

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the approval)
of a Code of Conduct for)
CONSUMERS ENERGY)
COMPANY and the DETROIT)
EDISON COMPANY)
_____)

File No. U-12134

INITIAL BRIEF OF ENERGY MICHIGAN

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I. Introduction and Summary of Position

A. Introduction

On September 14, 1999 the Michigan Public Service Commission (Commission) ordered that a proceeding be initiated for the purpose of determining what modifications, if any, should be made to the existing Codes of Conduct for Consumers Energy and Detroit Edison Company which were approved in connection with the Retail Open Access service program. *Opinion and Order of the Commission, September 14, 1999, Case U-12134.* On March 27 and 28, 2000 witnesses representing parties in this case were subjected to cross examination or their testimony was bound into the record without cross examination. Included in those materials bound into the record was the testimony of Roy Boston on behalf of Energy Michigan, Inc. (Energy Michigan).

On June 19, 2000 the Commission Ordered new proceedings in this matter to allow consideration of the impact of 141 PA 2000.

This brief is submitted on behalf of Energy Michigan by Varnum, Riddering, Schmidt & HowlettLLP.

B. Summary of Position

2000 PA 141 (Act 141) requires the Commission to adopt a Code of Conduct which includes, but is not limited to, measures to prevent cross subsidization, information sharing and preferential treatment between an electric utility's regulated and unregulated services, whether provided by the utility or its affiliates. *Act 141 Sec. 10a(4)*. Enforcement powers were provided at Section 10c of PA 141.

The existing Consumers Energy Company (Consumers Energy) and Detroit Edison Company (Detroit Edison) Codes of Conduct approved by the Commission in connection with their respective Retail Open Access programs are inadequate to prevent cross subsidization, information sharing or preferential treatment. The current Codes of Conduct for Consumers and Detroit Edison are completely devoid of any specific criteria for pricing of goods and services provided by parent to affiliate and vice versa. The existing Codes have no structural separation requirement which would create a legal structure that would enable a regulator to detect violations of cross subsidy and pricing standards. Worst of all, the existing codes contain no penalties or enforcement mechanisms which would provide financial deterrents to the current pattern of repeated violations accompanied by promises to "do better the next time" when the violations are detected. In short, the existing Codes do not comply with the mandates of 2000 PA 141.

The Staff mark ups of existing Consumers and Edison Codes of Conduct are a significant improvement when compared to the status quo. The Staff mark ups are based upon existing Codes, but correctly remove unenforceable terms like "undue", "unduly", "to the extent practical", etc. and appropriately extend and sharpen prohibitions against discrimination so that all utility services are covered and affiliates are required to achieve a minimal level of separation from the parent. Edison and Consumers are prohibited from participating in open access

programs as regulated utilities so that a minimal separation of regulated and unregulated activities is achieved.

Incorporation of the Staff's proposed penalties for violations is no longer critical in view of Act 141 Section 10c which specifies penalties for violation of Act 141 including the new Code of Conduct established pursuant to Act 141 Sec.10a(4).

Staff's Proposed New Code of Conduct Is Needed

The Staff mark up of existing Codes of Conduct cannot address some of the more fundamental reforms necessary to both limit and enforce limitations on utility behavior which would constitute an exercise of market power. The most important tools in the prevention of an exercise of market power are strict standards for the pricing of services between the utility and utility affiliate such as those adopted by the Commission in U-11916 (June 2, 2000, p. 10), strict prohibitions against information sharing, prohibitions against discrimination directed to non-affiliated entities, and structural changes which allow the Commission to enforce the prohibitions. These critical tools cannot be used in the context of the current utility Codes of Conduct or the Staff mark up of those Codes.

Structural and legal and physical separation of utilities and utility affiliates is necessary to enforce pricing standards between parent and affiliate and prohibitions against information sharing. Without structural separation the policing task of the Staff becomes impossible. Tracking the transfer and use of employees shared by parent and unseparated subsidiary is difficult or impossible. Structural and legal separation creates both the appearance and the reality of completely separate business entities and will deprive the affiliate of an unfair market advantage.

Finally, appropriate pricing standards for the transfer of goods and services between parent and subsidiary allow the economies of scope and scale to be captured by the parent in its pricing of goods and services provided to the affiliate at the higher of market price or cost of service.

