VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
ATTORNEYS AT LAW

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

July 28, 1999

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

Re: Case No. U-l 1290. et al

Dear Ms. Wideman:

Enclosed for filing in the above captioned matter please find the original and 4 copies of Energy Michigan's Initial Brief. 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

Eric J. Schneidewind

EJS/mrr

cc: ALJ
parties

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-l 1290 electric utility industry	)))))	Case No. U-l 1290, et al

ENERGY MICHIGAN'S INITIAL BRIEF

I. INTRODUCTION AND SUMMARY OF POSITION

A. Introduction

On June 29, 1999 the Michigan Supreme Court issued a decision vacating the Order of the Michigan Public Service Commission (Commission) approving a retail wheeling experiment in Case Nos. U-10143 and U-10176 (the Supreme Court Opinion). On June 30, 1999 the Commission requested Briefs from any interested party concerning the effect of the Supreme Court's opinion on the Commission Orders in the above captioned cases. This Brief is filed in response to the Commission's request.

B. Summary of Position

The Michigan Supreme Court reviewed the statutory authority of the Commission and concluded that the Commission lacks statutory authority to Order a utility to transmit a third party provider's electricity through its [the utility's] system to a customer. *Supreme Court Opinion, p. 11 of 21.*[1]

[1] Page numbers refer to a copy of the Opinion as obtained from the ICLE Michigan Supreme Court web site.

The Court also noted 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 through a local utility's system, appellants do not challenge that aspect of the experimental program." *Id, p. 6 of 21, emphasis supplied.*

The above captioned U-l 1290 et al Orders including specifically Case U-l 1453 plus Case U-11726, have provided significant benefits to Consumers Energy and Detroit Edison. Consumers Energy has been granted the right to freeze its PSCR costs through 2001. Detroit Edison was granted accelerated depreciation for the Fermi 2 nuclear plant. The Commission has also held out the possibility that it will grant frozen base rates for both utilities. In return for these significiant financial concessions, Detroit Edison formally agreed to implement the MPSC Retail Open Access program and Consumers Energy has made formal statements on the record of Case U-l 1955 with the same position. More important, both Detroit Edison and Consumers Energy have voluntarily submitted Retail Open Access tariffs and implementation plans to the Commission for review and approval. This act of voluntarily filing open access tariffs, in effect submitted the open access programs to the jurisdiction of the Commission in compliance with the ruling of the Supreme Court because the Commission clearly has authority to modify, approve or reject rate filings which have been made on a voluntary basis.

There remains the issue of enforcement. The relevant rate making statutes give the MPSC full authority to enforce compliance with approved rates. Just as important, however, is the method by which the Commission will ensure that the filed open access programs remain in effect rather than being withdrawn at such time as utilities find the programs to be inconvenient or unacceptable.

Parties to the U-l 1290 and U-l 1726 cases have the legal ability to obtain court enforcement of compliance with what amounted to consent decrees whereby Consumers Energy and Detroit Edison agreed to file Retail Open Access implementation and tariff terms in return for financial benefits. The enforcement remedies would include terminating and recapturing the benefits which were the basis for inducing Detroit Edison and Consumers Energy to implement open access service in the first place. Also, the Commission could terminate accelerated depreciation for the Fermi plant

upon non-compliance by Detroit Edison. The PSCR clause could be reinstituted for Consumers under similar circumstances and any rate freeze which occurs in the future could be terminated as well. These enforcement tools give the Commission or the parties to the restructuring cases the ability to ensure that Detroit Edison and Consumers Energy comply with approved open access terms and conditions and do not withdraw these programs when it is expedient to do so.

