STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of Consumers Energy Company for approval of the sale of its River Hydroelectric Generating Fleet, related Power Purchase Agreement, and for other relief. /

MPSC Case No. U-21985

Attorney General's
PUBLIC
Reply to Exceptions

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INTRODUCTION

On June 10, 2026, Administrative Law Judge (ALJ) James M. Varchetti issued his proposal for decision (PFD) in this case. In the Notice of Proposal for Decision, the ALJ stated that replies to exceptions must be filed by July 15, 2026. However, after a Motion for Extension of Time to File Replies to Exceptions was filed by Michigan Trout Unlimited, Michigan Steelhead and Salmon Fisherman's Association, the Great Lakes Council of Fly Fishers International, Anglers of the Au Sable, and the Michigan Hydro Relicensing Coalition, the ALJ agreed to move the deadline for filing replies to exception to July 22, 2026. Accordingly, the Attorney General files the instant replies to exceptions to respond to or otherwise address arguments made by the Company and Confluence Hydro, LLC in their exceptions to the proposal for decision.

This Reply to Exceptions will address the following issues:

1. The sales transaction and PPA is not in the best interest of ratepayers.
2. The Company's condition for the proposed Hydro Safety Fund does not support approval of the sales transaction.
3. The Attorney General's conditions.

The Attorney General's decision not to address certain issues in this Reply to Exceptions is not a waiver of those issues. The Attorney General's Initial and Reply briefs, testimony, exhibits and her exceptions are all incorporated herein and help explain her position on the issues appearing in this case.

ARGUMENTS

A. The Sales Transaction is not in the best interest of ratepayers.

After reviewing the proceedings in this case including the PFD and Consumers Energy's exceptions, the Attorney General now believes that the sales transaction and PPA are not in the best interest of ratepayers. The PFD did not adopt all of the Attorney General's thirteen recommended conditions, which she addressed in her exceptions to the PFD. The conditions were recommended to address shortcoming and transaction terms that disadvantaged ratepayers and diminished benefits of the sale for ratepayers. The Company also continues to insist that it rejects any conditions for approval of the proposed sales transaction and PPA recommended by other parties. The sale would only be in ratepayers' best interest with the Attorney General's thirteen conditions as discussed in her Initial Brief, Exceptions and below. Because it is unlikely that the Attorney General's conditions will be adopted, the sales transaction and PPA are not beneficial to ratepayers and should be rejected as recommended by the PFD.

While the Company has proposed establishing a Hydro Safety Fund to purportedly address funding concerns raised by the parties, as the only condition it will accept, the proposal is problematic as discussed below and does not negate the need for the Attorney General's conditions to make the sales transaction and PPA beneficial for ratepayers.

Finally, just as the PFD addressed the Attorney General's proposed conditions although it recommended rejecting the transaction, the Attorney General will respond to the Company's exceptions regarding the Attorney General's conditions for completeness and to ensure the issues are preserved.

B. The PFD did not err in recommending conditions for approval of the sale.

The Company disagreed with the conditions recommended by the ALJ should the sale be approved by the Commission on the premise that they would "change the core elements of the transaction" which it claims resulted from more than 18 months of negotiations between it and Confluence.[1] According to the Company, "[a]ny conditions that "change the core elements of the transaction" would change one or both parties' view of the value of the transaction and potentially render the deal, as a whole, unacceptable."[2] Instead, the Company indicates that it is willing to accept a condition that it does not believe will alter the actual transaction between the parties. This never before mentioned condition would involve the use of FCM revenues, should they be granted by the Commission to establish a Hydro Safety Fund. For reasons discussed below, the conditions recommended by the PFD are necessary with or without the establishment of a Hydro Safety Fund as

[1] Consumers' Exceptions, p 84.

[2] *Id.*

proposed by the Company. Further, there are concerns with the proposed fund that are not addressed by the Company, that makes its establishment questionable.

1. Consumers Energy's proposed Hydro Safety Fund and use of FCM funds.

The Company has proposed its Hydro Safety Fund (the "Fund") proposal for the first time in its exceptions to the PFD:

> Consumers Energy proposes that it would <u>accept</u> a Commission condition on approval of the sale that requires the Company to establish a "Consumers Energy Hydro Safety Fund," ("the Fund") to be controlled and administered by the State of Michigan. Under this proposal the Company would <u>agree</u> to contribute <u>all</u> of the FCM revenue that Consumers Energy earns under the PPA with Confluence over its 30-year term – estimated to be approximately $270 million) (see 3 TR 1069) – to the Fund.[3]

According to the Company the Fund could be used for dam safety improvements, catastrophic incident response, and license surrender or decommissioning activities at the hydro facilities that are being sold by the Company as part of the transaction.[4]

As an initial matter, this proposal comes too late in the case. The record has been closed, so there is no evidence on which the Commission can judge the reasonableness and prudence of such a proposal. Further, none of the other parties to the case have had chance to vet the proposal through discovery or to build a

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[3] Consumers' Exceptions, p 85 (emphasis in the original).