For these reasons Energy Michigan supports the Staff's proposed new Code of Conduct with the minor changes discussed above.

New and tighter standards for a Code of Conduct, a structural framework which will enable standards to be detected and enforced coupled with the new framework of penalties in 2000 PA 141 are all needed to ensure the success of competition between existing utilities and new competitors.

II. The Impact of 2000 PA 141

On June 5, 2000, PA 141 became effective. Sec.10a(4) provides that “Within 180 days after the effective date of the amendatory act that added this section, the Commission shall establish a Code of Conduct that shall apply to all electric utilities. The Code of Conduct shall include, but is not limited to, measures to prevent cross subsidization, information sharing, and preferential treatment between a utility’s regulated and unregulated services, whether those services are provided by the utility or the utility’s affiliated entities. The Code of Conduct established under this subsection shall also be applicable to electric utilities and Alternate Electric Suppliers consistent with Section 10, this section and Sections 10b through 10bb.”

PA 141 uses the definition of “electric utility” contained in Section 2 of the Electric Transmission Line Certification Act 1995 PA 30 MCL 460.562 and MCL 460.1 through 460.8 the Public Service Commission Act PA 141 Sec.10g(c). These laws apply to Michigan jurisdictional electric utilities which physically deliver electricity to retail customers.

Finally, the coverage and scope of the Code of Conduct discussed above “is not limited to” measures to prevent cross subsidization, information sharing and preferential treatment. *See Sec. 10a(4)*. Thus, other Code measures which are required by and consistent with PA 141 are authorized.

It is clear that Sec.10a(4) requires that the Code in this case apply to Michigan jurisdictional electric utilities. It is also clear that the new Code must prohibit cross subsidization, information sharing and preferential treatment between a Michigan jurisdictional electric utility’s regulated and unregulated services if those unregulated services are rendered by the Michigan jurisdictional electric utility. The prohibitions also cover activities between the Michigan jurisdictional electric utility’s regulated services and unregulated services rendered by any of the utility’s affiliated entities.

Finally, the last sentence of Sec.10a(4) gives the Commission the authority to apply the promulgated Code to either a Michigan jurisdictional electric utility or an Alternate Electric Supplier which has violated the prohibitions set forth above relating to cross subsidization, information sharing and preferential treatment between a Michigan jurisdictional electric utility and its affiliates or any prohibition relating to an Alternate Electric Supplier that the Commission decides to include in the Code.

III. The Existing Consumers and Detroit Edison Codes of Conduct Are Inadequate

The testimony of several witnesses in this proceeding demonstrates that the current Codes of Conduct for Consumers Energy and Detroit Edison are inadequate and ineffective.

A. Margaret Roberts VanHaften

MPSC Staff member Margaret Roberts VanHaften was the lead witness supporting new Code of Conduct proposals. Ms. VanHaften commenced her testimony by demonstrating that the existing Codes of Conduct for Consumers

Energy and Detroit Edison are totally inadequate. Among the deficiencies of these Codes which she described were:

1. The first paragraph of the current Consumers Energy Code of Conduct inappropriately allows the utility itself to participate in Retail Open Access sales, thus eliminating any separation between regulated and unregulated activities. Consumers' use of "first tier" and "second tier" designations in their Code allows this inappropriate structure. *6 T 407-08.*
2. Section A of the current Consumers Code of Conduct is unclear as to whether it applies to affiliates of the utility itself or to affiliates of the parent company of the utility. *Id, 408.*
3. The current Codes of Conduct do not require that employees of regulated and affiliated entities which offer competitive service be separated, have separate business offices or even separate books and records. Without such separation, it would be difficult or impossible to enforce various Code requirements including non-discrimination, preferential pricing, information sharing, etc. *Id, 409-410.*
4. The Consumers Code of Conduct contains frequent use of vague terms such as "undue", "unduly" and "to the extent practical" to modify requirements throughout the text. These terms are so vague as to preclude effective interpretation much less enforcement. *Id., 411.*
5. Section C of the existing Codes should extend non-discrimination language to all utility services, not just listed services. There should be no preference to affiliates or their customers. *Id., 411-12.*
6. Section D does not prohibit preference to affiliates. *Id, 412.*

7. Section F should be modified to require that names of all PSC approved power marketers be given to customers. *Id.*, 412.
8. The Section G of the existing Code is unclear regarding who can request and obtain usage data. *Id.*, 412-13.
9. Finally, there is no penalty provision in the existing Codes of Conduct which allows effective enforcement or creates an effective deterrent to non-compliance.