II. LEGAL ANALYSIS

A. Holding of the Supreme Court

The Michigan Supreme Court has held that, "We conclude that the PSC lacks statutory authority to order a utility to transmit a third party provider's electricity through its system to a customer." *Supreme Court Opinion, p. 11 of 21.* The Court also stated, however, that, "Although retail wheeling; has a rate making; component i.e. the establishment of the rate a third party nrovider must pay to transmit power throunh a local utilitv's svstem. appellants do not challenge that aspect of the exnerimental 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." *Id, p. 6 of 21.* (Emphasis supplied)

Also, the Court Opinion repeatedly references the Union Carbide case to the effect that the State may regulate with a view to enforcing reasonable rates and charges but it may not exercise the general power of management incident to ownership. *Union Carbide v Michigan Public Service Commission; 431 Mich 13.5, 148-149, Supreme Court Opinion, p. 6 of 21.*

Thus, the Supreme Court Opinion stands for the proposition that the Michigan Public Service Commission cannot force utilities to implement a Retail Open Access program. Conversely, however, the Supreme Court Opinion may be read to hold that a Retail Open Access program voluntarily submitted by utility management can be reviewed and approved, disapproved or modified pursuant to the traditional rate making powers of the Commission.

B. Traditional Rate Making Authority of the Commission

PA 1919, No. 419 defined the jurisdiction of the Commission as extending to "...the control and regulation, including the fixing of rates and charges of all public utilities within this State producing, transmitting, delivering or furnishing steam for heating or power, or gas for heating or lighting purposes for the public use. Subject to the provisions of this Act the said Commission shall have the same measure of authority with reference to such utilities as is granted and conferred with respect to railroads and railroad companies under the various provisions of the statutes creating the Michigan Railroad Commission and defining its powers and duties." *MCL 460.54.*

The provisions of the Railroad Act (1909 PA No. 300) include broad authority for the Commission to require the filing of both imtial rates and rate revisions, a review of rates for justness and reasonableness and investigation by the Commission of both the reasonableness of rates and other matters. 462.10.

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.* This statutory authority may be used to revise existing tariffs submitted by utilities where the Commission investigation finds just cause. Id.

C. Conclusion: A Voluntarily Submitted Tariff or Implementation Plan for Open Access Service Is Subject to the Broad Rate Making and Enforcement Powers of the Commission

As described above, the appellants in the Supreme Court case conceded that tariffs specifying the rates, terms or conditions applicable to a third party provider who wishes to transmit power through a local utility system are subject to the authority to the Commission once filed by a utility. *Supreme Court Opinion, p. 6 of 21.*

The factual background of this case as discussed in III below demonstrates beyond all doubt

that Retail Open Access tariffs and implementation plans were submitted voluntarily to the jurisdiction of the Commission by Detroit Edison and Consumers Energy. Moreover, those utilities specifically accepted rulings of the Commission modifying their rates and evidenced their acceptance by filing the modified rates as their own on March 22, 1999.

Once filed, the open access tariffs and rates became subject to the enforcement powers of the Commission which are applicable to any rates that are approved under the Commission's jurisdiction.

III. THE CONSENT ORDERS WHICH CREATED OPEN ACCESS SERVICE

Over the past two years the Commission has issued a series of Orders which, together with utility responses, have achieved a series of consent orders in which implementation of open access service was conceded by Consumers Energy and Detroit Edison and certain decisions advantageous to those utilities were Ordered by the Commission. Collectively these Orders as described below constitute a series of consent orders which are binding upon the Commission, Detroit Edison and Consumers Energy.

A. Commission Orders U-l 1451 and U-l 1452 Implemented Retail Open Access tariffs for Detroit Edison and Consumers Energy

In Cases U-l 145 1 and U-l 1452 the Commission reviewed the rates and conditions of open access service which were proposed by Consumers Energy and Detroit Edison. The Commission concluded its review by Ordering that the tariffs attached to its Order for both utilities would be approved if they were submitted by both Detroit Edison and Consumers Energy in conformity with the Commission Order within 14 days. *March 8, 1999, p.* 5.5. On March 22.1999 both Consumers Energy and Detroit Edison did. in fact. file tariffs in conformity with the Commission's Order. The Commission also approved the implementation plans for Retail Open Access filed by Consumers Energy and Detroit Edison as modified by its Order. Id.

