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VARNUM, RIDDERING, SCHMIDT & HOWLETT^{LLP}

A T T O R N E Y S A T L A W

THE VICTOR CENTER
SUITE 810 . 201 NORTH WASHINGTON SQUARE . LANSING, MICHIGAN 48933
TELEPHONE 517/482-6237 . FAX 517/482-6937

ERIC J. SCHNEIDEWIND

E-MAIL ejschneidewind@vrsh.com

August 11, 1999

Ms. Dorothy Wideman
Michigan Public Service Commission
6545 Mercantile Way
P.O. Box 30221
Lansing, MI 48909

MICHIGAN PUBLIC SERVICE
FILED

AUG 11 1999

COMMISSION

Re: Case No. U-1 1290

Dear Ms. Wideman:

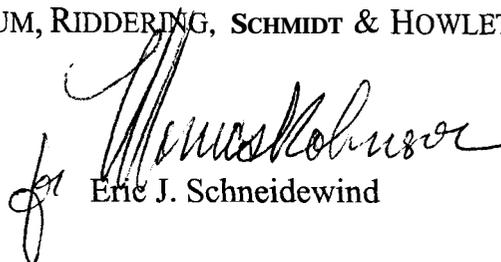
Enclosed for filing in the above captioned matter please find the original and 4 copies of Energy Michigan's Reply to Briefs. Also enclosed is the original Proof of Service indicating service on counsel.

Please date stamp one copy of the above entitled document for my records and return it in the self-addressed stamped envelope provided.

Thank you for your assistance in this matter.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT^{LLP}


Eric J. Schneidewind

EJS/mrr

cc: **ALJ**
parties

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STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter, on the Commission's own)
motion, to consider the restructuring of)
the Case No. U-1 1290 electric utility)
industry)
_____)

Case No. U-1 1290, et al

**MICHIGAN PUBLIC SERVICE
FILED**

ENERGY MICHIGAN REPLY TO BRIEFS

AUG 11 1999

COMMISSION

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
Attorneys for Energy Michigan
Eric J. Schneidewind (P20037)
The Victor Center, Suite 8 10
201 N. Washington Square
Lansing, Michigan 48933
(517) 482-6237

August 10, 1999

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ENERGY MICHIGAN REPLY TO BRIEFS

I. INTRODUCTION AND SUMMARY OF POSITION

A. Introduction

On June 30, 1999 the Michigan Public Service Commission (the Commission) requested briefs from interested parties concerning the effect of the Michigan Supreme Court's Opinion dated June 29, 1999 in Consumers Power Co v Michigan Public Service Commission, ___ Mich ___ (1999), S Ct Docket Nos. 111482, 111483, 111486, 111487, 111719-111726 (the Supreme Court Opinion) on the Commission Orders in the above captioned cases. The Commission provided for replies on August 11, 1999. The Energy Michigan replies are provided in response to the Commission's request. Failure to address a position or comment filed in this matter should not be taken as agreement with that position or comment.

As of today's date, Energy Michigan has received Briefs and/or Comments from the following participants: Michigan Public Power Agency, et al, North American Natural Resources, et al, Unicorn Energy, Inc., Michigan Independent Power Producers Association, et al, Michigan Petroleum Association, et al, Michigan United Conservation Clubs, Midland Cogeneration Venture, Attorney General, Indiana Michigan Power Company, Michigan

Power Limited Partnership and Ada Cogeneration, Association of Businesses Advocating Tariff Equity, Consumers Energy and Detroit Edison. Energy Michigan reserves the right to reply at a later date to Briefs which were not served upon it timely.

B. Summary of Issues Raised in Briefs and Comments

The Briefs/Comments of the above participants may be organized into six separate issues:

1. The Commission should halt progress on open access program implementation until passage of legislation which would provide both guidance and necessary legal authority.
2. The Commission must stop implementation of open access service and electric restructuring because it lacks legal authority.
3. Voluntary compliance with Commission Orders is not satisfactory because the Commission has no legal authority to enforce voluntary programs.
4. The Commission may not have authority under the Transmission Act to regulate rates for delivery power generated outside Michigan.
5. Commission open access and electric restructuring orders should require recovery of Qualified Facility avoided cost payments over the entire contract term applicable to each QF selling power to a regulated electric utility.
6. The MPSC cannot modify or set aside the U-1 1290, et al Orders until the

current appeals of those matters are remanded to the Commission by the Court of Appeals.

