OLSON, BZDOK & HOWARD

www.envlaw.com

July 18, 2013

Ms. Mary Jo Kunkle
Michigan Public Service Commission
6545 Mercantile Way
P. O. Box 30221
Lansing, MI 48909

RE: MPSC Case N^o. U-17097

Dear Ms. Kunkle:

The following is attached for paperless electronic filing:

Reply Brief of the Michigan Environmental Council and the Natural Resources Defense Council

E-Service List

Sincerely,

Emerson Hilton
emerson@envlaw.com

xc: Parties to Case No. U-17097
James Clift, MEC (james@environmentalcouncil.org)
Rebecca Stanfield, NRDC (rstanfield@nrdc.org)

420 East Front Street, Traverse City, Michigan 49686 | Ph 231.946.0044 | Fax 231.946.4807 | www.envlaw.com

James M. Olson | Christopher M. Bzdok | Scott W. Howard | Jeffrey L. Jocks | Ross A. Hammersley
Katherine E. Redman | Emerson Hilton | William Rastetter, Of Counsel | Michael H. Dettmer, Of Counsel

STATE OF MICHIGAN

MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application of THE DETROIT EDISON COMPANY for Authority to Implement a Power Supply Cost Recovery Plan in its Rate Schedules For 2013 Metered Jurisdictional Sales of Electricity.	Case N$^{o.}$ U-17097 ALJ Sharon L. Feldman

---

REPLY BRIEF OF THE MICHIGAN ENVIRONMENTAL COUNCIL AND THE NATURAL RESOURCES DEFENSE COUNCIL

Christopher M. Bzdok (P53094)
Emerson Hilton (P76363)
OLSON, BZDOK & HOWARD, P.C.
Attorneys for MEC
420 East Front Street
Traverse City, MI 49686
Telephone: (231) 946-0044
Email: chris@envlaw.com and emerson@envlaw.com

Shannon Fisk, *Pro Hac Vice*
Earthjustice
Attorneys for NRDC
1617 John F. Kennedy Blvd., Suite 1675
Philadelphia, PA 19103
Telephone: (215) 717-4522
Email: sfisk@earthjustice.org

July 18, 2013

INTRODUCTION

In their initial post-hearing brief, the Michigan Environmental Council ("MEC") and Natural Resources Defense Council ("NRDC") (collectively, "MEC/NRDC") demonstrated that the DTE Electric Company's ("DTE Electric" or "Company") 2013 Power Supply Cost Recovery ("PSCR") plan and five-year forecast are fatally deficient because they: (1) rely on an increasingly flawed modeling methodology, (2) propose a business-as-usual approach that is increasingly costly and non-competitive, and which ignores fundamentally changing market conditions, (3) request that the Michigan Public Service Commission ("MPSC" or "Commission") signal its likely future authorization of pollution control sorbent costs that have not been demonstrated to be part of a least cost plan for environmental compliance, and (4) set forth a Reduced Emission Fuel ("REF") project that is likely to increase PSCR costs and risks to PSCR customers, violates the Code of Conduct, and provides most of the significant benefits of that project to unregulated affiliates rather than to Company ratepayers.

In its initial brief, DTE Electric offers generalized assertions that its proposed PSCR plan and five-year forecast are reasonable and prudent, but it provides little explanation for why that is purportedly so. MEC/NRDC submit this post-hearing reply brief to respond to DTE Electric's generalized assertions, and to explain how the Commission's June 28, 2013 ruling in Case No. U-16892 (DTE Electric's 2012 PSCR plan proceeding), issued the day after MEC/NRDC filed their initial brief in this proceeding, does not decide or foreclose the arguments raised by MEC/NRDC here. MEC/NRDC respectfully request that the ALJ adopt and recommend the findings and remedies proposed in their initial brief.

I. DTE Electric Understates the Evidentiary Burden It Bears in This Proceeding

In its initial brief, DTE Electric acknowledges that it is required to demonstrate the reasonableness and prudence of its PSCR plan and five-year forecast by a "preponderance of the evidence,"[1] but it then proceeds to improperly minimize that evidentiary burden in two ways. First, the Company attempts to downplay the preponderance of the evidence standard by noting that it does not require perfection and is less stringent than the "beyond a reasonable doubt" standard for criminal proceedings.[2] While correct, those statements are essentially meaningless, as no one would seriously argue that a utility in a civil proceeding is held to the same standard as the state is in a criminal prosecution. What is far more relevant is that "preponderance of the evidence" is a substantially higher standard than the "substantial evidence" test that the Court of Appeals uses in reviewing administrative agency decisions.[3] While the latter requires only "evidence that a reasonable mind would accept as sufficient to support [a] conclusion,"[4] under the "preponderance of the evidence" standard DTE Electric bears the burden of putting forth evidence supporting its position and persuading the Commission that such evidence outweighs any contrary evidence.[5]

DTE Electric's portrayal of the evidentiary standard here also misstates what the Company is required to establish by a preponderance of the evidence. In addition to reasonableness and prudence noted by the Company, DTE Electric must establish that it

---

[1] Initial Brief of the DTE Electric Company ("DTE Br."), 5-6.