B. Revision of Consumers Energy PSCR Clause and Frozen Base Rates

In docket U-l 1453 the Commission considered a proposal to freeze the Consumers Energy PSCR clause when certain conditions were met including implementation of open access programs for 5% of the Consumers load. U-11453, October 29, ***1997, p.*** 12. In subsequent Orders which reconsidered and revised this Order, the Commission amended its position somewhat and finally issued an Order adopting a position offered by Consumers Energy which suspended the Consumers PSCR clause effective January 1998 and ordered a PSCR freeze through 2001 at such time as Consumers initiated 150 MW of Retail Open Access service. Case ***U-11290, et al, February 11, 1998, p. 11.***

The Commission also promised to consider a rate freeze for Consumers Energy and Detroit Edison at such time as the pending ABATE Rate Reduction Complaint regarding those companies had been heard. *Id,* ***p. 9.***

Thus, Consumers Energy was allowed to freeze its PSCR clause through 2001 in return for an agreement to implement at least 150 MW of open access service. The initial frozen PSCR factor has been effective since January 1998 in the form proposed by Consumers Energy.

C. The Case U-l 1954, the True-Up Process

Pursuant to schedules agreed to bv all parties, Detroit Edison and Consumers Energy filed their true-up cases in two separate phases. Phase 1 tilings occurred on June 4, 1999 and covered utility claims for reimbursement of implementation costs associated with open access. Phase 2 filings will occur August 20, 1999 covering longer term true-up processes and procedures.

In a hearing on a Motion in the U-l 1955 and U-l 1956 dockets, both Consumers Energy and Detroit Edison committed that they would proceed with implementation of open access programs.

3 *Tr-72, id* 73. Consumers Energy's counsel declared, "That Supreme Court decision doesn't change Consumers Energy's willingness to proceed with implementation and we're doing just that on the same basis as we were prior to the Supreme Court decision and with the same understandings of those Orders that we had prior to the Supreme Court decision." *Tr* 72. The Detroit Edison counsel stated on the record that, ". ..it is my understanding that Detroit Edison intends to proceed with the Commission's retail access programs on a voluntary basis." *Tr 73.*

D. The Fermi 2 Accelerated Depreciation Request

In Case U-l 1726 Detroit Edison requested that the Commission approve accelerated depreciation for the Fermi 2 nuclear plant which would allow full recovery of the utility's investment in the plant by December 31, 2007. On December 28, 1998 the Commission issued an Order approving the accelerated amortization request provided that Detroit Edison agree to six conditions including "(5) the utility must agree to abide by the open access programs set forth in Commission Orders". Case U-11 726, *March 8, p.* 2. On January 15, 1999 Detroit Edison filed a statement specifically accepting condition (5). On March 8, 1999 the Commission found that the Detroit Edison January 15, 1999 acceptance complied with the conditions of the December 28, 1998 Order. *Id., p. 22.*

E. Conclusion: Consumers Energy and Detroit Edison Have Entered Into a Series Consent Orders to Implement Retail Open Access Programs

The above list of decisions and Orders of the Commission collectively produce the frame work of a series of Consent Orders between the Commission on the one hand and Consumers Energy and Detroit Edison individually on the other hand. The broad outline of the Consent Orders are as follows:

1. Detroit Edison and Consumers agreed to implement the open access program as developed in the Commission Orders in this matter and have evidenced that compliance by submission

of open access implementation plans and specific tariffs to the jurisdiction of the Commission for review, approval and/or modification. The Commission reviewed these documents and ordered specific modifications. The utilities accepted these modifications by filing conforming tariffs with the Commission on March 22, 1998. For all intents and purposes the utilities have placed open access issues within the routine, accepted rate making and approval frame work specified in the Railroad Act and the Public Service Commission Act by initiating the open access program and accepting Commission modification of their submitted filings.

