the remainder of Rule 8 to limit applicability of the rules to affiliate alternative electric suppliers instead of alternative electric suppliers should be disregarded.

III. MICHIGAN ELECTRIC AND GAS ASSOCIATION

The last sentence of Michigan Electric and Gas Association's ("MEGA") revision to paragraph 1 of Rule 5 contains a typographical error. The revision mistakenly refers to an affiliated alternative energy supplier rather than affiliated alternative electric supplier as defined by the

definitions in the rules. MEGA's revisions to Rule 5 also fail to address the corporate-wide accounting or similar in-house corporate-wide services that do not fall under the definition of unregulated value-added programs and services. 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 entities within a utility's corporate structure.

IV. MICHIGAN ENERGY INNOVATION BUSINESS COUNCIL

Michigan Energy Innovation Business Council's ("MEIBC") comments regarding the separation of a utility's offices, employees and resources fails to account for programs offered as part of a regulated service or in-house corporate-wide services used by a utility and its affiliates. Moreover, MEIBC's comment that a valued-added program and service should not use the utility brand is contrary to MCL 460.10ee(3) which specifically allows the assets of a utility, including its name and logo, to be used by an unregulated value-added program or service provided that the unregulated value-added program or service compensates the utility for its proportional use of the assets of the utility.

The Commission should disregard MEIBC's comment that a utility offering a value-added program or service should be subject to a market share cap. This concept is a restraint of trade and goes well beyond the legislature's intent of ensuring a level playing field among competitors. Likewise, the Commission should not adopt any rules prohibiting a utility's affiliate from bidding on a request for proposal issued by the utility. Additionally, this revision is superfluous given that other provisions of the Draft Code establish rules on transactions between a utility and its affiliates.

MEIBC's comment that an officer sign an affidavit is unneeded given the language of paragraph 2 of draft Rule 12.

V. PHIL FORNER

Mr. Forner's definition of anti-competitive behavior should not be adopted by the Commission. Having the Commission establish such a definition raises anti-trust issues which exceed the matters the Michigan Legislature intended the Commission to regulate via the Code of Conduct. Moreover, the proposed rule goes beyond limiting cross-subsidization and preferential treatment and attempts to establish a defined market cap for a utility's value-added program or service. As noted above, this is a restraint of trade which should not be codified in the Code of Conduct.

Mr. Forner's revision to Rule 3 lacks specificity as to what sections of MCL 460.10ee it is referencing.

Mr. Forner's revision to paragraph 2 of Rule 5 constitutes overbroad regulation and would prevent a utility from transferring its employees to an affiliate regardless of whether or not the transfer had anything to do with an unregulated value-added program or service. The Commission should not adopt any rules establishing an obligation for a utility to report on the assignment of its employees regarding matters that do not pertain to a value-added program or service.

Mr. Forner's reporting requirements regarding the use of monthly bills and call centers are unnecessary given the report requirements set forth in MCL 460.10ee(6)(c) and MCL 460.10ee(15). Moreover, semi-annual filing requirements are over-burdensome on both a utility and Staff and exceed the annual reporting requirements set forth in the statute.

Mr. Forner's proffered revisions to the notification rules of the Draft Code should not be adopted by the Commission. First, there is no need to increase the notification time-frame prior to instituting a value-added program or service from 30 days to 90 days given the requirements set forth in MCL 460.10ee(6)(a). The revision of subparagraph (c) of paragraph 1 of Rule 10 (Mr.

Forner's Rule 11) is not needed as the statute and other provisions of the Draft Code address this issue. The revisions regarding the provision of zip codes and the institution of a new Commission approval procedure exceed the scope of the legislature's intent to only require a utility to notify the Commission of a new value-added program or service.

Finally, Mr. Forner's proposed requirement that a utility provide notice regarding a request for a waiver is overly burdensome and unnecessary.

Dated: July 28, 2017

Respectfully submitted,

FISCHER, FRANKLIN & FORD

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Mr. Phil Forner

July 28, 2017

Phil Forner's reply to July 14, 2017 comments on MPSC Staff's Initial Code of Conduct

It is obvious from reading the July 14, 2017 comments from those who will financially benefit from the state sanctioned monopolies (i.e. the utilities) being able to offer one or more value added program and service (VAPS) would prefer the proposed code of conduct to be as least restrictive and vague as possible. However being fully aware of the potential harm to ratepayers, consumers, and free-market businesses when allowing monopolistic utilities to venture outside of the regulated utility business, the Legislature empowered and instructed the MPSC to establish a code of conduct that, according to MCL 460.10ee(1), must try to and actually prevent cross-subsidization, preferential treatment and, except as otherwise provided under MCL 460.10ee, information sharing. Having less restrictive and vague code of conduct will not prevent cross-subsidization, preferential treatment and or inappropriate information sharing. Therefore it is strongly recommended that the code of conduct contain specific requirements to actually prevent all cross-subsidization, preferential treatment and inappropriate information sharing that is not specifically allowed by MCL 460.10ee instead of leaving it up to the Commission to decide in complaint case or worse yet, up to the courts.

