



ENVIRONMENTAL LAW & POLICY CENTER
Protecting the Midwest's Environment and Natural Heritage

March 12, 2018

Ms. Kavita Kale
Michigan Public Service Commission
7109 W. Saginaw Hwy.
P. O. Box 30221
Lansing, MI 48909

RE: MPSC Case No. U-18419

Dear Ms. Kale:

The following is attached for paperless electronic filing:

Reply brief on behalf of the Environmental Law & Policy Center, the Ecology Center, the Solar Energy Industries Association, the Union of Concerned Scientists, and Vote Solar

Proof of Service

Sincerely,

Margrethe Kearney
Environmental Law & Policy Center
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cc: Service List, Case No. U-18419

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**STATE OF MICHIGAN
MICHIGAN PUBLIC SERVICE COMMISSION**

In the matter of the Application of **DTE**)
ELECTRIC COMPANY for approval of)
Certificates of Necessity pursuant to MCL)
460.6s, as amended, in connection with the)
addition of a natural gas combined cycle)
generating facility to its generation fleet and)
for related accounting and ratemaking)
authorizations.)

Case No. U-18419

REPLY BRIEF

ON BEHALF OF

**THE ENVIRONMENTAL LAW AND POLICY CENTER, THE ECOLOGY CENTER,
THE SOLAR ENERGY INDUSTRIES ASSOCIATION, THE UNION OF CONCERNED
SCIENTISTS, AND VOTE SOLAR**

March 12, 2018

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I. INTRODUCTION

Staff's brief frames the issue: can the Michigan Public Service Commission ("Commission") create a statutory exception for DTE because the company filed its application ("Application") and Integrated Resource Plan ("IRP") before the Commission updated its 2008 IRP guidance under the applicable statute? The answer is no. DTE filed its application *after* the passage 2016 PA 341 ("Act 341") and the Commission must apply this law equally to all parties. This controlling law prohibits the Commission from granting a certificate of necessity unless the Commission affirmatively determines, based on the record, that the Applicant has sufficiently evaluated the "availability and costs of other electric resources that could defer, displace, or partially displace the proposed generation facility." MCL 460.6s(11)(f). In its brief, however, the Michigan Public Service Commission Staff ("Staff") concludes that DTE's "goal" in this case was the opposite. According to Staff's assessment, DTE put forth "the least amount of effort for the maximum return *without an effort to attempt to defer or displace the need to build a nearly one-billion-dollar plant.*" Staff Brief at 38 (emphasis added). Instead of meeting the requirements set out by section 460.6s(11)(f), the Company "overlooked and underutilized" resources that "could partially displace the Company's proposed plant." Staff Brief at 9, citing 5 TR 181. Furthermore, DTE tilted its models to present an "unfair comparison of generation resources that could potentially offset the need for a large combined cycle plant." Staff Brief at 27. DTE "pre-decided" its energy efficiency portfolio to earn the "maximum financial incentive payment" for its shareholders rather than holding down costs for its customers. Staff Brief at 33-36. DTE's flawed risk analysis and gas price forecasts mean that "[r]atepayers will incur significant financial risk if the Company's proposal is adopted." Staff Brief at 14.

Staff concludes that “[t]here is ample evidence in the record for the Commission to require alternatives . . . to defer the need for a plant.” Staff Brief at 36. Remarkably, despite “ample evidence” that DTE failed to rigorously evaluate alternatives that could defer the plant, Staff suggests that the Commission “grant the three requested CONs with the specification *that this case should not be a model for future IRP filings.*” Staff Brief at 51 (emphasis added). Staff’s recommendation turns on a technicality. According to Staff, the Company’s IRP would fail if it were filed today, but it “minimally complies” with the law “under the guidance available at the time the application was filed.” Staff Brief at 10. Despite identifying fundamental inadequacies in DTE’s proposal, Staff’s recommendation stops short of its inevitable conclusion. Even assuming that DTE’s application satisfies the 2008 guidance—which ELPC disputes—the 2008 guidance is not the standard against which DTE’s proposal must be judged. A reviewing court will focus on the plain language of the statute. *Consumers Power Co. v. Pub. Serv. Comm’n*, 460 Mich. 148, 157 at fn. 8 (Mich. 1999) (“An agency interpretation cannot overcome the plain meaning of a statute.”).