2. In return for acceptance and voluntary implementation of open access, Detroit Edison received approval in Case U-l 1726 to collect customer funds which would allow accelerated recovery of Fermi nuclear plant investment. Consumers Energy received approval to freeze its power supply costs through 2001 at levels which do not necessarily reflect costs. Both utilities are currently receiving these benefits approved by the Commission.

In broad form, a series of Orders were issued by the Commission, accepted by Edison and Consumers and were implemented by the utilities on a voluntary basis. This process represents a voluntary decision by utility management rather than a mandate of the Commission.

IV. UTILITIES MAY NOT WITHDRAW RETAIL OPEN ACCESS SERVICE WITHOUT FORFEITING THE BENEFITS THAT INDUCED THEM TO ACCEPT OPEN ACCESS

The discussion in II demonstrates that the Commission can modify and enforce a Retail Open Access tariff which has been submitted to its jurisdiction. The discussion does not deal with the contingency of a utility withdrawing or terminating that service offering.

A. A Withdrawal or Termination of Open Access Service Would Clearly Break the Commitments of Detroit Edison and Consumers Energy

1. Detroit Edison

Detroit Edison agreed to implement the Commission's Retail Open Access program as part of its filing in Case U-l 1726 described above. That commitment was to implement the Commission open access program as described in its previous Orders which contemplate a term of service through 2007. There can be no doubt whatsoever that a withdrawal of Retail Open Access service or termination of the program prior to an Order of the Commission would break the commitment of Detroit Edison which was the basis for the grant of accelerated depreciation for the Fermi 2 plant.

2. Consumers Energy

In return for its commitment to implement open access programs, Consumers Energy received benefits from the Commission in the form of a termination of its PSCR clause and a freeze of its PSCR factor at the exact levels proposed by Consumers in Case U-l 1453. Termination or withdrawal of the ROA program without Commission permission would clearly break the terms of the commitment made in Consumers' own proposal in U-l 1453 which was accepted in its entirety.

B. If a Utility Breaks Commitments Made in the Context of a Consent Order, the Terms of That Consent Order May Be Enforced

The MPSC has an enforcement mechanism to ensure that the utility commitments to implement open access are not unilaterally withdrawn: termination and recapture of benefits granted as part of the "bargains" entered into by the utilities.

The Administrative Procedures Act provides that a contested case may be disposed of by stipulation, settlement agreement or consent order, unless precluded by law. *MCL 24.278*. Moreover, such a settlement or consent order of a contested case may be approved by the

administrative agency in spite of the fact that some parties, including intervenors, do not agree with the terms of the settlement or consent order. *2 Am Jur 2d, Administrative Law, §301 (1994).* The present circumstance involves consent orders, agreed to by the PSC as well as both Detroit Edison and Consumers.

1. Detroit Edison Consent

Detroit Edison petitioned the PSC for permission to amortize depreciation of its nuclear power plant over a significantly shorter term than its previously approved 35 year period. The PSC agreed to permit such a change only on several specified conditions, one of which is that Detroit Edison would agree to implement the PSC's plan for competition.

Detroit Edison agreed, on the record, to comply with all the PSC conditions to granting its petition. Where a party is present when the terms of the settlement agreement or consent order are read in open court and no objections are raised, it is presumed that all terms of the consent order met with the party's approval. *Michigan Bell v Sfat, 177 Mich App 506,* 513 (1989). A consent made in open court by either the parties or their counsel is binding on *the* parties. *Id. at 515, citing MCR 2.507(H).* After so agreeing in open court, a party cannot refuse to sign the order memorializing such a consent absent "mistake, fraud, or unconscionable advantage which would justify settling aside the [consent order] ." *Id.*

2. Consumers Energy Consent

IN Case U-l 1453 Consumers presented a complete proposal to implement a frozen PSCR clause and implement concurrently the Commission open access program. U-l 1290, *et al, February 11, 1998, p.* 9. The Commission approved the Consumers proposal in its entirety on February 11, 1998. Consumers has evidenced its acceptance of this Order by implementing the frozen PSCR plan and submitting open access tariffs to the jurisdiction of the Commission.