C. Summary of Replies to Comments

Energy Michigan's replies to these six issues may be summarized as concluding that the Commission does have the authority to implement and enforce Retail Open Access programs, including electric restructuring, which are voluntarily submitted by electric utilities. Moreover, the Commission has the authority to determine that voluntarily submitted open access programs are not just and reasonable, to indicate what changes must be made to achieve Commission approval and then to accept, approve and enforce tariffs and proposals which are voluntarily resubmitted and meet conditions required by the Commission. Should a utility withdraw approved open access programs without permission, the Commission has authority to terminate any benefits which were obtained by the utility as a condition of offering Retail Open Access service.

II. DETAILED REPLIES TO ISSUES CONTAINED IN INITIAL BRIEFS

A. Issue 1: The Commission Halt Action to Implement Retail Open Access Service until Legislation Is Enacted?

1. Summary of Comments

ABATE (Brief, p. 3-4), Unicorn (Brief, p. 2-3), the City of Detroit, et al, (Brief, p. 4) and I&M (Brief, p. 10) urge that the Commission halt activities designed to implement Retail Open Access service and electric restructuring and await passage of legislation which would clarify authority of the Commission to implement open

access programs.

2. Energy Michigan Reply

The Commission does possess legal authority to implement and enforce voluntarily submitted Retail Open Access service tariffs. See *II.B. below*. Since the Commission possesses authority to approve open access programs voluntarily submitted by utilities, implementation and enforcement of the U-1 1290 Retail Open Access tariffs and implementation plans may continue without additional legislative authority.

However, the fact that the Commission can proceed with open access implementation does not eliminate or lessen the desirability of legislation which would take a more aggressive stance than Commission Orders on electric restructuring issues such as calculation and true-up of stranded costs, elimination or mitigation of utility market power, aggressive enforcement of customer protection measures and adoption of a streamlined marketer licensing program. Enactment of legislation addressing these subjects would achieve a more customer oriented balance to Retail Open Access service than has been evident in Commission Orders to date.

B. Issue 2: Should the Commission Cease Implementation Of Open Access Programs Because The Supreme Court Has Found That it Lacks Authority To Require Such Programs?

1. Summary of Comments

ABATE argues that the Commission needs specific legislative authority to adopt open access programs, that mere utility consent to implement such Orders does

not confer jurisdiction and that the PSC has no common law authority (ABATE Brief, The Attorney General, MCV and I&M argue that the MPSC lacks authority to order implementation of open *access*. *AG Brief*, p. 8; *MCV Brief* p. 2; *I&M Brief*, p. 3. Finally, the Attorney General also argues that mere consent by the utility cannot confer jurisdiction (AG Brief, p. 14).

The MCV, Consumers Energy and Detroit Edison all agree that while compulsory open access programs are prohibited by the Supreme Court Order, open access tariffs where were voluntarily submitted on March 22, 1999 are permitted by that Opinion. *MCV*, p. 2; *Consumers*, p. 2; *Edison*, p. 1-5.

2. Energy Michigan Reply

a. The Supreme Court Opinion applies to Retail Open Access programs which were made compulsory by the Commission in U-10143 and U- 10176, not to the voluntary U-1 1290 programs.