While the Commission’s guidance can help to clarify what is required under Michigan law, it does not supersede the underlying statutory obligations that govern this proceeding. The Commission is “a creature of the Legislature” and “the exercise of all its power and authority must be found in statutory enactments.” *Union Carbide Corp. v. Pub. Serv. Comm’n*, 431 Mich. 135, 146 (Mich. 1988). DTE filed its CON case after Act 341 took effect on April 1, 2017, and it is this law—not the outdated 2008 guidance—that DTE’s proposal must satisfy. The statutory standard DTE is required to meet was in place at the time the Company filed its Application. If DTE’s IRP would fail if filed today, then it cannot be saved by reference to ten-year old Commission guidance. DTE chose the timing of its Application, and the law is the law. The

Commission must review DTE's Application in the manner that it intends to review all utility applications under Act 341.

The legislature intended Act 341 to increase affordability for customers, improve the reliability of electricity, and help protect the environment. The Act requires DTE to do more than just check the boxes prescribed by outdated guidelines. *See In the matter, on the Commission's own motion, to implement the provisions of Section 6s(1) of 2016 PA 341*, Case No. U-18418, Order at 1 (Nov. 21, 2017). DTE must show that it considered all available alternatives thoroughly and fairly. In describing how Act 341 should be implemented, the Commission concluded that "in applying the most reasonable and prudent standard *it is essential to fully evaluate alternatives* ranging from conventional or distributed generation, transmission or distribution, energy storage, [energy waste reduction] or [demand response] programs." *Id.* at 87-88 (emphasis added). The law requires the Commission to faithfully apply the "most reasonable and prudent" legal standard to all Michigan utilities, whether or not formal IRP guidelines were in place when DTE chose to file its Application. DTE cannot avoid its statutory responsibilities through clever timing of its Application.

The stakes in this case are high. DTE is asking the Commission to approve a \$1 billion, 1,100 MW natural gas plant ("Proposed Project") that will define the Company's portfolio for decades to come, based on a planning exercise that failed to consider available alternatives and that botched the alternatives it did consider. The Company has attempted to frame this proceeding as a choice between its Proposed Project and a portfolio that integrates a greater quantity of renewable energy. However, the question at issue here is not one of natural gas or renewables; it is a question of whether DTE has supplied sufficient evidence to demonstrate that its proposal is truly the most reasonable and prudent path forward for Michigan. The multiple

lower-cost scenario models presented by the intervenors in this proceeding (“Intervenors”) are not intended to suggest that DTE build one of those scenarios, but rather demonstrate how DTE’s flawed assumptions with respect to renewables, energy waste reduction (“EWR”), and demand response (“DR”) raise substantial questions about the validity of the Company’s IRP.

The remedy for DTE’s failures is not to do better next time; it is to deny the CON. DTE simply has not provided enough information for the Commission to conclude that its proposal is the most reasonable and prudent alternative, or to be confident that there are not other commercially-available resources that could cost-effectively defer, displace, or partially displace the proposed plant. DTE must show by a preponderance of the evidence that its proposed plant is the most reasonable and prudent alternative. This cannot be done simply by submitting an IRP that, as Staff described “complies with the minimal standards under Act 341 at MCL 460.6s(11) under the guidance available at the time of the filing of the application with certain qualifications.” Staff Brief at 17. All the Company has demonstrated is that it has failed to perform the basic due diligence that is required by Michigan law and that its customers deserve.