Moreover, a party is precluded from arguing that a provision of the consent order violated a statute because "[b]y agreeing to the terms of the consent..., defendant cannot challenge it on appeal." *Id.* Thus, whether the PSC would be permitted, under current law, to force such actions on Detroit Edison or Consumers Energy is irrelevant. These were simply consent orders, which involved a quid pro quo between the parties and the PSC. Detroit Edison and Consumers Energy agreed to the conditions and they cannot now be heard to challenge those conditions.

The principle of *Sfat* that the terms of a consent cannot be challenged on appeal comports with the description of the Michigan Supreme Court's unequivocal statement in *Dana Corp v Employment Security Comm 'n, 3 71 Mich 107, 11 0 (1963):*

> To the bench, the bar, and administrative agencies, be it known herefrom that the practice of submission of questions to any adjudicating forum, judicial or quasijudicial on stipulation of fact, is praiseworthy in proper cases. It eliminates costly and time-consuming hearings. It narrows and delineates issues. But once stipulations have been received and approved they are sacrosanct. Neither a hearing officer nor a judge may thereafter alter them.
>
> If this be true of a simple stipulation of fact, it is all the more true of a condition agreed to in a consent judgment.
>
> The trial judge was powerless to alter the plain unambiguous terms of the proviso. *Shahan v Shahan, 74 Mich App 621, 623 (1977); see also Kline v Kline, 92 Mich App 62, 79 (19 79).*

Not only is a party to the consent order precluded from challenging its terms on appeal, the courts may not alter the terms of the consent order. Detroit Edison and Consumers Energy agreed to several very specific conditions in their consent orders in exchange for substantial benefits. Not only are the conditions unalterable on appeal, they are enforceable by all parties to the consent order.

After a consent order has been entered, it, like any other judgment or decree, cannot be collaterally attacked. So long as it is the judgment or order of a court of competent jurisdiction, collateral attack is not permitted. *Dunlap v City of Southfield, 54 Mich App 398,* 401 (1974). In fact, if the court has jurisdiction over the parties and the subject matter, "no one can question its force and effect as terminating the particular litigation and doing so, with finality. * * * it is immaterial that the adjudication was unjust, * * * mistaken, or excessive." *Id.(internal quotation marks omitted.)* This rule applies to any and all judgments, including those by consent. *Id.* By their petition for approval of open access tariffs, Detroit Edison and Consumers Energy submitted to the jurisdiction of the PSC. The PSC may modify these petitions and it may also issue a consent order to resolve a contested case. The conditions or modifications may come from other parties or the PSC itself. Once the order becomes final, that is, once the time for appeal has passed, no valid argument exists that it is not enforceable, even if a court would have found the PSC without authority to implement such a plan of its own accord.

After a consent order becomes final, seeking enforcement of a consent order is logically left to the parties. That is, if one party does not comply with the terms of the order, the other(s) will likely seek court intervention to enforce the terms of the consent order. In some circumstances, the administrative agency itself seeks enforcement of its order, whether it was a consent order or otherwise. In such cases, there are usually no other parties to the original action. For example, the Air Pollution Control Commission and the Water Resource Commission entered into a consent agreement with an incineration company requiring the company to install pollution control equipment at its facilities. *Berlin & Farro v DNR, 80 Mich App* 490, 492 (1978). On finding the company in violation of the consent order, administrative proceedings were undertaken seeking enforcement of that order. *Id.* Both statutes governing the APCC and the WRC specifically authorized the pursuit of further administrative action after a consent agreement was violated. *Id. at 496*

However, the present circumstance is different for two reasons. First, enforcement

in this case would not involve further administrative action; it would be the same type of enforcement that any party to a consent order, a settlement agreement, or any other "contract" is entitled to: court enforcement of the terms of the agreement.