The Legislature then went on to further empower and instruct the MPSC in MCL 460.10ee(2) to make sure that every utility offered VAPS does not harm the public interest by unduly restraining trade or competition in an unregulated market. The utilities opine in their July 14, 2017 comments, that "the MPSC should not be creating a public database for competitors about a utility's VAPS business plans and projections" as those competitors of future utility VAPS "would certainly oppose this type of access to their business plans". However the utility statements fail to recognize the tremendous business advantage given to them in MCL 460.10ee(3); by being able to have the utility buy and maintain its assets and then allow the VAPS to use utility assets whenever needed with the VAPS only have to compensate the utility for its proportional use of the assets. In exchange for this enormous business advantage and for the potential for VAPS to harm the public interest by unduly restraining trade or competition in an unregulated market, the Legislature empowered the MPSC to establish and enforce a code of conduct and enforce the letter and intent of MCL 460.10ee. Therefore it is respectfully requested that the MPSC Staff resist pressures to not be informed of VAPS activities and ensure that all VAPS do not harm the public interest by unduly restraining trade or competition in an unregulated market.

Given the above and when MCL 460.10ee is read as a whole, it is clear that the Legislature intended the MPSC to initially and in an ongoing manner protect ratepayers, consumers, and free-market businesses that have to compete with the VAPS, from the obvious and real harm that could easily come if the monopolistic utilities offer VAPS.

Michigan Energy Efficiency Contractors Association

July 28, 2017

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

Dear Mr. Slaughter:

The Michigan Energy Efficiency Contractors Association (MEECA) submits these comments as part of a stakeholder process prior to formal rulemaking by the Michigan Public Service Commission (MPSC) on the Code of Conduct, 2016 PA 341, Sec. 10ee.

MEECA was created to serve our core members: companies that design, install or evaluate energy efficiency solutions in residential, commercial and industrial buildings. Its primary purpose is to advocate that Michigan has the most robust, reliable, qualified, and predictable energy efficiency industry in the nation. Many of our members are small businesses that have been operating in established unregulated markets for many years. Most of these companies do not enjoy the significant marketing, institutional, and operational advantages of the much larger utility providers that have been granted permission to offer new value-added programs and services (VAPS) in Michigan. Therefore, establishing and enforcing an effective Code of Conduct that supports a fair, functioning market without cross-subsidies is important to our membership.

According to the *Paths to the Future Report*, "Once a market is open, it is important that there be fair competition in order to create a robust market with many participants. Here, the role of the regulator shifts emphasis from prices to ensuring that the market structure is fair so that the market can function properly and clear at reasonable prices. Without proper controls, [electric distribution utilities] EDUs can achieve a competitive advantage, squeeze out competitors, and control the market."[1]

Recognizing that regulated utilities may now offer VAPS to their customers, MEECA stresses that these programs and services should not harm the public interest by unduly restraining trade or competition in an unregulated market. We provide specific comments below.

A. Flexibility in developing a new Code of Conduct is warranted

Allowing regulated utilities to offer an expanded range of VAPS departs from Michigan's historical energy marketplace. Therefore, it is appropriate for the MPSC to use sufficient

[1] *Paths to the Future Report: Roadmap to Implementing Michigan's New Energy Policy*; Prepared for Michigan Energy Office; Written by Regulatory Assistance Project; Prepared by Public Sector Consults, August 2015; Page 6.

judgement in anticipating potential issues of concern as rulemaking proceeds. MEECA recognizes this general concept in the proposed language (emphasis added):

- R 460.10103 Separation. (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.

B. Underscore the need to protect against discrimination in the marketplace

In developing rules with regard to R 460.10108 Discrimination, MEECA encourages MPSC to consider more subtle ways that discrimination can occur. For example, *Paths to the Future* identifies the following list of less obvious activities that should not be tolerated:

- "Processing requests of the affiliate [electric service provider] ESP before the unaffiliated ESP, which results in faster and better service for the affiliate, impacting end-use customer satisfaction;
- Policing prohibitions against providing leads to the affiliate or directing customers who call for information to the affiliate;
- Sharing any kind of market analysis or other proprietary reports that are not made publicly available;
- Giving the appearance that the [electric distribution utility] EDU speaks on behalf of the affiliate ESP and vice versa;
- Requesting customer permission to pass on customer information exclusively to the affiliate ESP."