II. BURDEN OF PROOF

In order to meet its burden of proof in this case, DTE must clearly demonstrate that it has met two separate but related requirements. First, DTE must meet what is known as the “burden of production,” which means that DTE must produce enough evidence to support its claim that the Proposed Project is the most reasonable and prudent alternative. *See Schaffer v. Weast*, 546 U.S. 49, 56 (2005). Second, DTE must meet what is known as the “burden of persuasion,” which means that DTE must persuade the Commission that the evidence it produced is convincing enough to justify approval of the proposed \$1 billion gas plant. *See id.* at 56-57 (“[applicants] bear the ‘ultimate’ burden of persuasion”). DTE has not met its “burden of

production” because it has not provided evidence that it considered alternatives that could defer or displace its proposed gas plant. Even if the Commission could justify the exclusion of those alternatives, DTE has not met its “burden of persuasion” because the evidence that DTE has supplied to attempt to persuade the Commission that the proposed gas plant is the most reasonable and prudent alternative is fundamentally flawed.

If DTE meets its burden of producing enough evidence to support its claim, which it does not do here, the burden then shifts to opposing parties to demonstrate that the evidence is insufficient. However, DTE’s burden of persuasion *never shifts*. See, e.g., *Moore v. Kulicke & Soffa Indus., Inc.*, 318 F.3d 561, 566 (3rd Cir. 2003); *Samuel v. Ford Motor Co.*, 112 F. Supp. 2d 460, 467 (D. Md. 2000). This burden stands in stark contrast to DTE’s flippant dismissal of Staff and Intervenors’ concerns about the Company’s IRP process. DTE characterizes the comprehensive testimony and analysis of more than a dozen Staff and Intervenor expert witnesses as presenting alternatives that “might be possible if somebody else figures it out and does it.” DTE Brief at 29. What DTE seems to have forgotten is that *it is DTE’s job* to consider all available resources and “figure out” which is the most reasonable and prudent alternative. DTE’s blasé attitude towards recovering \$1 billion (plus a generous return) from customers – not to mention billions of dollars in unpredictable and volatile future fuel costs – is inappropriate and inconsistent with statutory requirements. DTE bears the burden of providing evidence that it has considered all available alternatives and the burden of persuading the Commission that its proposed natural gas plant is the most reasonable and prudent choice. If, as is evident in this proceeding, DTE cannot “figure it out and do it,” the Commission must deny the CON.

A. DTE Did Not Meet its Burden of Production Because it Did Not Provide Evidence that it Considered Alternatives that Could Defer or Displace its Proposed Gas Plant.

DTE failed to evaluate available, reliable alternatives to its proposed gas plant. Pursuant to section 460.6s(11)(f), an IRP must include an analysis of the availability and costs of other electric resources that could defer, displace, or partially displace the proposed generation facility, including additional renewable energy, energy waste reduction programs, load management, and demand response. MCL 460.6s(11)(f). DTE did not meet the requirements of 460.6s(11)(f). As Staff explains, “the Company overlooked and underutilized . . . supply and demand resources in its IRP that, in the aggregate, could partially displace the Company’s proposed plant.” Staff Brief at 9.

1) DTE Failed to Sufficiently Consider Hybrid Resource Portfolios

DTE claims that it considered “concerns” about renewable resources, energy efficiency, and demand response programs and suggests that those “concerns” are addressed because the Company will still have some capacity needs in the future that those resources might address. DTE Brief at 49-50. DTE’s argument misses the point and reflects the Company’s flawed approach to incorporating these resources into its planning process. Renewable energy, energy efficiency, and demand response should not be seen as “add-ons” to the planning process; the law requires that they be evaluated on par with other commercially-available and utility-deployed resources, such as natural gas power plants. The concerns DTE raises about the intermittent nature of renewables have already been addressed by the MISO-accredited firm capacity values used to evaluate those resources, though DTE uniformly skews those assumptions in favor of its proposed plant. *See, e.g.*, DTE Brief at 56; ELPC Brief at 16-18. DTE’s claim that renewable resources are less flexible than its natural gas plant is inexcusable

when the Company refused even to consider how storage could be used with renewable resources to increase the flexibility of DTE's portfolio and provide ancillary services.