The Supreme Court ruling considered the Orders of the MPSC issued in Cases U- 10143 and U- 10 176 which were appealed by Detroit Edison and Consumers Energy. In those cases the Commission issued Orders requiring Detroit Edison and Consumers Energy to implement an open access set of tariffs and conditions which the utilities opposed. *Supreme Court Opinion*, p. 4. This factual situation is radically different from the U-1 1290 Orders which approved Retail Open Access tariffs voluntarily submitted by Detroit Edison and Consumers Energy. The MPSC reviewed those utility submissions, indicated revisions which it desired. Both Detroit Edison and Consumers Energy voluntarily resubmitted tariffs incorporating the changes required by the

Commission on March 22, 1999. See Detroit Edison and Consumers Energy tariff filings, U-1 1290, et al, March 22, 1999. If there were any question regarding the voluntary nature of the utility filings, the Briefs submitted by Detroit Edison and Consumers Energy in this matter declare that their voluntarily submitted open access tariffs should remain effective. *Edison, p. 1-5; Consumers, p.2.* Thus, the Supreme Court ruling does not apply to the current factual situation.

b. The Supreme Court has said that utilities could propose and the MPSC could approve open access tariff terms and conditions which were voluntarily submitted by utility management.

Two sections of the Supreme Court Opinion make it abundantly clear that utilities may voluntarily submit open access tariffs which can then be approved, modified or rejected pursuant to the Commission's rate making authority.

In a discussion of the Commission's ratemaking power, the Court stated that, "Although retail wheeling has a rate making component, i.e., the establishment of the rate a third party provider must pay to transmit power to a local utility's system, appellants do not challenge that aspect of the experimental program. Instead appellants contend that the PSC cannot order local utilities to transmit electricity from a third party provider's system through its own system to an end user. This aspect of retail wheeling is simply not rate making." *Supreme Court Opinion, p. 6 of 1.*

In a continuation of this discussion, the Court stated, "This Court has

concluded that, absent specific statutory authority, the decision whether to provide the [utility open access] service rests with the utility's management." *Id.*, p. 7.

Second, the Court also stated that, "Absent a statute clearly conferring on the PSC the authority to order such [retail wheeling] service the decision to provide the service lies within the province of the utility's management, not the PSC." *Id.* ¶ 21.

Thus, the Supreme Court has clearly held: a) that utility management may voluntarily propose retail wheeling service to the Commission and b) if such service is proposed it then comes under the rate making jurisdiction of the Commission.

c. The Supreme Court has identified the rate making authority which could be exercised when open access tariffs are voluntarily submitted.

In their discussion of Commission rate making authority, the Supreme Court said that voluntarily submitted retail wheeling terms and conditions would come under Commission rate making authority. The Court said, "Although retail wheeling has a rate making component, i.e. the establishment of the rate a third party provider must pay to transmit power through a local utility system, Appellants do not challenge that aspect." *Id.*, p. 6. This discussion related to the rate making authority of the MPSC under Section 7 of the Electric Transmission Act, MCL 460.557 and Section 22 of the Railroad Commission Act, MCL 462.22. As discussed above, given voluntary submission of retail access service tariffs to the Commission by utilities, the

referenced Transmission Act and Railroad Act provisions give the Commission authority to exercise rate making jurisdiction over submitted tariffs.

d. The authority of the Commission in this case may be distinguished from the factual circumstances of Detroit Edison v PSC, 221 Mich App 370.

Detroit Edison has argued that the Commission's exercise of jurisdiction in this matter is analogous to Detroit Edison v PSC. *Edison Brief*, p. 7. In that case, the Court of Appeals rejected a decision by the Commission to substantially modify the terms of a DSM program submitted by Detroit Edison. Using reasoning similar to *Union Carbide, etc.*, the Court found that the Commission had, in effect, created a new program which it was attempting to force upon Detroit Edison. 387-389.

In the instant case, Detroit Edison and Consumers Energy submitted open access tariffs on a voluntary basis, the Commission reviewed these tariffs and indicated changes which would be required and the two utilities then voluntarily submitted revised tariffs on March 22, 1999 which incorporated all of the changes requested by the Commission. This last, voluntary submission of modified tariffs together with the fact that Edison and Consumers did not appeal Commission jurisdiction to issue the U-1 1290 Orders indicates voluntary compliance which, unlike Edison v PSC as discussed above, conferred jurisdiction over the Commission under statutory authority pursuant to the Railroad Act and the Electric Transmission Act provisions cited above.

e. The jurisdiction of the Commission is pursuant to statutory authority, not the consent of the utilities.