[4] *Id.*, at p. 86. The Company provides examples of the type of activities covered under each category, but does not clearly define the extent of activities that are covered.

record for it pro or con. If the Company was amenable to such a condition, it could have indicated so in rebuttal, which would have given the parties an opportunity to respond to such a proposal before their replies to exceptions. However, if the Commission decides that this is a condition worth considering, it is not without problems.

While the Company's self-imposed condition proposes to establish the Fund in collaboration with the State of Michigan, there is no indication that it had substantive discussions with the State on the extent of its proposed role with the Fund before filing its exceptions. Further, the Company claims that the Fund would be controlled and administered by the State, but that it "would retain the right to establish the final terms of the Fund, including the determination of a different Fund administrator, *at its sole discretion consistent with the purposes proposed in these Exceptions* if the State of Michigan either (i) fails to timely cooperate in negotiating the final terms of the Fund or (ii) cannot reach terms acceptable to Consumers Energy prior to Consumers Energy and Confluence's closing date as set forth in the Purchase and Sale Agreement."[5] This sounds more like the Company will try to impose a Fund on the State of Michigan, if it does not establish one to its liking in its predetermined time frame.

The Company's terms show a lack of understanding about the process and authority that State departments and agencies operate under. The Company does

[5] *Id.*, at p 86, footnote 5 (emphasis added).

not explain whether its proposal is legally possible given the appropriation process necessary for establishing directed funds and spending by State government. It has not established how the Commission would have authority to approve or impose any requirements for administration of the Fund on another agency of the State. Specific legislation may be required. Moreover, the proposal imposes an administrative burden on the State to impose conditions on distributions from the Fund and ensuring that they are met without providing funding for such administration.[6] This proposal is clearly an attempt to salvage the sales transaction and PPA after the PFD's recommendation to reject the deal. However, there is much that will need to be done to establish the Fund as envisioned by the Company. The Commission should not be swayed by this last-minute and ill-conceived proposal for reasons discussed herein.

The Company characterizes it proposal as its willingness to forego profits that it is entitled to under the Confluence PPA to help ensure the long-term safety of the thirteen hydro plants.[7] It is also being used by the Company to alleviate concerns with it earning an FCM on power that it buys from its former facilities through a PPA. The Company notes that the ALJ while acknowledging that the law requires the application of an FCM to a PPA, he also expressed concerns of a policy nature. "The Company submits that it was inappropriate for the ALJ to base his rationale for disapproving the PPA on his view of the policy implications for

[6] Id., at p 87.

[7] *Id.*, p 85.

applying an FCM to the PPA where the legislature had already determined – as a superseding policy matter – that it is appropriate (and even required) to apply an FCM to any PPA – including this PPA- that meets all the statutory requirements."[8]

In the context of this proceeding in which approval of the PPA is coincident to the approval of a transaction selling the plant for which the Company will subsequently buy power back from pursuant to the PPA, a broader analysis of the terms of the PPA and whether it is reasonable to ratepayers is appropriate. As the Attorney General discussed in her Exceptions, the PPA is part of a transaction that allows the Company to divest itself of hydroelectric facilities that it has owned for decades and then buy back the power from its former facilities. The PFD correctly noted that "the proposed PPA is not intended to support the development of new renewable generation; instead it is intended to financially prop up preexisting dams that the Company is divesting because of their unfavorable economic profile."[9]This type of transaction is not what was intended when the Commission approved the original FCM in Case No. U-20165.[10] The purpose of the FCM was to encourage the Company to seek lower cost alternatives for obtaining energy from new renewable sources by encouraging the Company to forego its preference for building all new generation.[11] There is no indication that the legislature in adopting the concept of

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[8] *Id.*, p 88.

[9] PFD, p 148.

[10] Attorney General's Initial Brief, page 18 – 19.

[11] Order dated July 19, 2019, Case No. U-20165, pp 84 – 85.

the FCM made a policy decision intending the outcome in this case where the PPA was included payment of a FCM from facilities that are not truly a new sources. It is unlikely that the legislature even contemplated such an outcome. The Attorney General disagrees that this is a proper outcome.

MCL 460.6q(9) provides:

> (9) In approving an acquisition, transfer, merger, or encumbrance under this section, the commission may impose reasonable terms and conditions on the acquisition, transfer, merger, or encumbrance to protect customers of the jurisdiction regulated utility. A jurisdictional regulated utility may reject the terms and conditions imposed by the commission and not proceed with the transaction.

A condition rejecting the FCM in this case would be appropriate as discussed in the Attorney General's exceptions.[12] If the Commission rejects the FCM, the Company's proposed Fund will be rendered moot.

The Company's claim that the Fund undermines arguments of certain parties and the ALJ that the transaction places substantial financial risk on taxpayers should be rejected.[13] First, it is notable that the Company excludes ratepayers from the group that would be protected from substantial financial risk. Ratepayers was a group that was also included in the PFD as needing protection.[14] And, of course, the Attorney General was also concerned about the impact on ratepayers. The omission of ratepayers by the Company was not accidental because the Company

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[12] Attorney General's Exception to the Proposal for Decision, pp 17 – 18.

[13] Consumers' Exceptions, p 89.