These are some examples, but the principle is simple—all competitive ESPs should be treated the same at all times and at the same time."[2]

MEECA further notes that the list of concerns is not limited to circumstances in which a utility intentionally favors an affiliate provider. Unintentional discrimination can also result from, for instance, more familiar communication pathways between the utility and its affiliate as compared with an unknown third-party provider. Final rules should reflect this reality.

C. Need for clearly delineated initial review process and conflict resolution process

MEECA concurs with initial comments by Direct Energy/IGS/Constellation: "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

[2] *Paths to the Future Report,* Page 9.

other time frame; however, the longer time frame with Staff review ensures a more thorough analysis."

MEECA endorses the concept of a 60 or even 90-day review period for new VAPS during which the MPSC can determine if an offering would result in any cross-subsidization or unduly restrain trade or competition in an unregulated market.

In terms of the process for conflict resolution, MEECA agrees with Mr. Phil Forner in his initial comments that "This dispute resolution process is not required as a prerequisite to a formal complaint." Adding further weight to Mr. Forner's recommendation, we note a precedent from the Texas Public Utilities Commission in similar Code of Conduct language, which states, "The informal complaint process shall not be a prerequisite for filing a formal complaint with the commission, and the commission may, at any time, institute a complaint against a utility on its own motion."[3]

D. Transparency of information

MEECA concurs with initial comments by Michigan EIBC: "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."

E. No favorable pricing for VAPS

MEECA concurs with initial comments by Michigan EIBC: "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."

F. Utility compliance plan should include employee training on Code of Conduct

Effective implementation of the Code of Conduct will require utility and affiliate employees who are knowledgeable of the applicable provisions. Therefore, MEECA highlights this helpful language from *Paths to the Future* for MPSC to consider during the rulemaking process:

"As part of the plan, there should be an educational component for all employees that includes training and a handbook, so that employees of both EDUs and affiliate ESP understand what conduct is and is not permissible. There should be training and education procedures in place for all new and existing employees."[4]

[3] Public Utility Commission of Texas, Ch. 25 Substantive Rules Applicable to Electric Service Providers (K)(i)(4), Page 9; https://www.puc.texas.gov/agency/rulesnlaws/subrules/electric/25.272/25.272.pdf
[4] *Paths to the Future*, Page 11.

G. Utility branding should not be used to market VAPS

In keeping with the proposed language (R 460.10106 Marketing. Rule 6. (1) "… 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."), MEECA concludes that leveraging a regulated company's branding is inappropriate for products and services offered in an unregulated market.

MEECA shares this concern with Michigan EIBC, whose initial comments state (emphasis added): "Those programs and services should be independent including a separation of accounts, offices, employees and other resources, *including the use of the utility brand*."

Paths to the Future further develops the same point:

"The affiliate ESP should not use or trade upon, promote, or advertise its business using the EDU's name or logo, as this would tend to be to its commercial advantage. The affiliate ESP should have its own separate identification, and its identity should also be kept separate. If such practice (same or similar name and logo) is permitted, then the affiliate ESP must be required to disclose expressly that the affiliate ESP is not the same company as the EDU, that the affiliate ESP is not regulated by the commission, and that the customer does not have to buy the affiliate ESP's services in order to remain a customer of the EDU. The affiliate ESP should also be prohibited to use the EDU to advertise its services or any kind of joint advertising between the two entities. This not only creates fairness in the market (a company with a utility logo or name has market recognition that gives it a competitive advantage), but also avoids customer confusion. Customers have the right to understand who the entity is with whom they are contracting. When the same or similar name and logo is used by the affiliate ESP, it can be difficult for the customer to understand that they are dealing with a separate company."[5]

H. Notification requirements should include zip codes

MEECA concurs with initial comments by Mr. Phil Forner regarding Notification: "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."

I. Establishment of a market share limit for VAPS

Initial comments by Michigan EIBC state that "If an affiliate offers competitive services within its monopoly utility territory, there must be a cap on affiliate market share for the utility territory." MEECA endorses this position and further recommends that MPSC begin research to determine the appropriate level or levels for such a limit on allowable unregulated market share.

[5] *Paths to the Future,* Pages 9-10.

Conclusion

We thank the Commission and staff for considering these comments and look forward to engaging with others in the ongoing Code of Conduct rulemaking process.

Sincerely,

David Gard
Executive Director

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