[2] *Id*.

[3] *Great Lakes Div of Nat'l Steel Corp v City of Ecorse,* 227 Mich App 379, 388-89; 576 NW2d 667 (1998).

[4] *Id*. at 389.

[5] *Blue Cross and Blue Shield of Mich v. Milliken*, 422 Mich 1, 89; 367 NW2d 1 (1985).

"has taken all appropriate actions to minimize the cost of fuel."[6] The Company's initial brief barely mentions this statutory standard, and it certainly does not attempt to demonstrate that the standard is satisfied by DTE Electric's 2013 PSCR plan and five-year forecast.

Finally, DTE Electric will likely argue in its reply brief that the Commission's recent decision in Case No. U-16892 forecloses much of the relief sought by MEC/NRDC (and other parties) in this proceeding. Not only have MEC/NRDC raised a number of new issues in this proceeding that were not addressed by the Commission in Case No. U-16892, however, but the Michigan Court of Appeals has noted that "ratemaking is a legislative, rather than a judicial, function, and thus the doctrines of res judicata or collateral estoppel cannot apply in the pure sense" to Commission proceedings.[7] Even where the Commission has fully decided an issue in an earlier proceeding, parties can later raise the same issue by demonstrating that new evidence and/or changed circumstances have rendered the earlier result unreasonable.[8] As explained below, the record in this proceeding is substantially more robust that the record before the Commission in Case No. U-16892, and there is now a sound legal and factual basis for revisiting and recommending a modification of the Commission's prior order.

II. DTE Electric Has Based Its PSCR Application on a Methodology That Has Been Increasingly Inaccurate for at Least the Past Eight Years.

In its initial brief, DTE Electric contends that its projections of generation and purchased power upon which its PSCR plan and five-year forecast are based are

[6] MCL 460.6j(6).

[7] *In re Consumers Energy Application for Rate Increase*, 291 Mich App 106, 122; 804 NW2d 574 (2010).

[8] *Id.*

"reasonable and prudent" and that "there is no credible evidence to the contrary."[9] In reality, neither statement is accurate, as the Company's own PSCR filings demonstrate that its projections are unreliable.

The only evidence identified by DTE Electric in support of its claim that its projections are "reasonable and prudent" is a paragraph of written testimony in which Witness Angela Wojtowicz explained that "the projection of Detroit Edison's generation and purchased power were developed from an economic dispatch forecast."[10] Such forecast was derived from "largely the same" PROMOD modeling that the Company has used in each of its past eight PSCR filings.[11] But as MEC/NRDC detailed in their initial brief, such PROMOD modeling has consistently over-projected generation by the Company's generating units while underestimating market purchases. For example:

- DTE Electric has over-projected its generation in seven of the past eight years, with the 2010 projection off by 6.6% and the 2012 projection off by 9.4%[12]
- DTE Electric has underestimated market purchases for each of the past eight years, with actual purchases being well over double the projections for the past three years[13]
- DTE Electric has underestimated the cost of its market purchases in seven of the past eight years by between $139 million and $357 million per year[14]

---

[9] DTE Br. at 7.

[10] Direct Testimony of DTE Electric witness Angela P. Wojtowicz ("Wojtowicz Direct"), 3 Tr 565; DTE Br. at 9.

[11] Direct Testimony of DTE Electric witness Robert E. Palmer ("Palmer Direct"), 3 Tr 449-50; Wojtowicz Direct at 3 Tr 558-59.

[12] Initial Brief of MEC and NRDC ("MEC/NRDC Br."), 9-10, Table 1.

[13] *Id*. at 10, Table 2.

[14] *Id*. at 11, Table 3.

- DTE Electric has sought increasingly large under-recoveries in six of the past seven years, with such under-recoveries exceeding $95 million in 2011 and $86 million in 2012.[15]

Despite this pattern of missing the mark, DTE Electric used essentially the same methodology for developing the generation and market purchase projections upon which its present PSCR application relies.

The Company has failed to offer any explanation in its initial brief as to why its PROMOD modeling has consistently over-projected generation and underestimated market purchases, whether the Company has taken any steps to address this pattern, or how its projections in this proceeding could be considered reliable given that they were derived from "largely the same" PROMOD methodology as used in the previous eight proceedings. In the absence of such explanations, the record is clear that DTE Electric's reliance on the generation and market purchase projections set forth in its application is neither reasonable nor prudent. As such, the ALJ should recommend that the Commission reject DTE Electric's 2013 PSCR plan and five-year forecast and require DTE Electric to develop and implement a newer and more accurate methodology for forecasting generation and power purchases.