[14] PFD, pp 148 – 149.

must realize that its proposal of using FCM revenues to backstop any failure by Confluence or subsequent owners to fund necessary activity as described in its Fund proposal means ratepayers are shouldering a burden that should rightly be held by the owners of the hydro facilities, even if the Company tries to characterize it as a voluntary contribution of its FCM.

Second, the fund does not provide the level of protection that a parental guarantee or commitment to fund Confluence's operation of the hydro facilities above the amounts already committed by Hull Street Energy (HSE). Only an incremental amount of the total $270 million the Company expects in FCM payments will be received each year. While the exact amount is unknown, a simple average of 30 years is approximately $9 million. This may not be sufficient to address work needed in any given year, but especially in the early years of Confluence's ownership, where financial deficits are projected to occur.

Confluence provided a [Begin Conf] [redacted]

[15] Exhibit AG-12 CONF (DR MHRC-CH-8 CONF).

[redacted]End CONF]

Third, the PPA price of $160/MWh is not a market price comparable to recent and typical PPAs entered into by the Company. While the out-of-market price of $160/MWh, would provide the Company with more than $270 million in FCM incentive revenue over 30 years, a lower PPA market rate should be applied to the FCM. Mr. Coppola determined that the latest market price for power purchases under PPAs signed by the Company is $73/MWh. The $160/MWh transaction price provides for the recovery of costs that will be incurred by Confluence to make capital investments to upgrade the Hydro Facilities over the 30-year period term of the PPA. It also reflects the potential liabilities assumed by Confluence post-closing. The Attorney General argued in her initial brief that by applying the $73/MWh PPA market rate determined by Mr. Coppola, the Company would earn about $84 million in FCM incentive revenue during the 30-year period, consistent with FCMs for other PPAs.[17] If the Commission were to adopt this lower market

[16] Coppola, 3 TR 1080 – 1081. *See also*, Attorney General's Initial Brief, pp 32 – 33.

[17] *See*, Attorney General's Initial Brief pp 15 – 18 and 20.

price for power purchased under the PPA, there would be even less FCM revenue available for the Fund.

Fourth, the Company argues in a footnote, that the ALJ's observation that of a fundamental concern that the Company has already earned a return of and on the investment in the dam in the last century and with an FCM, it would profit handsomely by divesting its own asset and buying back power from those same asset at a premium (i.e. double dipping) is invalid.[18] It argues that Company would earn a return on new investments required at the plant if it kept them. It tries to draw a parallel that but for the Company's agreement to establish the Fund, it would be appropriate for it to earn some return on the PPA funds that funds the same new investment that are needed for the benefit of the Company's customers because either way it represents new investments, not fully depreciated old investments.[19]

The Company is making a false equivalency. The FCM does not represent a return on investment. It is a form of compensation to the Company for forgoing an internal investment (and therefore an increase in rate base) at the Company's ROE that it would earn if it built new generation instead of purchasing energy from an outside source. The Company's argument blurs the difference between the Company earning a return on its assets and receiving an FCM on its PPA payments and it

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[18] Consumers Exceptions, p 89, footnote 6 and PFD, p 147.

[19] Id., at p 89, footnote 6.

should be rejected. Further, an FCM should not represent a return on a former asset. This argument should be rejected.

Finally, the Fund proposal does not obviate the need for the Attorney General's thirteen conditions, which address a broad range of problems with the terms of the sales transaction and PPA.

2. Proposed Conditions imposed solely on Confluence and its Affiliates.

The Company argues that it cannot compel Confluence to agree to any modifications of PSA and PPA, which was the result of negotiations.[20] It posits that "any modifications to the terms of the agreement could have a material impact on Confluence's perception of the value of the bargain struck."[21] It notes Confluence's obligations under the PSA to purchase the hydro facilities is expressly conditioned on MPSC approval of the transactions which according to the PSA is a final order from the Commission "(a) approving the transaction contemplated by this Agreement, <u>on terms and conditions mutually acceptable to each of the Parties, in each Party's respective reasonable discretion</u>, including terms and conditions related to cost recovery and (b) <u>which does not contain terms, conditions or modifications unacceptable to each of the Parties in each Party's respective reasonable discretion</u>."[22]

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[20] Consumers' Exceptions, pp 90 – 91.

[21] Id., at p 91.

[22] *Id.* (emphasis in the original).

Under MCL 460.6q(8) or (9), the Commission is not limited by terms that the parties negotiate if it determines other conditions are in the best interest of the Company or ratepayers. To interpret the language otherwise would render it nugatory. The language from the PSA, quoted by the Company, does not appear to limit the imposition of acceptable terms and conditions to those negotiated by the parties. It would be their individual choice whether to go forward with the agreement with any conditions imposed by the Commission. However, the Commission should not shy away from adopting any conditions that protect the Company or ratepayers if it decides to approve the sales transaction.