Both ABATE and the Attorney General have argued that consent by utilities to voluntarily implement open access service does not confer jurisdiction over the Commission to regulate such service. *ABATE Brief, p. 4, AG Brief, p. 13.*

ABATE and the Attorney General have in effect turned this argument upside down. The statutes governing the Michigan Public Service Commission confer authority to review and reject service offerings and tariffs proposed by utilities pursuant to the Transmission Act and Railroad Act statutes. MCL 460.557 and MCL 462.22.

In the case of new program offerings or services which are proposed by utilities to the Commission, the Commission has full authority to reject those tariffs or indicate modifications necessary to gain approval. If utilities choose to submit tariffs or proposals which do not initially meet the Commission's criteria for reasonableness and the tariffs are then are changed to meet those criteria, the Commission will possess authority to approve and police or regulate such service offerings. Thus, the act of voluntary tariff submission by a utility does not establish jurisdiction but, rather, meets the statutory criteria found by the Sunreme Court to exist within Railroad Act and the Electric Transmission Act.

C. Compliance or Enforcement Standards for Voluntary Open Access Programs

1. Summary of Comments

Parties question the enforcement standards which would be applicable to

voluntarily submitted open access programs.

The City of Detroit, I&M and Michigan Petroleum Association caution that the MPSC may have little or at least inadequate enforcement or policing powers regarding voluntarily submitted open access programs. I&M expresses fears that voluntarily submitted programs could be withdrawn or would be unnecessarily biased toward a utility and therefore unjust and unreasonable. They argue that there would be little or no ability on the part of the regulator to correct the biases. *Briefs, p. 4-5, p. 9 and p. 9 respectively.*

2. Energy Michigan Reply

- a. The legal authority of the MPSC to regulate and enforce voluntarily filed open access rates, terms and conditions.

The Energy Michigan Reply in II.B. above (Issue 2) has documented the legal authority of the MPSC to approve voluntarily submitted Retail Open Access programs under the Railroad Act MCL 462.2, et seq. and the Electric Transmission Act MCL 460.55 1 et. seq.

The Transmission Act contains authority for the MPSC to investigate complaints (460.557) and fix rates (Id.).

The Railroad Act grants the Commission specific enforcement authority including the ability to investigate complaints or initiate complaints on its own motion and to prevent rate discrimination. *MCL 462.16 and .22*. Also the rates submitted may be reviewed for justness and reasonableness after being

supported by investigations conducted at the will of the Commission. *MCL* 462.10.

Collectively these statutes give the Commission ability to enforce the finally approved terms and conditions of open access service as well as prevent discrimination and other improper actions.

b. The MPSC has legal authority to prevent withdrawal of open access service tariffs.

At the very least, if Consumers Energy and Detroit Edison withdraw open access service tariffs which were voluntarily submitted and were approved by the Commission, this action would empower the Commission to terminate the benefits which those companies have received pursuant to Orders U- 11726 (accelerated depreciation for the Fermi nuclear plant) and U-1 1453 (implementation of a frozen PSCR clause for Consumers Energy). By accepting the benefits of the referenced Orders and implementing the Retail Open Access service terms, Edison and Consumers have entered into a consent order with the Commission. *Energy Michigan Brief, p. 8-14*. Such a consent order cannot be challenged by the parties. *Michigan Bell v Sfat, 177 Mich App 506*. Nor can the terms of the consent be challenged on appeal. *Dana Corp v Employment Security Comm'n, 371 Mich 107 (1963)*. Nor can the parties collaterally attack the order. *Dunlap v City of Southfield, 54 Mich App 398, 401 (1974)*. Finally, enforcement of the consent order may be exercised by the parties to the cases. *Berlin & Farro v DNR, 80 Mich App 490 (1978)*.

In summary, the acceptance of the terms of Orders U-1 1726 and U-

11453 and receipt of benefits under those Orders has created a series of consent orders which must be followed by Detroit Edison and Consumers Energy and which may be enforced by parties to those matters. Since implementation of Retail Open Access service was a clearly stated and explicit condition of each referenced Order, the utilities may not terminate such service without violating the terms of the consent orders.