The Commission's recent order in Case No. U-16892 does not foreclose or decide (or even address) the issue of whether it is reasonable and prudent for DTE Electric to base its 2013 PSCR plan and five-year forecast on a modeling methodology that has been consistently wrong. While the Commission approved DTE Electric's 2012 PSCR filing, no party challenged, and the Commission made no findings regarding, the reliability of the Company's generation and market purchase projections in that case. In addition, nothing in the Commission's ruling suggests that a PSCR plan or five-year forecast must be accepted even if based on unreliable generation and market purchase projections. As

---

[15] *Id*. at 12, Table 4.

such, MEC/NRDC's claims regarding DTE Electric's reliance on a demonstrably flawed modeling methodology remains ripe for decision in this proceeding.

III. DTE Electric's Five-Year PSCR Forecast Unreasonably and Imprudently Sets Forth a Business-as-Usual Approach That Ignores Fundamental Changes in Energy Markets.

MEC/NRDC have demonstrated that DTE Electric's five-year forecast is unreasonable and imprudent because it perpetuates a business-as-usual approach that is subjecting ratepayers to unnecessarily high PSCR costs. As explained in MEC/NRDC's initial brief, the Company's inertial power supply approach has led to a situation where DTE Electric's generating units are increasingly uncompetitive and operating less, which is resulting in higher levels of power purchases and greater PSCR costs over a time period when market energy and natural gas prices have fallen significantly. DTE Electric's five-year plan, however, is to simply double-down on this failed approach and, as such, is neither reasonable nor prudent.

DTE Electric's primary response is that the Commission is powerless to require the Company to pursue a resource approach that is anything other than business-as-usual. In support, DTE Electric argues that the statutory reference to the five-year forecast being "in light of its existing sources of electrical generation" means that only the Company's current generating sources need to be considered.[16] DTE Electric will presumably also cite to the Commission's recent statement in Case No. U-16892 that "Detroit Edison is not required to pursue other energy sources" to support its proposal to continue its costly business-as-usual approach.[17]

---

[16] DTE Br. at 11, citing MCL 460.6j(3).

[17] Final Order of the MPSC in Case No. U-16892 (June 28, 2013), 30.

DTE Electric's argument misconstrues both the relevant statutory provisions and the arguments being made by MEC/NRDC. First, while DTE Electric cites to a snippet of language from MCL 460.6j(3), that statutory provision states that a PSCR plan "shall also include the utility's evaluation of the reasonableness and prudence of its decisions to provide power supply in the manner described in the plan, in light of its existing sources of electrical generation, and an explanation of the actions taken by the utility to minimize the cost of fuel to the utility." To the extent that the phrase "in light of its existing sources of electrical generation" is a limitation on the scope of a PSCR plan, it is a limitation only on the scope of the utility's own required evaluation of the "reasonableness and prudence of [the utility's] decisions to provide power supply in the manner described in the plan." This limitation does not apply to the utility's responsibility to explain its actions to minimize fuel costs, and it certainly does not limit the Commission's review of the PSCR plan.

Similarly, the Company cites the requirement of MCL 460.6j(6) that the Commission "consider the cost and availability of the electrical generation available to the utility," and suggests that this language forecloses any consideration of new or alternative generation capacity.[18] This suggestion is clearly incorrect, however, in that it seeks to conflate "available generation" with "existing generation." It cannot seriously be argued that additional natural gas or wind generation capacity, for example, are not "available" to the Company and therefore cannot be considered in a PSCR plan.

Second, while the Company focuses on the additional statutory reference to a five-year forecast being "in light of [the utility's] existing sources of electrical generation," it ignores the fact that such a forecast is also supposed to be based on the utility's "anticipated sources of supply," "major contracts and power supply arrangements entered

---

[18] DTE Br. at 11.

into or contemplated," and "such other information as the commission may require."[19] If the five-year forecast were actually limited to a consideration of only the Company's existing generating sources, those other portions of the statutory provision would be rendered superfluous as there would be no reason to evaluate "anticipated" or "contemplated" sources of energy supply. A far more reasonable interpretation that gives effect to all of MCL 460.6j(4) is that it leaves the door open to an evaluation of other generation options where a business-as-usual plan would not be reasonable and prudent.

DTE Electric also incorrectly construes MEC/NRDC's claim as seeking to require the Company to pursue a "hypothetical . . . plant mix."[20] Such claim would arguably run afoul of the Commission's holding in Case No. U-16892 that "Detroit Edison is not required to pursue other energy sources" in a PSCR proceeding.[21] But MEC/NRDC's claim is not that DTE Electric's five-year forecast is inherently invalid because the Company did not decide to pursue other energy resources. Instead, MEC/NRDC's argument is that DTE Electric's five-year forecast is unreasonable and imprudent because it sets forth an approach that has been shown to be increasingly uncompetitive and unnecessarily costly to PSCR customers. In the face of such un-competitiveness, a prudent utility would evaluate options such as retiring some existing generating units, increasing its existing market purchases from the Midcontinent Independent System Operator ("MISO"), and/or seeking more generation from available natural gas and wind capacity as ways to minimize future PSCR costs. While the Commission may not be able to require DTE Electric to pursue such other options, nothing requires the Commission to approve a PSCR five-year

---

[19] MCL 460.6j(4).