The Company also claims that there are indications that Confluence will be a responsible dam owner and that there are sufficient incentives and safeguards around the transaction, which have been supplemented by the Fund discussed above. Whether Confluence will be a responsible dam owner is to be seen. As noted in the Attorney General's briefs, Confluence relies heavily on the experience and financial backing of its parent, HSE because it is a new entity with no track record.[23] While there is no indication that HSE had any problems in its operations of its own dams, it sold all but one of its dams within a few years, so its experience is limited. As discussed herein, there are other issues that are problematic and can negatively impact ratepayers if the Commission approves the sales transaction without adopting the Attorney General's recommended conditions. And, as

[23] *See*, Attorney General's Initial Brief, pp 30 – 36 for the Attorney General's complete evaluation of Confluence and its parent, HSE.

discussed above, there are concerns with the Fund's establishment, operation and efficacy, and so reliance on the Company's Fund proposal should not be a basis for the Commission to reject the Attorney General's conditions and approve the sales transaction.

The Company identified conditions recommended by the Attorney General and Staff, that the Company believes would solely impact Confluence including, but not limited to some form of parental guarantees. The ALJ recommended that if the transaction is approved the Commission should "require a parent-level financial guarantee that addresses and mitigates the concerns identified above."[24] The Company notes that the PFD did not recommend Staff's and the Attorney General's specific recommendations, including a condition requiring an additional equity commitment, which is not functionally different from a parental guarantee. However, the Attorney General clearly addressed this issue in her initial brief and exceptions, and the Commission can adopt any of the proposed conditions, even if not specifically recommended by the ALJ.[25] With regard to further financial commitments, the Company seems to imply that HSE is available to ensure adequate funding in other parts of its exceptions.[26] Maybe it is referring to existing commitments, but it is not clear.

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[24] Id., at p 92, referring to PFD, p 277.

[25] Attorney General's Initial Brief, pp 33, 34, 35 – 36, 43 – 44, and 58 -59 (conditions 1 and 4. *See also*, Attorney General's Exceptions, pp 21 – 23.

[26] Citations.

The Company argues that the Commission cannot impose a parental guarantee after the fact without fundamentally altering the bargain struck by the parties and that it strongly believes that Confluence would reject a condition imposing a parental guarantee.[27] While Confluence disagreed with certain determinations and recommendations in the PFD in its exceptions, it is not nearly as strident as the Company when it comes to conditions.[28] So far, it has rejected very few conditions, in most instances it recommends alternative conditions. It does not object to the PFD's recommendation of a parental guarantee in its exceptions and instead concedes that the Commission has the authority to issue conditions.[29]

Finally, the Company argues that to the extent that Confluence indicates that a condition is not acceptable, the Commission should refrain from imposing that condition.[30] The statute does not provide for a counterparty to control whether conditions should be imposed. As discussed above, it is free to walk away from the transaction if any terms or conditions are unacceptable to it. The Commission should reject this argument and impose any conditions that it deems appropriate.

3. **Other Conditions recommended by the PFD are necessary to ensure that the sales transaction and PPA are beneficial to ratepayers.**

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[27] Consumers' Exceptions, p 93.

[28] See, Exceptions of Confluence Hydro, LLC, pp 4 – 15.

[29] *Id.*, at pp 15 – 19.

[30] Consumers' Exceptions, p. 93.

The Company filed exceptions to other conditions recommended by the Attorney General and adopted by the PFD. In particular the Attorney General's conditions result from her review of the deal documents, including the Environmental Liability Agreement, the Regulatory Disallowance Agreement, the PSA provisions related to Excluded Liabilities, Employee Retention and Incremental Employee costs, and the PPA. For the reasons discussed in the Attorney General's brief and these replies, any sales approval should include her recommended conditions.

There are four major documents between the Company and Confluence that provide the terms of the agreement: PPA, PSA, RDA, and EIA.[31] These complex agreements with intertwining provisions will have significant financial and other implications for ratepayers, and the residents of Michigan. Mr. Coppola identified several concerns with the agreements that can be mitigated by the Commission placing conditions on the sale of the Hydro Facilities if it chooses to approve the sale.[32]

a. Environmental Liability and Regulatory Disallowance Agreement Cost Recovery Recommendations.

The Company notes that the Attorney General recommended that the Commission impose a condition that if Confluence or HSE fail to make payment on

[31] *See*, Blumenstock, 3 TR 53.

[32] Coppola, 3 TR 1084 – 1088.

any environmental liabilities or other obligations, the Company should not be allowed to recover those costs from its customers. It also notes that the Attorney General recommended that the Commission impose a condition that if the Company is required to make any payment under the PPA or the Regulatory Disallowance Agreement for Economic Loss Payment those payments will not be recoverable from customers.[33] The PFD recommended that those conditions be adopted if the Commission approves the transaction.[34] The Company claims that the recommendations are invalid and should be rejected by the Commission.[35] For reasons discussed below and in the Attorney General's Initial Brief, the Company's arguments should be rejected.

i. The PFD did not err in recommending that the Company not be able to recover any environmental liability cost or other obligations from ratepayers.

In recommending the condition that the Company should not recover unpaid environmental liability payments from ratepayers, the PFD noted that the assumption of liabilities by Confluence is a benefit of the proposed transaction and "this benefit would be rendered illusory if Confluence's failure to make payment on future environmental liabilities merely gets pushed back to ratepayers."[36] The Company argues that the ALJ's reasoning lacks context or critical analysis of the

[33] Consumers' Exceptions, p 94.