DTE claims that its proposal consists of a "blend of flexible resources," but Staff and Intervenors consistently conclude that DTE's Application did not consider hybrid resource portfolios that account for the benefits of additional EWR, DR, and renewable energy to meet or supplement the Company's energy load requirements. DTE Brief at 30; Staff Brief at 39; MEC Brief at 89; ELPC Brief at 22. Staff goes so far as to maintain that accounting for the benefits of these three resources could "delay or displace the need for a new combined cycle generating facility. This triad can, at the very least, provide enough energy and capacity to decrease the size of a new generating facility." Staff Brief at 39. This finding, alone, should be fatal to DTE's Application in light of DTE's legal burden to thoroughly evaluate alternatives that could defer or partially displace the plant. MCL 460.6s(11)(f).

DTE had the opportunity to fully consider hybrid alternative resources, but it did not. The Commission must now exercise its authority to send DTE back to the drawing board. Staff in particular asked the Company "to include Staff's supply and demand resources that could have mitigated defects in the Company's IRP, in a combined, cohesive analysis. However, the Company refused and indicated that its low load sensitivity serves as an adequate proxy for Staff's request." Staff Brief at 9. But a sensitivity that is meant to evaluate how the Proposed Project performs if customer demand is lower than expected (6 TR 1750:3-7.) does not provide a proxy for a scenario of combined supply- and demand-side resources. And while DTE did eventually run a number of scenarios that come closer to approximating Staff's requested scenario modeling, the Company did not do so in a timely manner, which prevented Staff from fully evaluating the actual results of the run. Staff Brief at 9; 6 TR 1815:15-1816:2.

DTE's failure to comply with MCL 460.6s(11)(f) and its flawed approach to resource planning is reflected in its argument that DR cannot partially replace the proposed gas plant because reducing the size of the plant would reduce its efficiency. DTE Brief at 51. DTE's argument is contrary to the plain language of the statute, which requires that DTE consider in its IRP and the Commission consider in its review, "an analysis of the availability and costs of other electric resources that could . . . partially displace the proposed generation facility, including additional . . . demand response." MCL 460.6s(11)(f). The statute's requirement to provide evidence to the Commission of demand response resources that partially displace the proposed plant protects ratepayers against utility incentives to overbuild generation resources. While DTE may prefer to build one, large generation plant, MCL 460.6s(11)(f) clearly requires the Company to provide evidence on the record that it has also considered alternative, more incremental solutions that have the flexibility to respond to uncertain future changes in customer demand and market prices.

2) DTE Failed to Sufficiently Consider Battery Storage Resources

The Company claims to have considered battery storage in its "most comprehensive and complex modeling steps" (DTE Brief at 46), but in reality, DTE dropped battery storage from its planning without even a cursory analysis. 5 TR 890:4-892:16. As established by Intervenors, battery storage resources are capable of providing significant benefits to utilities seeking cost-effective solutions to their identified power needs. 5 TR 884:18-885:7. The Federal Energy Regulatory Commission ("FERC") is taking affirmative steps to ensure that energy storage resources can fully participate in wholesale energy, capacity, and ancillary services markets. FERC Order 841 at 46, 49 (Feb. 15, 2018).¹ Section 460.6s(11)(f) requires DTE to analyze the availability and costs of this load management resource in its IRP. MCL 460.6s(11)(f). DTE's

¹ <https://www.ferc.gov/whats-new/comm-meet/2018/021518/E-1.pdf>

failure to fully evaluate energy storage in its IRP creates a major blind spot for the Commission and undermines DTE's conclusion that an 1,100 MW gas plant is truly necessary.

However, the Company made little effort to model battery storage resources to meet DTE's identified need. DTE used Strategist in its analysis, but ELPC witness Jacobs testifies that "the Strategist model does not have the means to identify the cost savings and operational benefits from battery storage or other forms of flexible supply or demand." 5 TR 890:9-10. The pairing of storage with renewable resources can significantly increase the capacity value of renewables by reliably shifting their output to the hours when power is most needed; DTE failed to analyze this capability. Nowhere in its brief does DTE discuss its failure to model the benefits of battery storage as a resource option. 5 TR 890:6-7. This makes it impossible for DTE to claim with any quantitative certainty that including battery storage in its resource plan would not provide additional value to the company or its ratepayers or cost-effectively defer or partially displace DTE's Proposed Project. 5 TR 891:2-4. DTE's failure to analyze battery storage serves as one example of how DTE has failed to carry its burden of production in demonstrating that its Proposed Project is the most reasonable and prudent means of meeting the utility's power need relative to other resources.