[20] DTE Br. at 11.

[21] Final Order in Case No. U-16892 at 30. MEC/NRDC expressly reserve the right to challenge the Commission's final order in Case No. U-16892 through a motion for reconsideration and/or appeal to the Michigan Court of Appeals.

forecast that is unreasonable or imprudent, especially where, as here, the utility has failed to even consider other potentially lower cost resource options in its five-year forecast.

DTE Electric also suggests that it cannot evaluate anything besides a business-as-usual approach because "as a participant in the MISO market, the Company cannot unilaterally retire units."[22] While technically true, this argument is misleading to the extent that the Company is suggesting that MISO is preventing it from pursuing a power supply plan that could achieve lower costs through the retirement of one or more generating units. It is accurate that DTE Electric is required to notify MISO of any proposal to retire a generating unit so that MISO can evaluate whether such unit should be declared a System Support Resource ("SSR") because retirement of the unit would impact the reliability of the transmission system. But what DTE Electric leaves out is that when MISO declares a unit to be an SSR, it enters into an SSR agreement with the utility under which the utility receives payments to keep the SSR unit operating. In addition, the Federal Energy Regulatory Commission ("FERC"), which oversees MISO, has made clear that SSR agreements should be of only the "limited and short duration" needed to address what transmission grid upgrades are necessary to allow for the unit retirement.[23] In other words, while DTE Electric "cannot unilaterally retire" one of its generating units, if the Company finds that such retirement is appropriate MISO will either authorize the retirement as proposed, or pay DTE Electric to keep the unit operating until retirement can occur. As with most of DTE Electric's efforts to hide its uneconomic power supply decisions behind

---

[22] DTE Br. at 10.

[23] *In re Midwest Indep Transmission Sys Operator, Inc*, Docket No. ER12-2302-000, Order Conditionally Accepting Tariff Revisions and Requiring Compliance Filings, 140 FERC 61,237 (Sept. 21, 2012), 5.

what it refers to as the "big black box" that is MISO,[24] the Company's suggestion that it cannot retire uneconomic units because of MISO falls flat.[25]

IV. The Commission Should Inform DTE Electric That It Is Unlikely to Authorize Recovery of PSCR Costs For DSI and ACI Sorbents at Plants for Which Use of Such Sorbents Is Not Part of a Least Cost Compliance Plan.

In their initial brief, MEC/NRDC urged the Commission to indicate, pursuant to MCL 460.6j(7), that it is unlikely to authorize recovery for the PSCR costs related to DTE Electric's proposed use of Dry Sorbent Injection ("DSI") and Activated Carbon Injection ("ACI") pollution control sorbents starting in 2015.[26] Such a "Section 7 warning" is proper because the DSI and ACI proposals have not been shown to be a least cost plan for achieving compliance with applicable environmental standards and, instead, are a key component of DTE Electric's unreasonable and imprudent business-as-usual approach discussed in Section III, above.

DTE Electric's initial brief does nothing to bolster its proposed use of DSI and ACI. Instead, the Company simply identifies portions of the record explaining how DTE Electric plans to use DSI to bring many of its generating units into compliance with the acid gas emission limit in the Mercury and Air Toxics Standard ("MATS"), and to use ACI to bring those same units into compliance with mercury limits established under MATS and the

---

[24] Cross Examination of DTE Electric witness Robert E. Palmer ("Palmer Cross"), 3 Tr 471.

[25] DTE Electric's cursory claims in a single paragraph on page 10 of its initial brief regarding MEC/NRDC witness Patricia Richards' purported "misstatements" and "unfounded criticisms" about fuel diversity, natural gas prices, the MISO market, and DSI testing results are unsupported and fully addressed in MEC/NRDC's initial brief (see MEC/NRDC Br. at 22-26, 37).

[26] MEC/NRDC Br. at 27-38.

Michigan Mercury Rule.[27] To the extent the cited testimony presents any evidence regarding the reasonableness, prudence, or cost of the DSI and ACI proposal, such issues have been fully addressed in MEC/NRDC's initial brief.[28]

It is important to note that the Commission's ruling in U-16892 does not foreclose the issuance of a Section 7 warning here. For one thing, the Commission's ruling in that proceeding focused solely on the ACI sorbents and did not involve the DSI sorbents proposed here. In addition, while the Commission declined to issue a Section 7 warning in that case, it made clear that the reasonableness and prudence of the sorbents would have to be addressed in a future proceeding. Finally, DTE Electric's Levelized Cost of Electricity ("LCOE") analysis presented in response to discovery in this proceeding was not before the Commission in U-16892. As MEC/NRDC explained in their initial brief, the LCOE analysis found only a marginal cost difference between installing DSI and ACI on DTE Electric's River Rouge plant even while relying on an escalated natural gas price projection, ignoring the future cost of carbon emissions and the likely need to achieve further Sulfur Dioxide ("SO2") emission reductions, and unreasonably assuming that the per ton cost of DSI sorbents would not increase between 2015 and 2030.[29] Correcting for those errors in the LCOE analysis would demonstrate that DSI and ACI is not the least cost compliance approach at River Rouge, or likely other DTE Electric generating units. As such, the ALJ should recommend that the Commission indicate under Section 7 that it is likely to reject recovery for DSI and ACI at River Rouge and potentially other of the Company's generating units.