[34] PFD, pp 283 and 288.

[35] Consumers' Exceptions, p 94.

[36] Consumers' Exceptions, p 94, referring to PFD 288.

conditions that the Attorney General proposed. The Attorney General's condition would be triggered by any failure to make payments "even if there is arguably a reasonable basis for it."[37] It claims that as written, the condition could include a failure to pay an Excluded Environmental Liability which Confluence was never required to assume and is properly a liability of the Company, which is characterizes as unjust.[38] It also claims that if Confluence failed to pay a legitimate liability assigned to it under the PSA for which the Company would take legal action, it would be required to cover the cost while litigation is pending which may cause other problems.[39] The Company's arguments should be rejected.

There is no reasonable basis for the ratepayers to potentially retain responsibility for future environmental liabilities given the economics of this deal. The Environmental Indemnity Agreement ("EIA") transfers all substantial environmental liabilities for the Hydro Facilities to Confluence and is a major component of the value of the sales transaction for Consumers and its customers. The Company negotiated the terms of the sales transaction, including the EIA. While the EIA requires Confluence to maintain a letter and credit and pollution legal liability insurance (PLLI) of a certain amount, Confluence is expected to experience negative net operating cash flows for several years of its operation and has no other assets other than the Hydro Facilities. The letter of credit and PLLI,

[37] *Id.*

[38] *Id.*, at p. 95.

[39] *Id.*

may not be sufficient to meet all of Confluence's obligations should large environmental liabilities arise. The risk of nonpayment under the terms negotiated by the Company should be borne by it. Further, Customers will already be paying an above-market PPA rate as part of this transaction and should not be burdened with any additional costs.

The Company also argues that the Commission should not categorically deny future cost recovery without a contemporaneous hearing on the reasonableness and prudency of the cost.[40] As discussed in the Attorney General's Initial Brief, there is no need for the Commission to have another hearing to establish whether it would be appropriate to pass on the costs to Consumers' customers that Confluence does not pay. The cost should already be included in the above market rates paid by ratepayers, and it would not be reasonable or prudent to allow the Company to recover these costs since customers were not in the position to protect their interest during negotiations between Consumers and Confluence. The Company should bear the risk of these costs.[41] The Commission should adopt the PFD's recommendation.

ii. **The PFD did not err in its recommendation regarding payments under the RDA.**

[40] Consumers' Exceptions, pp 95 – 96.

[41] Attorney General's Initial Brief, pp 43 – 45.

The RDA requires the Company to pay Confluence for any Commission disallowances of PPA payments to be made to Confluence.[42] The Company argues in its exceptions that the "RDA provides vital security to assure Confluence that it can trust the stream of income from the PPA, which is needed for Confluence to make the necessary investments in the hydro plants to relicense them and to take on considerable liabilities associated with the hydro plants."[43] According to the Company, it was a non-negotiable requirement for Confluence to complete the deal.[44] The Attorney General recommended a condition that the any payments made under the PPA and RDA for Economic Loss should not be recoverable from ratepayers.[45]

The PFD recommends that the Commission adopt the Attorney General's condition regarding the RDA, noting that the RDA can shift the risk of any future disallowance under the PPA onto ratepayers, and that the Company should bear the risk instead.[46] In making its determination, the PFD noted that the RDA arose from a negotiated arrangement that the Company had a role in shaping.[47] The Company disagrees with the PFD.

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[42] Blumenstock, 3 TR 55 – 56.

[43] Consumers' Exceptions, p 96.

[44] *Id.*

[45] Attorney General's Initial Brief, pp 45 – 47.

[46] PFD, p 283.

[47] *Id.*

First, the Company argues that the characterization that it played a central role in shaping the RDA is not fair. This argument should be rejected. The RDA resulted from the arms-length negotiation that the Company engaged in with Confluence. The fact that it conceded on a term that Confluence wanted is still part of the process that resulted in the overall deal and in a sense, the Company still helped shape the RDA.

Second, the Company argues that the Commission has discretion whether to allow recovery of any payments under the RDA.[48] According to the Company, it is not asking the Commission to guarantee recovery of RDA payments in this case, but the Commission should not foreclose the possibility of recovery in this case because it is unknown what potentially justifiable circumstances may occur in the future that would allow the Commission to reject a PPA, but nonetheless grant recovery of any resulting RDA payment. It argues that "[i]t is simply premature to make that decision today without a contemporaneous record."[49] Not true. The Economic Loss Payment provision of the RDA is inherently unreasonable.

The RDA can trigger substantial payments by the Company to Confluence. If the Commission were to disallow any portion of the PPA payments that would trigger Confluence to terminate the PPA and request compensation from the Company. The Company would be required to pay Confluence an amount equal to

[48] Consumers' Exceptions, p 97.