3) DTE Failed to Sufficiently Consider PURPA or Customer-Requested Renewable Energy

DTE claims that PURPA is too "speculative" to include in its planning, but the Company's failure to include expected growth of PURPA contracts means that DTE once again failed to meet its burden of production. DTE Brief at 55; MEC Brief at 28; MiEIBC Brief at 19; ELPC Brief at 22. After criticizing Intervenors for cross examining the Company's witness on the Commission's existing PURPA orders, DTE makes an inappropriate attempt to relitigate those orders in its briefs. DTE Brief at 56. DTE mischaracterizes Mr. Beach's testimony as

suggesting that DTE could meet the entirety of its energy needs through PURPA contracts. DTE Brief at 57. Mr. Beach identifies PURPA as one of many available procurement options that DTE failed completely to consider, and suggests that PURPA could displace some portion of DTE's proposed plant. 55 TR 958:5-959:9.

DTE does not dispute that it failed to consider existing or potential PURPA contracts as an available resource, despite the fact that this Commission has recognized that “there is significant ratepayer value in deferring large, capacity additions through contracting with QFs for incremental capacity.” *In re DTE Electric*, Case No. 18091, Order at 15 (July 31, 2017). As the Commission then noted, the ability for PURPA contracts to defer large capacity additions is a “particularly acute concern in the case of DTE Electric, which is in fact planning a significant increase to its capacity portfolio, at a substantial cost to ratepayers.” *Id.* DTE's alleged concerns about PURPA contracts exacerbating natural gas price risk ring hollow, as Company witness Bloch agrees that new PURPA contracts actually serve as a hedge against price volatility. 8 TR 2361.

Nor does DTE's analysis include any consideration of an increase in customer-requested renewable energy. Instead, the Company argues that the assumptions proposed by Mr. Jester are unreasonable. DTE Brief at 45; MiEIBC Brief at 6-7. DTE provides no credible justification for assuming zero increase in customer-requested renewable energy, especially in light of Ms. Schroeder's testimony that she expects demand for customer-requested renewable energy will increase. 8 TR 2483:13-14. While Ms. Schroeder may dispute Mr. Jester's proposal to use a 5% increase in customer-requested renewable energy, she provides no justification for the Company's failure to model some percentage growth higher than zero.

In this respect, DTE fails to meet its burden of production because: (1) it fails, without justification, to consider PURPA contracts as an available resource; and (2) it fails to include any provision for increased growth in customer-requested renewable energy.

B. DTE’s Analysis of the Proposed Gas Plant is Fundamentally Flawed

Even if the Commission concludes that DTE provided enough documentation to meet its burden of production, the quality of the evidence DTE provided is insufficient to meet the Company’s burden of persuading the Commission that the Proposed Plant is the most reasonable and prudent alternative. If the Commission’s IRP guidance is intended to reflect the minimal level of analysis required by the statute, the Company cannot credibly argue that its analysis was robust when IRP guidance put into place a few months after it filed its Application requires significantly more information be provided to comply with the statute. The statute in July 2017 when DTE chose to file its application was the same statute for which the Commission issued IRP guidelines in November 2017. The Commission must hold DTE to the same statutory requirements as it will hold other Michigan utilities to. DTE’s choice to file its application before Commission guidelines were issued does not mean that DTE can be held to a different standard under the statute.