---

[27] DTE Br. at 25-27.

[28] MEC/NRDC Br. at 27-38.

[29] *Id.* at 30-38.

V. The REF Project Should Not Be Approved Because It Is Not Reasonable and Prudent and Because It Does Not Constitute "All Appropriate Actions" to Minimize DTE Electric's Cost of Fuel.

DTE Electric's initial brief does little to shore up the Company's flawed evidentiary presentation concerning the REF project. In particular, the Company continues to claim – in contravention of the record – that the REF project will be "risk free" and involve "zero or less" PSCR costs for DTE Electric customers. The Company also repeats a variety of assertions about "emissions benefits" associated with the project, despite a conspicuous lack of evidence in the record to support such assertions. Finally, the Company argues that the REF project does not violate the Commission's Code of Conduct because, regardless of the Code's plain language, the REF project "is consistent with the Code of Conduct's intent" and therefore "effectuates the proper outcome." None of these claims is sufficient to support a finding that the REF project is reasonable and prudent, much less that it represents "all appropriate actions" to reduce the cost of fuel.

In its final order in Case No. U-16892, the Commission approved of DTE Electric's REF project. The present proceeding, however, involves a far more substantial record and body of evidence than was before the Commission in Case No. U-16892. The record here comprises a wide range of evidence presented in this case and in Case No. U-16434-R, and it includes, for example, a variety of contracts and other agreements between the DTE Electric Company and its affiliate Fuels Companies. Over the course of two subsequent proceedings, various parties have used both the discovery and cross examination processes to develop a more complete picture of the REF project and its likely impacts on DTE Electric PSCR customers than was available to the Commission in Case No. U-16892. DTE Electric, too, has provided substantially more information about its project and underlying transactions. This reply brief will focus largely on issues that were not implicated by the record in Case No. U-16892, but these issues are not the only ones that can and should be addressed anew in the current case. On this record, there is ample

basis for rejecting the REF project, and MEC/NRDC therefore urge the ALJ to recommend that the REF project be disapproved in its entirety.

A. The REF Project Places Significant Risks on DTE Electric and its Ratepayers

In its initial brief, DTE Electric states that the REF project is a "risk free option" for attaining required emissions reductions, and, likewise, that the Company's "customers benefit without assuming any technology, tax, or capital risk."[30] As MEC/NRDC explained in their initial brief, however, the Company has consistently downplayed a number of very real risks posed by the REF project. That is because, to the extent that the affiliate Fuels Companies are subject to risks related to the possibility that they could be disqualified from the underlying refined coal tax credit, DTE Electric and its ratepayers are subject to a number of consequential collateral risks.[31] Given that the Company has designed an approach to future emissions controls that depends directly on the burning of REF at three power plants, for example, it now runs the risk of suddenly having to redesign its approach if REF becomes unavailable at some point in the future.[32] The Company's contracts with the Fuels Companies, moreover – which were not before the Commission in Case No. U-16892 – provide for no remedy or compensation in the event that the Fuels Companies are unable to continue providing DTE Electric with all of the alleged benefits of the REF project.[33] And if the Company wishes to continue burning REF in such circumstances, it must find its own supply of refined coal elsewhere and at whatever price may be available in the market.

---

[30] DTE Br. at 17-18.

[31] See, e.g., MEC/NRDC Br. at 51, 61, 72-75.

[32] See *id.* at 61.

[33] *Id.* at 73-74.

Simply stated, DTE Electric's approach to power supply and emissions control could be upended at any time, if the Fuels Companies become unable or unwilling to produce and sell REF, and DTE Electric failed to bargain for contractual provisions that would minimize or remedy such risks. DTE Electric customers are therefore subject to the risk of significant uncertainty and potential cost increases throughout the life of the project. For these reasons, and as explained more fully in MEC/NRDC's initial brief, the record in this case does not sustain DTE Electric's contention that the REF project is "risk free."

B. The Record In This Case Demonstrates That the REF Project Would Increase PSCR Costs for Customers.

Just as the Company states that its REF project is "risk free," DTE Electric's initial brief claims that the project will provide benefits to customers "without increasing costs to PSCR customers," and that "[o]n a PSCR basis, the costs of the REF project to [DTE Electric] customers are effectively zero *or less* . . . ."[34] But once again, the updated and expanded record in this case belies that claim. While DTE Electric's claim that the REF project would not increase PSCR costs has long been unsupported, this is the first proceeding in which evidence has arisen showing that such claim is false.