[49] *Id.*

the lesser of the Economic Loss Payment or $250 million plus any unpaid amounts that remain outstanding prior to the termination of the PPA.[50] The RDA defines the Economic Loss Payment in Paragraph 2(b), as follows: [Begin Conf]

> The "**Economic Loss Payment**" shall equal: (i) an amount equal to the [redacted] [End Conf]

Customers should not pay those costs; therefore, the Commission should include such a condition with any approval of the sale transaction. Further, the Company's position that the Commission should not pre-deny recovery of the economic loss payments should be rejected. As discussed in the Attorney General's Initial Brief, the Commission should make it clear upfront in this case that those payments are not a reasonable recovery of costs – they simply shift all risks to the Company and ratepayers, including those related to an order of the Commission. It also does not require Confluence to take [Begin CONF] [redacted] [End CONF] which is contrary to the Company's duty to minimize the cost of

[50] *See*, Exhibit A-1 (RTB-1), pp 534 – 535 (RDA, paragraph 2(a) and (b)).

power.[51] There is no need to hold another hearing or conduct another case for the Commission to decide that economic loss payments should be disallowed.

b. Recommendation related to Excluded Liabilities.

Section 9.2 of the PSA requires Consumers to indemnify Confluence for any Excluded Liabilities. Excluded Liabilities, as defined in Section 2.1(d) of the PSA, include liabilities related to assets retained by the Company or on easements reserved by the Consumers, Consumers' Employee Benefits Plan and employment matters incurred before the closing, defaults on contracts before Closing, Consumers' share of taxes, liabilities resulting from the default by Consumers or its affiliates on any Project Permit that arises during the "Lookback Period" (5 years before the closing), deficiencies with FERC licenses, etc. Should the Company need to make any payments to Confluence under this indemnity clause, the Attorney General recommended that the Commission order that recovery of such payments from customers will be subject to reasonableness and prudence review.[52]

The PFD recommended that the Commission adopt the Attorney General's condition.[53] The Company disagrees with the PFD's recommendation, arguing that Court's may be confused by seemingly unnecessary language being included in the

[51] *See e.g.*, Order dated October 31, 2021, Case No. U-20220, p 31 (disallowing cost due to Consumers' failure to pursue remedy that would reduce cost to customers).

[52] Coppola, 3 TR 317.

[53] PFD, p 289.

Commission's order.[54] It claims that "a court may liken the requirement of the condition to an administrative rule and apply the same rules of construction to the requirement as it would to other rules and statutes citing to two cases.[55] However, neither case supports the Company's argument. They are purely statutory construction cases dealing with statutes. There is no indication that the rules of statutory construction have been applied to Commission or agency decisions.

Further, it is not uncommon for Commission orders to reference that future cost recovery is subject to a reasonableness and prudency review without invoking claims that it somehow leads to some redundancy that would cause a reviewing court to conclude that the Commission must have meant to supplement the ordinary and reasonableness review. More importantly, this case involves several contractual agreements with various terms that may not be entirely clear that the parties consider them subject to Commission review before operation of the terms. To avoid any question of what is intended, the Commission should adopt the PFD's recommendation even if the Company believes it may be redundant.

c. Requirement for the Commission to Review and Re-approve the PPA after the sale of one or more of the thirteen hydroelectric facilities.

[Begin CONF] [redacted]

[54] Consumers' Exception, p 98.

[55] *Averill v Dauterman*, 284 Mich App 18, 24 (2009) and *Wyandotte Sav Bank v Eveland*, 347 Mich 33, 44 (1956).

[redacted]

[End Conf][57] The Attorney General argued that a sale or some or all of the hydro facilities changes the economics of the deal such that the PPA rate is no longer applicable to the assets sold or remaining.[58] While the Attorney General is obviously concerned about the new owner's ability to own and operate the dam, the primary concern, which the PFD ultimately determined is whether terms of the PPA remain reasonable to ratepayers.

The PFD agreed with the Attorney General's recommended condition. The Company argues that requiring the Commission to reapprove a PPA if any facility is sold to a non-affiliate (or if HSE's ownership/control of Confluence falls below 50%) is both unnecessary and unworkable.[59] First, it argues that the condition would require renegotiation that the parties will not undertake. Second, it argues

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[56] Exhibit AG-15 CONF (AG-CE-0189 CONF and 0322 CONF).

[57] Coppola, 3 TR 1088.

[58] *See*, Attorney General's Initial Brief, pp 40 – 42.

[59] Consumer's Exception, p 99.

that it is unnecessary because FERC will oversee any license transfer to ensure a safe operator.[60] Of course that has nothing to do with the terms of the PPA. Third, the Company also claims that it would be logistically problematic to require reapproval of the PPA because the Company [Begin CONF] [redacted] [End CONF][61] Fourth, the Company also discusses [Begin CONF] [redacted] End CONF] These arguments do not address the Attorney General's concerns.

The PPA rate of $160/MWh is premised on Confluence assuming the operating and capital obligations, as well as other liabilities for all the 13 hydro facilities. The sale was structured as a "full-fleet" sale.[62] If some of the hydro facilities are sold to a third-party (ies), the basic structure of the initial deal is no longer intact and therefore, the Commission must retain jurisdiction over the PPA

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[60] *Id.*

[61] Consumers' Exceptions, p 100.

[62] *Id.*

to ensure that customers are not being disadvantaged by a subsequent sale transaction and to ensure that the new owner can meet the same commitments made by Confluence and HSE.