1) DTE Used Flawed Natural Gas Prices in Its Analysis

DTE’s analysis of fuel costs was inadequate and insufficient to convince the Commission that the proposed project is the most reasonable and prudent alternative. Pursuant to section 460.6s(11)(b), an IRP shall include the projected fuel and regulatory costs of the type of generation technology proposed for the generation facility under various reasonable scenarios. MCL 460.6s(11)(b). In an attempt to satisfy this requirement, DTE projected natural gas fuel costs for a reference scenario, a low gas price scenario, and a high gas price scenario. While the forecasts for the reference and low gas price scenarios were consistent with those of other

industry projections, the high gas price scenario was unreasonably optimistic. DTE should have used higher prices in the high gas price scenario. Instead, its long-term natural gas price forecasts for the high gas scenario had a compound annual growth rate (“CAGR”) that is 1.6% lower than the Energy Information Administration’s (“EIA”)² high gas case. According to Staff, the Company “is underestimating the net present value of revenue requirements in the event that gas prices rise closer to the EIA’s high gas price scenario.” Staff Brief at 19. “If the growth rate of prices were to track that of the EIA’s high gas prices, then DTE’s proposed project may not be the most reasonable and prudent choice.” Staff Brief at 18.

2) DTE Used Flawed Assumptions for Energy Waste Reduction and Demand Response Resources

While DTE claims to have adequately considered energy waste reduction and demand response, its flawed analysis cannot persuade the Commission that the proposed plant is the best choice. The record is clear that the Company did not model energy waste reduction and demand response to the achievable and cost-effective amounts reported in the potential studies. (5 TR 214; State of Michigan Demand Response Potential Study, Michigan Lower Peninsula Electric Energy Efficiency Potential Study.)³ Staff expressed definite concerns with the Company’s scenario development because “the Company did not model these resources simultaneously, at the amounts that Staff believes to be achievable and cost-effective, therefore Staff has no way of knowing if this type of multi-resource approach would be more cost effective for the rate-payer than the Company’s proposed project.” 5 TR 214. MEC-NRDC-SC agree with Staff’s concerns.

² The Energy Information Administration is a principal agency of the U.S. Federal Statistical System and is responsible for collecting, analyzing, and disseminating energy information to promote policymaking, efficient markets, and public understanding of energy and its interaction with the economy and the environment. Its programs cover data on natural gas, coal, petroleum, electric, renewable, and nuclear energy.

³: http://www.michigan.gov/documents/mpsc/State_of_Michigan_-_Demand_Response_Potential_Report_-_Final_29sep2017_602435_7.pdf;
http://www.michigan.gov/documents/mpsc/MI_Lower_Peninsula_EE_Potential_Study_Final_Report_08.11.17_598053_7.pdf

5 TR 347. MEC-NRDC-SC identified similar defects with the Company's analysis. Specifically, assessed shortcomings include DTE's failure to allow additional demand response resources to be selected prior to 2023, flaws in DTE's energy efficiency program modeling, incorrect capacity factors for solar, and flaws in modeling renewable resources. 5 TR 329-330; Staff Brief at 40-41.

3) DTE Used Flawed Assumptions for Renewable Energy Resources

DTE claims that its models never selected renewables beyond the 15% level required of all Michigan utilities in Act 342 (DTE Brief at 46-47), but that is because DTE used flawed inputs and assumptions that led the model to not select renewables. DTE's model placed restrictions on new renewable resources by making new solar and wind facilities available only in 502 MW and 1,000 MW increments, respectively. Staff Brief at 26-27; MEC Brief at 27-28. As MEC explained in its brief, "this means that for each year, Strategist had only two options for solar: either 502 MW of new solar or no new solar. Similarly, Strategist had only two options for wind each year: either select 1,000 MW of new wind or no new wind. By constraining solar and wind additions in this way, DTE limited the ability of Strategist to select renewable resources that would displace (in whole or in part) the need for new capacity, as required by section 6s(11)(f)."

In each of its scenarios, DTE excluded accelerated near-term builds of renewables, modeled the least efficient solar technology to meet DTE's needs, and relied on price forecasts for solar resources that are too high. ELPC Brief at 8. As a result, the Company's analysis of renewable energy resources is superficial and unpersuasive. DTE criticizes certain details of Mr. Beach's modeling, but Mr. Beach and Intervenors do not bear the burden of proof here. Mr. Beach's testimony and modeling was not a proposed build, nor are Intervenors in the position of

asking the Commission to recover from DTE's customers the costs of Mr. Beach's proposed scenario. Rather, Mr. Beach's scenario provided for the Commission a concrete illustration of the ramifications of DTE's many flawed assumptions with respect to renewables.