For example, although burning REF at the St. Clair Power Plant reduces SO2 emissions at the plant, and therefore allows the Company to avoid using a small number of SO2 emissions allowances each year, DTE Electric Company witness Angela Wojtowicz explained during cross examination that the Company sells these avoided SO2 allowances at a loss and then accounts for that loss as a PSCR expense.[35] In 2013, for example, the Company's PSCR plan projects that the sale of avoided SO2 allowances will result in gross revenue of $6,297. DTE Electric touts this revenue as one benefit of its REF project. But

---

[34] DTE Br. at 17-18 (emphasis in original).

[35] June 28, 2013 at 54-55.

in reality, because the book value of these avoided SO2 allowances is much more than their market value in 2013, the Company ultimately projects that their sale will result in a net PSCR loss of more than $126,000 in this year alone.[36] The record in this case – unlike the limited record in Case No. U-16892 – appears to show that the use of REF at St. Clair actually increases PSCR costs for DTE Electric customers.

The expanded record in this case suggests that other PSCR costs are expected to rise as a result of REF. Witness William Rogers testified that the cost of sorbents used in the Company's proposed DSI system will be $1.4 million to $6.9 million higher, every year, as a result of burning REF.[37] These overall amounts may well rise over time, too, along with the variable commodity cost of DSI sorbents.[38] Although DTE Electric argues that these costs can be recovered from the Fuels Companies under the respective REF contracts, only a very strained reading of the contracts themselves supports such an argument.[39] At best, then, it appears that DTE Electric customers run the risk of incurring substantially more DSI sorbent costs as a result of the REF project than they would without the project. And along with the fact that the Company would be selling SO2 emissions allowances at a loss as part of the REF project, the likelihood of increased DSI trona costs suggests that the REF project will have a substantial impact on PSCR costs for DTE Electric customers. The Company's claim to the contrary is not supported by the record, and it should be disregarded. Because this potential for significant PSCR cost increases

---

[36] *Id.* at 56.

[37] *Id.* at 65-66.

[38] *Id.* at 68. As MEC/NRDC explained in their initial brief, DTE Electric's assumed $250 per ton price for DSI sorbents is unsupported in the record and ignores factors that would likely lead to a higher cost for DSI sorbents in 2016 and 2017. MEC/NRDC Br. at 29.

[39] *Id.* at 66-68.

was not before the Commission in Case No. U-16892, the Commission's ruling in U-16892 does not foreclose those increases as a basis for rejecting the REF project.

C. The Purported Emissions Benefits of the REF Project Continue to be Overstated or Unknown By DTE Electric.

The Company's initial brief repeats a number of earlier claims about alleged emissions benefits associated with the REF project.[40] But these claimed emissions benefits are overstated, at best, and at worst they are non-existent.

DTE Electric states that burning REF at its power plants will reduce emissions of Nitrogen Oxides ("NOx") at those plants, providing an intangible environmental benefit to the Company's customers,[41] and also that REF "provides a cost-free reduction in NOx emission allowance expense."[42] The record in this case, however, includes no evidence of how much the use of REF will reduce NOx emissions, and no quantification of reduced NOx emission allowance expense.[43] Indeed, the Company's exhibits pertaining to NOx emissions allowances contain no reference to REF, in stark contrast to the Company's exhibits pertaining to SO2 emissions allowances.[44] The Company's principal witness on environmental control technologies, Mr. Rogers, testified that the Company did "not know what level NOx reductions will be attributed specifically to REF in the units."[45] And the Company's principal REF witness, Karthik Krishnamurthy, likewise could not provide any evidence or projection of REF-related NOx emissions reductions, and he could not identify

---

[40] See, e.g., DTE Br. at 17-18.

[41] *Id.* at 17.

[42] *Id.* at 18.

[43] MEC/NRDC Br. at 48-51.

[44] *Id.* at 48-49.

[45] *Id.* at 49.

any witness that might have such knowledge.[46] In sum, the record in this case simply does not and cannot support the Company's contention that REF will provide NOx-related benefits to PSCR customers. And although the same lack of information plagued the Company's evidentiary presentation in Case No. U-16892, the fact that DTE Electric still cannot prove such a central component of its case for the REF project justifies considering this lack of evidence anew.

The Company's initial brief also claims that the REF project will provide DTE Electric customers with benefits related to SO2 and mercury emissions reductions, but both of these claimed benefits are significantly overstated. To begin with, the Company's projected SO2 benefit is less than $2000 at the St. Clair power plant in 2013,[47] and, in 2012, its actual SO2 benefit at St. Clair was $0.[48] One of the Company's own witnesses has acknowledged that any actual SO2 benefit associated with the REF project will be *de minimis*, and another DTE Electric witness testified in this case that the Company is unlikely to accrue even the minimal projected benefit of $2000 in 2013.[49] Even if the Company did accrue a small SO2 benefit by selling avoided SO2 allowances, any such benefit would be negated by two factors. First, as explained above, we now know that the Company is likely to write off such sales as a loss, resulting in a net increase of PSCR expense. Second – even if avoided SO2 emissions allowances were not sold at a loss – any resulting benefit at St. Clair and Belle River would be negated entirely by the requirement that DTE Electric reimburse the Fuels Companies for any REF-related environmental benefit up to the Fuels Companies' respective revenue requirements of

---

[46] *Id.* at 50.