The Commission should adopt the PFD's recommendation if the sales transaction is approved.

d. The PFD was correct in recommending the adoption of conditions that would shield the Company and ratepayers from assuming liabilities and risks that should rightfully be borne by Confluence, as the owners of generation facilities.

[Begin CONF] [redacted] [End CONF] The Attorney General recommended that Confluence should bear cost related to these MISO related actions as any owner of generation would bear.[65] The PFD recommended that the Attorney General's condition that Confluence assume the

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[63] Exhibit AG-16 CONF (AG-CE-0186d Conf).

[64] Exhibit AG-16 (AG-CE-0185 Conf and 0326 Conf).

[65] Attorney General's Initial Brief, pp 37 – 40.

risks for negative LMPs and for non-delivery of energy be adopted by the Commission if it approves the sales transaction.

The Company disagrees with the PFD's recommendation arguing that it due to the nature of hydroelectric generation that hydro plants will be dispatched at times and in ways other generation units would not, including times that are not economic and that the owners of the plant should be compensated for it.[66] The Company also stated that the condition would require changes to the transaction that the Company is not willing to renegotiate.[67] The Company indicates that this cost would be expected in any PPA with a hydro generator.

To the Attorney General's knowledge this is the first PPA the Company is entering for hydroelectric generation. Even if it is not, there is no evidence that these provisions are normal parts of PPAs with hydroelectric generators. Further, ratepayers should have no obligation to fund a private entity in this way. The PPA terms [Begin CONF] [redacted]

[66] Consumers' Exceptions, p 102.

[67] *Id.*

[redacted] [redacted]

[redacted]. [End CONF]

The Commission should adopt the PFD's recommendation if it approves the sales transaction and PPA.

e. The PFD did not err in recommending that the Attorney General's condition regarding PPA Price-Adjustments be adopted by the Commission.

[Begin CONF] [redacted].[69] [End CONF]

The Attorney General recommended that a condition be imposed by the Commission that would prohibit any adjustment in the PPA price for any costs

[68] Coppola, 3 TR 1086.

[69] *Id.* at 1085

overruns at the Hardy or Rogers dams capital projects.[70] The PFD agreed that this condition be adopted by the Commission if it approves the sales transaction.[71] The Company disagrees with the ALJ's recommendation, claiming his argument that "[i]t is generally incongruous to sell the dams and still require ratepayers to potentially be on the hook for certain cost overruns associated with known work at the facilities."[72]

According to the Company, a potential buyer in a situation like this would demand that major capital projects necessary for the continued licensure and operation of the plants be completed by the sell before the transaction. Whether this is the usual approach is questionable, however the Company points to a problem with that approach in this case.[73] The Company notes that the [Begin CONF] the PPA reflects the fact that Confluence believes it could complete the upgrades at a significantly lower cost that Consumers' estimated it would cost. [End CONF][74] However, "with any engineering project of this scope and complexity, there are always risk of cost overruns. Confluence negotiated the PPA price with the understanding that it was economic for them to perform the Hardy and Roger upgrade work at specified cost, but overruns in those costs could be sufficient to change the economics of the deal. Where those kinds of cost risk exist in large

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[70] See, Attorney General's Initial Brief, pp 37 – 39.

[71] PFD, p 296.

[72] Consumers' Exceptions, p 103, quoting PFD, p 296.

[73] *Id.*

[74] *Id.*

corporate transactions, it is ordinary or customary to include price adjustment provision that contemplate those kind of contingencies."[75] The Company's arguments do not justify approval of price adjustment provisions.

First, Confluence's business[76] case is premised in part on the fact that it can perform necessary work, including work on the Hardy and Rogers dams at a lower cost than the Company.[77] The above market rate proposed by the Company supposedly provides sufficient funding to accomplish its work. Cost-overruns and contingencies call into question the Company's claims underlying its proposed sales transaction. Second, the Commission has previously indicated that contingencies are inappropriate for projecting cost and recovery in rate cases. While this is not a rate case, it would be incongruous to take contingencies into consideration for purposes of justifying a cost overrun provision. [Begin CONF] [redacted]

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[75] *Id.*

[76] This is a mischaracterization; it should really be part of Consumers' business case supporting the economics of the sales transaction.

[77] Consumers' Exceptions, pp 61, 62 – 63 and 65 - 68.

[78] Exhibit AG-15 (ST-CE-0076 Conf and AG-CE-0194 and 0293).

[redacted].[End CONF]

According to the Company, [Begin CONF] [redacted] [End CONF][79] However, [Begin CONF] [redacted] [End CONF] [80]

The Company argues that there is nothing incongruous about customers bearing a nominal cost necessary to sell the plants in order to avoid the much more significant costs of decommissioning or relicensing the plants.[81] Its not clear how the Company defines nominal, but any cost above the amount the Company relies on to support its sales case is unreasonable. The PFD's recommendation should be adopted by the Commission if it approves the sales transaction.

f. The PFD did not err in recommending the adoption of conditions that would shield ratepayers and the Company from paying excessive employee retention and other employee costs for the benefit of Confluence.

[79] Consumers' Exceptions, p 104.

[80] Exhibit AG-24 CONF, p 3 (AG-CE-0392 CONF).