C. DTE's Analysis Relies Upon Outdated 2008 Guidance

DTE cannot hide behind outdated Commission guidance when attempting to meet its burden of producing sufficient evidence to demonstrate that the Proposed Plant is the most prudent and reasonable alternative. DTE Brief at 15. While DTE argues that it should not be held to the standards set out in the Commission's recent guidance because that guidance was not available at the time it filed its Application, (DTE Brief at 15), that does not absolve the Company from the statutory requirement that it provide sufficient information to demonstrate by the preponderance of the evidence and persuade the Commission that its proposed plant is the most reasonable and prudent alternative.

Act 342 prescribes two IRP requirements: section 6(s) requires utilities to perform an IRP in support of a CON application, and section 6(t) requires utilities to perform a periodic stand-alone IRP. To implement these requirements, the Legislature directed the Commission to establish filing requirements and IRP guidelines. The Commission finalized 6(s) filing requirements on May 11, 2017 and 6(t) filing requirements on December 20, 2017. The Commission finalized IRP guidelines for 6(t) and 6(s) on November 21, 2017. These November 2017 IRP guidelines superseded the Commission's 2008 IRP guidelines. In its November 21, 2017, Order, the Commission explained how the guidelines accomplished the legislature's statutory directive:

The IRP parameters set forth in this order and Exhibit A will also help ensure that decisions we make about the state's energy supplies can adapt to changing conditions. This is essential given the stakes involved and the dynamic nature of the energy industry, customer behavior, and technology trends. The Commission

expects a planning process that is transparent, thorough, and open to considering evolving technologies, ownership structures, and innovative solutions to meet customer needs. In applying the ‘most reasonable and prudent’ standard, it is essential to fully evaluate alternatives ranging from conventional or distributed generation, transmission or distribution, energy storage, EWR or DR programs.

See In the matter, on the Commission’s own motion, to implement the provisions of Section 6s(1) of 2016 PA 341, Case No. U-18418, Order at 87-88. (Nov. 21, 2017).

Here, Staff has concluded that the IRP “would fail if it were simply refreshed and refiled under Section 6(t),” which means that if DTE had waited four months to file its Application, Staff would have recommended that the Commission deny the Company’s CON. Staff Brief at 10. DTE controlled the timing of its Application. The Commission cannot create an exception for DTE under the statute because the Company chose to file its CON application before the Commission could complete its IRP guidelines. The Commission’s conclusion that “in applying the most reasonable and prudent standard it is essential to fully evaluate alternatives ranging from conventional or distributed generation, transmission or distribution, energy storage, EWR or DR programs” applies regardless of whether official guidelines were in place at the time DTE chose to file its Application. If DTE’s IRP would fail under the statutory standard, the Commission must reject the CON Application.

While compliance with Commission filing and IRP guidelines is a necessary condition for approval of a CON, it is most certainly not sufficient. Nor can the Commission make or change substantive legal requirements through the issuance of IRP guidelines. Michigan law directs the Commission to establish standards for an IRP that is required to be filed by a utility requesting a CON. MCL 460.6s(11). Any filing that falls short of those standards would not meet the burden of production. But the law does not contemplate that meeting those IRP standards fully satisfies a utility’s burden of production or of persuasion. *Id.* Rather, the burdens

of production and persuasion are tied to the underlying statutory requirements, which did not change between July 2017 when DTE filed this application and November 2017 when the Commission issued updated guidelines for IRPs. If the 2017 Commission guidance reflects what is necessary for a utility to comply with MCL 460.6s(11), then that same evidence would be required of DTE regardless of when the guidelines were issued. DTE knowingly accepted the risk of filing its application before Commission guidance was released. DTE should not be allowed to use that timing choice to its advantage.

