



## Legislation Text

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**File #:** 19-1365, **Version:** 1

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Resolution to Approve Amendment No. 2 to Professional Services Agreement with Varnum LLP for Legal Services Relative to MPSC Case No. U-18091 (\$15,000.00)

By contracts entered into with The Detroit Edison Company (DTE) in 1984, the City became and remains the owner and operator of 2 hydroelectric plants at Barton and Superior Dams, committed to sell all the net electrical output to DTE, and DTE committed to purchase all net electrical output. The generation of electricity started in 1986, and the contracts run for 50 years, until 2036.

Under the federal Public Utility Regulatory Policy Act (PURPA) both plants are Qualifying Facilities (QFs), defined as qualifying cogeneration facilities or qualifying small power production facilities, entitle to sell to the electric utility of the City's choosing at a cost that does not exceed "the incremental cost to the electric utility of alternate electric energy." This is also referred to as a "must purchase" obligation on the part of the electric utility. PURPA was enacted to further energy independence at a national level, and to try to solve the country's energy crisis.

In Michigan Public Services Commission (MPSC) Case No. U-18091, DTE filed a proposal seeking, among other things, a change in how its incremental cost is calculated for purpose of its purchases of electricity from QFs, and possibly to avoid its obligation to purchase electricity from QFs such as the City notwithstanding the requirements of PURPA.

The City has made significant investments in the hydroelectric plants at both Barton and Superior Dams, starting with the \$3.2 million in hydroelectric bond funds approved to be issued by the voters in early 1983, and continuing since then the cost of millions of dollars. The City relies on revenues from the City's two power purchase contracts with DTE to pay back the capital investments to the hydro facilities at both dams. Reduction of those payment amounts, or the possibility that DTE could avoid its purchase obligations, jeopardizes the financial viability of the hydro facilities. Revenues from DTE for power supplied from both hydro facilities is approximately \$500,000.00 per year. Although the City's contracts with DTE run until 2036, the City's concerns relative to MPSC Case No. U-18091 are with both what will happen after 2036, and possible impacts on DTE's exiting contractual obligations.

On December 19, 2016, City Council approved a professional services agreement with Varnum LLP based on its qualifications and expertise in matters such as MPSC Case No. U-18091 (R-16-483), and the City intervened in MPSC Case No. U-18091. The original contract amount was up to \$48,000.00, which included \$5,000.00 to cover the fees of Peter Richardson, who served as an expert witness in the proceedings on behalf of the City. While MPSC Case No. U-18091 was proceeding, a case was filed by DTE (MPSC Case No. U-18419) that had the potential to impact the calculation of rates in MPSC Case No. U-18091. Because of the potential impact, the City intervened for limited purposes related to MPSC Case No. U-18091. Because of the additional legal services for work for MPSC Case No. U-18419, Amendment No. 1 to add up to \$6,300.00 to cover those legal services was approved.

Ultimately, the MPSC resolved some of the issues in Case No. U-18091 with a July 2018 order. Then, after the MPSC resolved Case No. U-18419 by approving a new fossil fuel power plant, on December 20, 2018, the MPSC remanded Case No. U-18091 to “address[] the inputs to be used for avoided costs based on the new” plant, “DTE Electric’s capacity needs, the planning horizon, and the Standard Offer tariff ...” The City believes it is prudent to continue to press its interests in Case No. U-18091. In particular, the City has contended (in its initial brief) and has again contended on remand that the MPSC must: implement PURPA in a way that encourages QFs like the City’s, ensure DTE’s standard power purchase agreement is commercially reasonable and not so one-sided as to impair QF development, and ensure DTE’s standard offer tariff does not discriminate against existing QFs, like the City’s.

To cover the legal services of Varnum LLP, including the services on remand to protect and articulate the City’s interests, an additional amendment of up to \$15,000.00 to Varnum LLP’s contract is needed. Because the expert witness services used did not use all of the \$5,000.00, and no additional expert witness services are needed, the amendment also reduces the expert witness amount to \$3,775.00 and shifts the remaining \$1,225.00 balance to cover legal services.

Budget/Fiscal Impact: Funds in the amount of \$15,000.00 are available in the Water Treatment General Fund Operations and Maintenance Budget to fund this legal services amendment with Varnum LLP.

Varnum LLP complies with the City of Ann Arbor’s Non-Discrimination and Living Wage Ordinances. Approval of this amendment to the professional services agreement with Varnum LLP in the amount of up to \$15,000.00 for legal services relative to MPSC Case No. U-18091 is recommended.

Prepared by: Stephen K. Postema, City Attorney

Reviewed by: Craig A. Hupy, Public Services Area Administrator

Approved by: Howard S. Lazarus, City Administrator

Whereas, On December 19, 2016, City Council approved a legal services contract with Varnum LLP for up to \$48,000.00, including \$5,000.00 for expert witness testimony, to provide legal services for the City’s intervention in MPSC Case No. U-18091 before later approving an amendment to the contract adding up to \$6,300.00 for legal services;

Whereas, Because the MPSC remanded Case No. U-18091, an additional amount up to \$15,000 is necessary to fund Varnum LLP’s remaining work in the case; and

Whereas, Varnum LLP, complies with the City of Ann Arbor’s Non-Discrimination and Living Wage Ordinances;

RESOLVED, That an amendment to the agreement for legal services with Varnum LLP be approved in the amount of up to \$15,000.00, increasing the total contract amount to up to \$69,300.00, of which \$65,525.00 is for legal services and \$3,775.00 is for expert witness services;

RESOLVED, That the Mayor and City Clerk be authorized to execute the amendment to the professional services agreement with Varnum LLP, subject to approval as to form and substance by the City Attorney; and

RESOLVED, That the City Attorney and City Administrator be authorized to take the necessary administrative actions to implement this resolution.