[47] DTE Br. at 19.

[48] MEC/NRDC Br. at 52.

[49] *Id.* at 52-53.

more than $10 million per year.[50] Unlike in Case No. U-16892, the record in this case demonstrates that the Company's claims concerning SO2 benefits are overstated and, in fact, may result in increased PSCR costs at St. Clair and Belle River.

Although there is no environmental benefit reimbursement obligation at Monroe (i.e., no "REF adder" mechanism), that power plant's costly Flue Gas Desulphurization ("FGD") systems, also known as "scrubbers," already reduce SO2 emissions by 98%, meaning that REF independently reduces those emissions by a negligible amount.[51] Indeed, although DTE Electric's initial brief mistakenly states that the use of REF at Monroe will result in "emissions cost savings of $4,390,000," the Company's PSCR plan actually projects SO2 cost savings at Monroe of only $4,390 in 2013 – a figure that quickly declines to $263 by 2017.[52] Because the record in this case includes additional years of SO2 benefit projections for Monroe, it is now clear that any claimed benefit in this regard is extremely minimal. And this must also be weighed against the fact that – as newly demonstrated on the record in this case – the Coal Fee Rate at Monroe amounts to far less than originally claimed once reimbursements for additional O&M costs are subtracted.[53]

The Company's claim that REF provides a mercury benefit is also overstated. Although DTE Electric projects a more significant level of mercury benefit than SO2 benefit at St. Clair and Belle River, the record in this case demonstrates that even this mercury benefit will never reach or exceed the Fuels Companies' respective annual revenue requirements.[54] As a result, DTE Electric's PSCR customers will never realize a net

---

[50] *Id.* at 48, 55.

[51] *Id.* at 53-54.

[52] *Id.* at 53.

[53] See *id.* at 69-70.

[54] *Id.* at 58.

mercury benefit as a result of burning REF at those plants.[55] At Monroe, just as the FGD systems render REF redundant in terms of SO2 emissions reductions, existing pollution control equipment results in substantial mercury emissions reductions even without the use of REF.[56] Along with the FGD system, the Monroe units also employ existing (and also costly) Selective Catalytic Reduction ("SCR") equipment; in tandem, the SCR and FGD systems may well be sufficient to comply with both the federal MATS standard and the Michigan Mercury Rule when both regulations go into effect in 2015.[57] As explained in MEC and NRDC's initial brief, the record in this case contains no meaningful evidence that burning REF at Monroe is necessary to comply with mercury emissions regulations, and the record likewise contains no quantitative projection of the Company's claimed REF-related mercury.[58] The Company's claim that there will be any REF-related mercury benefit at Monroe is speculative, in other words, and the actual amount of such a claimed benefit is completely unknown. Once again, it is telling that the record in this case still contains a lack of meaningful evidence about the Company's claimed REF-related mercury benefit. It is one thing for the record in Case No. U-16892 to omit such evidence, but the Company has now had two subsequent proceedings in which to present this critical evidence, and it has not done so.

[55] *Id.*

[56] *Id.* at 59.

[57] See *id.* at 59-60.

[58] *Id.* at 60-62.

D. DTE Electric Has Not Demonstrated That the REF Project Complies With the Code of Conduct.

In its initial brief, DTE Electric unconvincingly maintains that the REF project fully complies with the Commission's Code of Conduct and Affiliate Transaction Guidelines.[59] MEC/NRDC's initial brief addressed this issue at length,[60] but one point in DTE Electric's initial brief merits a further response. The Company reiterates its prior claim that the REF project is "consistent" with the Code of Conduct's "intent," and that, as designed, the REF project "effectuates the proper outcome."[61] As the record in this case shows, however, DTE Electric does not and cannot demonstrate that its recurring transactions with the Fuels Companies are consistent with the Code's "intent," much less that they actually comply with the Code's clear textual provisions.

The Company states that "any adjustments to the <u>sale</u> price [of feedstock coal] to reflect higher market pricing would only serve to increase the resale price [of REF] to [DTE Electric],"[62] a perspective that the Commission appears to have adopted in Case No. U-16892. The problem with this explanation, however, is that it does not address the fact that DTE Electric may be able to <u>purchase</u> refined coal from alternative suppliers at a lower price than that offered by its affiliate Fuels Companies. Mr. Krishnamurthy testified during cross examination, in fact, that DTE Electric sells feedstock coal to the Fuels Companies as much as several months before it buys back REF from those Fuels Companies.[63] But at no time, Mr. Krishnamurthy testified, does the Company conduct any market analysis to determine whether it could obtain refined coal at a lower price at the time it burns that

---

[59] DTE Br. at 23-24.