D. Issue 4: Authority of the Commission Under the Electric Transmission Act to Regulate Transmission Rates for Power Generated Outside of Michigan

1. Summary of Comments

The City of Detroit has read the Supreme Court Opinion to question the ability of the Michigan Public Service Commission to regulate rates charged to transmit electricity generated within one county and transmitted to customers in the same or other counties. *City of Detroit Brief*, p. 4.

2. Energy Michigan Reply

As noted in II.B. and C above, both the Railroad Act and the Electric Transmission Act clearly grant the MPSC authority to regulate voluntarily submitted open access delivery charges of Detroit Edison and Consumers Energy. To the extent that the Transmission Act is construed as not covering open access rates applicable to energy produced outside of Michigan, the Energy Michigan analysis clearly shows that jurisdiction would lie within the terms of the Railroad Act and specifically MCL 462.22 with regards to the submitted open access tariffs.

E. Issue 5: Appropriate Treatment of Long Term QF Capacity Costs

1. Summary of Comments

MIPPA, et al and MCV argue that the Commission should use these proceedings as an opportunity to clarify the duty of the Commission to address treatment of long term QF capacity costs past 2007 pursuant to the decision of the Court in North American Natural Resources, Inc., et al v MPSC, Case No. 5:98-CV-2 (*North American*) (pending in the United States District Court for the Western District of Michigan). *MIPPA Brief*, p. 4.

2. Energy Michigan Reply

There is no compelling reason to address the impact of *the North American* case in this docket. This docket as noticed by the Commission involves a determination of the Supreme Court Opinion on the Commission's Retail Open Access decisions. The Commission did not notice, nor does it need to consider, the impact of the referenced US District Court case on those same programs. To the extent that the Commission desires such input it should issue a separate notice and opportunity for comment.

F. Issue 6: Impact of the Appeal of Retail Open Access Orders on This Docket

1. Summary of Comments

MPLP and Ada, the AG, and North American Natural Resources contend that MCR 7.208(8) prohibits the Commission from setting aside or amending its Orders in U-1 1290, et al because of the pending claim of appeal to the Michigan Court of

Appeals. *MPLP*, p. 1; *AG*, p. 5; *North American*, p. 1. These parties argue that further action may not be taken until the Court of Appeals remands these matters to the Commission for consideration of the impact of the Supreme Court Opinion.

2. Energy Michigan Reply

Energy Michigan believes that the Commission may proceed to implement the U-1 1290, et al Orders as issued because the Orders approved voluntary open access tariffs. Thus the Orders need not be set aside or amended because they comply with the ruling of the Supreme Court Opinion.

III. CONCLUSION AND PRAYER FOR RELIEF

A. Conclusion

The Supreme Court Opinion does not prevent the Michigan Public Service Commission from implementing a voluntarily filed open access program. The Commission may exercise its traditional enforcement powers regarding the filed tariffs and implementation plans. The Commission may sanction or prevent withdrawal of these open access programs by terminating benefits provided to the electric utilities under Orders U- 11726, U- 11453 and others. Parties to the U- 11726 and U- 11453 cases may enforce the terms agreed to by the utilities in the proceedings.

In view of the foregoing, the Supreme Court Opinion does not prevent the Commission from proceeding with its electric restructuring program.

B. Prayer for Relief

WHEREFORE Energy Michigan requests that the Commission issue an Order stating that:

1. The Commission has the authority to modify implement and enforce the Retail Open Access implementation plans and tariffs approved in U-1 1290, et al; and
2. Unilateral termination or withdrawal of open access programs by Detroit Edison or Consumers Energy can be prevented by enforcing the terms of the U- 11726 and U- 11290, et al Orders including termination and recapture of the benefits conferred on those utilities by the Orders discussed above.

Respectfully submitted,

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
Attorneys for Energy Michigan

August 10, 1999

By: *Eric J. Schneidewind*
Eric J. Schneidewind (P20037)
The Victor Center, Suite 8 10
201 N. Washington Square
Lansing, Michigan 48933
(5 17) 482-6237