Second, it is not the administrative body itself that would be seeking enforcement of its order; it would be one or more of the parties to the consent order, which is the normal course of action when a party to a consent order does not comply with its terms. In *Attorney General v LS Wood Preserving, Inc*, *199 Mich App* 149, *151 (1993)*, the Water Resources Commission and the Department of Natural Resources entered into a consent order with the defendant. The plaintiffs, on discovering the defendant's failure to comply with that order, filed a complaint for injunctive relief The Court of Appeals, reversing the trial court, ordered enforcement of the consent order, which included the implementation of a remedial action plan. *Id.* Thus, the avenue of court enforcement was open to this particular administrative body, however, it was an actual party (the only other party) to the consent order. In the present case, there are several parties, any of whom could seek enforcement of the consent orders.

C. Detroit Edison and Consumers Energy Must Clarify Their Position On Unilateral Termination of Open Access Programs

Consumers Energy and Detroit Edison should declare on the record their agreement that they may not terminate or withdraw ROA programs from the jurisdiction of the Commission without also subjecting themselves to enforcement sanctions including forfeiture of the benefits that they have received from the Commission in return for ROA implementation.

In Case U-l 1955 and U-l 1956 the MPSC Staff filed a Motion which was intended to ask the question: Should open access go forward in the light of uncertainty created by the Supreme Court decision?

Consumers Energy through its attorney stated that the Supreme Court decision did not change Consumers Energy's willingness to proceed with implementation. Counsel Jon Robinson also stated that, "By the end of 1998, Consumers had spent over $20 million with the understanding that the money would be recoverable in some sort of reasonably prompt way and were continuing to incur some significant expenses in 1999 with the same understanding. So anv action in this case that nuts in ieonardv the recovery of those exnenses or that undulv delavs recovery of those exnense I think is an inappropriate action." 3 *Tr 72*.

Consumers Energy, Detroit Edison and the Michigan Public Service Commission should understand that third party suppliers under the Retail Open Access program are in much the same position. These providers are expending significant sums of money to prepare to render service under the open access program. Billing, metering and administrative systems are being designed and installed. Marketing efforts are commencing as is the process for obtaining required governmental approvals. It is clear that utilities will not attempt to terminate or withdraw ROA service unless it is in their financial interest to do so. However, a utility evaluation of the desirability of continuing ROA service is unlikely to give significant weight to the financial impact on the third party supplier community. This supplier community also needs a form of certainty which can be provided by Consumers Energy and Detroit Edison. Consumers Energy and Detroit Edison should use the Reply Brief phase of this process to confirm that:

1. Their submission of open access tariffs and implementation plans to the Commission and acceptance of benefits from the Commission created a form of consent order which has conferred jurisdiction on the Commission to revise and enforce Retail Open Access tariffs until the Commission decides otherwise.

2. That unilateral termination or withdrawal of open access service by either utility would be grounds for enforcement of the Orders which comprise the consent process and that such enforcement could include termination and recapture of the benefits conferred on those utilities by the Commission in the Orders discussed above.

In return for a clear and unambiguous statement of agreement with these principals the utilities, customers and the third party supplier community have a right to expect that the Commission will issue a clear and unambiguous statement that it will enforce open access programs consistent with the clarifications provided in these pleadings.

V. PRAYER FOR RELIEF

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

1. The Commission has the authority to modify and enforce the Retail Open Access implementation plans and tariffs filed by Consumers Energy and Detroit Edison; and

2. Unilateral termination or withdrawal of open access programs by Detroit Edison or Consumers Energy may be prevented by enforcing the terms of the 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

July 28, 1999 By: Eric J. Schneidewind

Eric J. Schneidewind (P20037)
201 N. Washington Square, Suite 810
Lansing, Michigan 48933
(5 17 482-6237