[81] Consumers' Exceptions, p 104.

To encourage existing employees (union and non-union) to stay with the Company during the transition period and eventually transfer to Confluence if the sale transaction is approved, the Company proposes retention bonuses and severance payments totaling $14.5 million for approximately 50 employees currently working at the hydro facilities and administratively supporting those functions. The $14.5 million was included in the transaction costs that would ultimately be paid by Consumers' customers.[82] The Attorney General recommended that the Company exclude $6.4 million for employee retention bonuses and severance payments and restricted stock, $4.9 million additional employee costs, and $1.6 million for internal closing costs.[83] The PFD recommended that the Commission adopt the Attorney General's employee retention, closing cost, and internal labor cost adjustments.[84] The Company objects to the PFD's recommendation claiming that it is contrary to the ultimate goal of the transaction, which is to preserve the dams and provide for their continuous safe operation.[85] The Company's arguments should be rejected.

First, the retention bonus proposal is excessive. Fourteen union employees under the collective bargaining agreement plan to transfer to Confluence. Twenty-three non-union employees were not given the choice to stay with the Company and

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[82] Exhibit AG-6 (DR SA-CE-009).

[83] *See*, Attorney General's Initial Brief, pp 60 and 22 – 28 for a complete analysis of the Attorney General's position.

[84] PFD, p 300.

[85] *See*, Consumers Energy's Exceptions, pp 105 – 106.

all will be transferred to Confluence, including the Executive Director in charge of the hydroelectric facilities.[86] The Company proposes that both union and non-union employees transferring to Confluence receive a bonus payment of 150% of annual wages, plus severance payments of up to half a year of wages depending on years of service. In addition, Confluence has notified the union employees [Begin Conf] [redacted] [End Conf] Given the fact that employees are assured jobs by transferring to Confluence, staying with the Company, or retiring, the bonus payment proposed by the Company are excessive and the severance payments are unnecessary.[87] By transferring to Confluence, both union and non-union employees can keep the job they currently have with the Company at the same work location. Losing their jobs is not the end result of the sale transaction.[88]

The Attorney General recommended that the retention bonus be reduced to 100% of annual wages, instead of 150% proposed by the Company, and that no severance payments be made. The recommended adjustments will reduce the Company's proposed retention, severance and employee benefit costs by $6.4 million to $8.1 million, which leaves generous level of special compensation to entice

[86] Monroe, 3 TR 175.

[87] Coppola, 3 TR 301.

[88] Coppola, 3 TR 301.

employees to stay in their current positions with the Company through the sale process and facilitate the transfer of the hydroelectric facilities to Confluence.[89] The Company purportedly negotiated the generous retention bonuses and severance payments with the union representatives. If true, it should absorb those amounts above the reasonable levels the Attorney General recommends above. Customers should not be responsible for paying $6.4 million for excessive compensation.

Second, Mr. Coppola evaluated the Company's proposal to fill vacant employee positions and add other positions before the transfer of the Hydro facilities to Confluence. Consumers identified ten vacant positions it wants to fill before transferring the facilities to Confluence. The timing to fill these vacancies remains uncertain and it appears that the Company will fill some positions and delay the others until closer to the transfer date of the facilities.[90] This seems to be a reasonable move by the Company, and no additional costs have been proposed to fill the vacancies.

Fourth, the Company's forecasted closing costs to complete the sale transaction includes $1.6 million for internal labor costs. The $1.6 million in internal labor costs should not be included as transaction and closing costs because the Company is already recovering those costs through existing rates charged to customers. The Company witnesses filing testimony in this case and other

[89] Coppola, 3 TR 303. *See also*, Exhibit AG-8 CONF.

[90] Exhibit AG-9 (AG-CE-0306 and 0325).

employees responsible for the evaluation of the sale transaction are employees of the Company and they are not incremental costs that should be offset against any future gain on the sale of the assets.

Because of the financial enticements being offered to employees who join Confluence, the Company has not demonstrated how the Attorney General's proposed adjustments are contrary to the goal of preserving the dams and providing for their continuous safe operation. Further plans to expand the workforce should be borne by Confluence. The PFD's recommendation should be adopted if the Commission approves the sales transaction.

CONCLUSION

As noted above, the PFD recommended that the sales transaction be rejected. While it did address the conditions recommended by the Attorney General as part of its analysis and recommended that the Commission adopt most of them if it decides to approve the sales transaction and PPA, nothing less than complete adoption of the Attorney General's conditions is warranted. The Company indicates that it will reject all conditions recommended by other parties, therefore any approval by the Commission with conditions will be moot. The Attorney General does not support the sale as proposed by the Company. Therefore, the Commission should reject the deal as recommended by the PFD and leave it to the Company to take its next step.

RELIEF REQUESTED

The Attorney General respectfully requests the Commission issue an order that is consistent with the positions set forth in this reply to exceptions.

Respectfully submitted,

Dana Nessel
Attorney General

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PROOF OF SERVICE - U-21985

The undersigned certifies that a copy of the ***Attorney General's public Replies to Exceptions to PFD*** was served upon the parties listed below by e-mailing the same to them at their respective e-mail addresses on the 22nd day of July 2026.

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