DTE argues that the 2017 IRP guidelines do not apply because “it is not required to be clairvoyant or otherwise foresee and comply with future requirements.” DTE Brief at 15. But when DTE filed its application, the requirement to provide sufficient evidence to meet its burden of proof was not a future requirement – it was already in place in the governing statute. Nor could this substantive, statutory requirement be altered by Commission guidance. Intervenors do not argue that DTE failed to meet a technical filing requirement of the 2017 guidance that DTE could not have known would be established; Intervenors argue that by conducting a flawed IRP, DTE failed to consider alternatives or demonstrate that its proposed project is the most reasonable and prudent path forward. While the standards issued by the Commission establish a floor for the required demonstration under the statute, they do not give anyone who filed before they were updated a “free pass” to fall short of the statutory requirements.

III. CONCLUSION

In passing Act 341, the Legislature established a robust IRP process, weighing the economic and social impacts of regulated utilities’ planning processes. The Commission, in turn, is charged with implementing Act 341 using the powers conferred upon it by the Legislature, *Union Carbide Corp. v. Public Service Comm.*, 428 N.W.2d 322 (1988). While the

Commission's authority to approve or deny DTE's CON is not disputed, it would not be a true and faithful implementation of the law to approve DTE's CON request under standards far below those that will be faced by other Michigan utilities in future CON cases and upcoming IRP processes. The Legislature did not give the Commission the authority to give DTE a "free pass" under Act 341, in the hope that the Company might do better next time. DTE must be held to the same rigorous standards that all Michigan utilities will be held to under the Act 341 IRP process.

The Commission plays a fundamental role in the regulation of Michigan's utilities. Failing to judge DTE's CON against the in-effect statutory requirements would thwart the goals of Act 341 until the next time DTE needs capacity. Based on its own modeling, DTE's next CON proceeding may not take place for more than a decade. While DTE may have checked the appropriate boxes under a 2008 guideline, the Commission's charge from the Legislature is to determine whether DTE's proposed \$1 billion gas plant is the most reasonable and prudent alternative.

DTE failed to put into the record evidence on hybrid-resource portfolios, battery storage resources, PURPA growth, and customer-requested renewable energy that are necessary to enable the Commission to make a determination on this CON. And the evidence that DTE did put into the record does not meet the requirements of this case. DTE made errors at every turn, resulting in a planning process that did not do justice to renewable resources, energy waste reduction, demand response resources, and, ultimately, DTE's customers.

This CON proceeding does not require the Commission to choose between renewables and fossil fuels, or one policy goal over another. The Commission is simply being asked to implement Act 341 consistently and fairly for all utilities. The alternative scenarios presented by Intervenors are meant to illustrate that, on the basis of this record, it is impossible for the

Commission to conclude that the proposed 1,100 MW natural gas unit is the most reasonable and prudent alternative. DTE can return to this Commission after performing the full analysis required by Act 341, at which time the Commission can make a decision. Such action by the Commission would be reasonable and in the best interest of DTE's customers. Staff notes that "the Commission could reasonably deny the Company's request for this CON and require a robust analysis in accordance with the Commission's November 21, 2017 Order in MPSC Case No. U-18418. (Attachment A.)" Staff Brief 11.

Because DTE failed to meet its Burden of Proof, the Commission must reject this CON Application.

Respectfully submitted,

Date: March 12, 2018

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**STATE OF MICHIGAN
MICHIGAN PUBLIC SERVICE COMMISSION**

In the matter of the Application of **DTE**)
ELECTRIC COMPANY for approval of)
Certificates of Necessity pursuant to MCL) Case No. U-18419
460.6s, as amended, in connection with the)
addition of a natural gas combined cycle)
generating facility to its generation fleet and)
for related accounting and ratemaking)
authorizations.)

PROOF OF SERVICE

I hereby certify that a true copy of *Reply brief on behalf of the Environmental Law & Policy Center, the Ecology Center, the Solar Energy Industries Association, the Union of Concerned Scientists, and Vote Solar* was served by electronic mail upon the following Parties of Record, this 12th of March, 2018.

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