[60] MEC/NRDC Br. at 83-92.

[61] DTE Br. at 24.

[62] *Id.* at 23-24 (emphasis added).

[63] MEC/NRDC Br. at 87-88.

refined coal.[64] Not only does this fact implicate the Commission's Code of Conduct, but it appears also to implicate the Legislature's express statutory requirement that the Commission, in PSCR reconciliation cases, "[d]isallow the cost of fuel purchased from an affiliated company to the extent that such fuel is more costly than fuel of requisite quality available at or about the same time from other suppliers with whom it would be comparably cost beneficial to deal."[65]

The same problem taints the Company's periodic purchases of "resold" coal (i.e., untreated coal) from the Fuels Companies.[66] Indeed, the structure of the REF project is such that DTE Electric and the Fuels Companies repeatedly buy and sell the same asset (untreated coal) to one another, even as they also buy and sell different assets (feedstock and refined coal) at other times. The contracts between DTE Electric and the Fuels Companies – which were not before the Commission in Case No. U-16892 – provide for DTE Electric's purchase of untreated coal from the Fuels Companies in a variety of circumstances, including when REF is not available.[67] The same contracts require DTE Electric to re-purchase all of the Fuels Companies' untreated coal inventory at the end of the REF project life.[68] To the extent that DTE Electric sells a portion of its coal inventory to the Fuels Companies knowing that some portion of that inventory will be re-purchased without modification or treatment, both DTE Electric's sale and purchase of that coal must comply with both the Code of Conduct and MCL 460.6j(13)(e), and such compliance necessarily requires some analysis of the market price of coal at the time of each

---

[64] *Id.* at 87, 89-90.

[65] See MCL 460.6j(13)(e).

[66] See MEC/NRDC Br. at 88-89.

[67] See *id.* at 73-74.

[68] *Id*. at 88-89.

transaction. Because the Company does not perform any such analysis – and because the Commission did not address the question of how such sales of untreated coal comply with the Code of Conduct in Case No. U-16892 – the record in this case raises substantial doubt about Code and statutory compliance in such scenarios.

CONCLUSION

For the reasons set forth above, as well as in MEC/NRDC's initial brief and on the record in this proceeding, MEC/NRDC respectfully request that the ALJ recommend that the Commission reject DTE Electric's 2013 PSCR plan, five-year forecast, and REF project, and adopt the requests for relief set forth in MEC/NRDC's initial brief.

OLSON, BZDOK & HOWARD, P.C.
Attorneys for MEC

Date: July 18, 2013

By:________________________________
Emerson Hilton (P76363)

420 East Front Street
Traverse City, MI 49686
Telephone: (231) 946-0044
Email: chris@envlaw.com and emerson@envlaw.com

EARTHJUSTICE
Attorneys for NRDC

Date: July 18, 2013

By:________________________________
Shannon Fisk, *Pro Hac Vice*

1617 John F. Kennedy Blvd., Suite 1675
Philadelphia, PA 19103
Telephone: (215) 717-4522
Email: sfisk@earthjustice.org

STATE OF MICHIGAN

MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application of THE DETROIT EDISON COMPANY for Authority to Implement a Power Supply Cost Recovery Plan in its Rate Schedules For 2013 Metered Jurisdictional Sales of Electricity.

Case N°. U-17097

ALJ Sharon L. Feldman

ELECTRONIC SERVICE LIST

On the date below, an electronic copy of **Reply Brief of the Michigan Environmental Council and the Natural Resources Defense Council** was served on the following:

Name/Party	E-mail Address
Sharon L. Feldman, ALJ	feldmans@michigan.gov
Counsel for Detroit Edison Co. David S. Maquera Jon P. Christinitis Michael J. Solo, Jr.	mpscfilings@dteenergy.com maquerad@dteenergy.com christinitisj@dteenergy.com solom@dteenergy.com
Counsel for ABATE Robert A. W. Strong Leland R. Rosier	rstrong@clarkhill.com lrrosier@clarkhill.com
Counsel for the Attorney General Donald E. Erickson John A. Janiszewski	ericksond@michigan.gov janiszewskij2@michigan.gov
Counsel for MPSC Staff Patricia S. Barone Lauren DuVal Donofrio	baronep@michigan.gov donofriol@michigan.gov
Counsel for MCAAA Don L. Keskey	donkeskey@publiclawresourcecenter.com
Counsel for NRDC Shannon Fisk	sfisk@earthjustice.org

The statements above are true to the best of my knowledge, information and belief.

OLSON, BZDOK & HOWARD, P.C.
Counsel for MEC and NRDC

Date: July 18, 2013

By: ________________________________

Ruth Ann Liebziet, Legal Assistant
Kimberly Flynn, Legal Assistant
420 E. Front St.
Traverse City, MI 49686
Phone: 231/946-0044
Email: ruthann@envlaw.com and kimberly@envlaw.com