B. William J. Celio

Mr. Celio's initial testimony recommended new enforcement mechanisms for Codes of Conduct. In supplemental testimony filed July 27, 2000, Mr. Celio stated that 200 PA 141 enforcement mechanisms were sufficient.

C. Maurice Brubaker

ABATE witness Maurice Brubaker testified that an effective Code of Conduct must prohibit subsidies, mandate non-discriminatory treatment of all competitors and allow all competitors to obtain equal access to essential facilities. *6 T 478-79*. Based upon these criteria, it was Mr. Brubaker's opinion that the existing utility Codes of Conduct were not only very limited but also were extremely vague in general. Mr. Brubaker testified that the existing Codes were couched in broad terms, tended to express the intended end result but didn't provide any specific guidance with respect to how to achieve that result including recommendations or requirements regarding separation of employees, facilities, information transfer or costing. *Id.*, 480.

Mr. Brubaker concluded that the existing Codes of Conduct for Detroit Edison and Consumers Energy would not be enforceable because of their vagueness and

that they would therefore impede development of competitive markets in Michigan. *Id.*, p. 480.

D. Douglas Oglesby

PG&E Energy Services witness Douglas Oglesby testified that the goals of an effective Code of Conduct could only be achieved “through rules that require all competitive services to be provided through companies that are legally and functionally separate from the utility.” 6 T 495. Mr. Oglesby also testified that strengthened monitoring and clarification of terms were required for an effective Code. *Id.*, 497. These positions are an implicit criticism of existing Codes because the Consumers Energy and Detroit Edison Codes do not incorporate such requirements or terms.

E. Conclusion

A series of witnesses have described the deficiencies of the existing, provisional Consumers Energy and Detroit Edison Codes of Conduct. The Commission approved these provisional Codes but ordered that contested case proceedings be held to determine what modifications should be utilized to produce satisfactory, permanent, Codes of Conduct. *U-12134, September 14, 1999.*

In summary, the existing Codes do not specifically prohibit participation by regulated utilities directly in competitive activities and do not contain prohibitions against parent company market power abuses. The existing Codes contain extremely vague language which would be impossible to enforce and appear to limit prohibitions to various listed services rather than all services. The existing Codes of Conduct do not contain structural requirements such as physical and legal separation which would enable a regulatory agency to effectively enforce prohibitions against information sharing, discrimination or cross subsidized pricing. Given these deficiencies, the existing Codes do not comply with the

mandates to PA 141 Sec 10a(4) to prevent cross subsidization, information sharing and preferential treatment.

Any Codes which incorporate all these deficiencies are worse than no Code at all because they tend to provide the appearance of State regulatory supervision as opposed to the reality that utility activities can be highly abusive and are currently subject to no realistic restriction or enforcement.

IV. The Staff Mark Up of the Provisional Codes of Conduct Is Preferable to the Existing Codes

A. The VanHaften Mark Up of Existing Codes of Conduct

Ms. VanHaften's proposed revisions to the existing provisional Codes of Conduct represent a significant improvement which should be adopted if the Commission will not adopt the Staff's proposed new Code presented as Exhibit S-16. Energy Michigan supports the following recommendations of Ms. VanHaften:

1. Section A of both Edison's and Consumers' provisional Codes should be revised to make the Code of Conduct provisions applicable to affiliates of a utility and affiliates of the parent holding company, if any, because the current Codes, particularly for Consumers, do not necessarily apply to parental affiliates. *6 T 407-08*. See II above.
2. Sections B, C, and H of both the Consumers' and Detroit Edison provisional Codes use language which is "conditional" and leaves too much room for interpretation of the likelihood of discriminatory behavior. The recommended changes should be adopted to remove words such as "undue", "unduly" and "to the extent practical" from the Codes of Conduct. *6 T 411*.

3. Section C of the provisional Codes allegedly prevents utilities from giving preferences but only makes the prohibitions applicable to named, specified services. It is likely that the mention of specific services by implication excludes others from these prohibitions. Energy Michigan agrees with the Staff's proposal that listing of covered services be eliminated and the Codes for Consumers and Detroit Edison contain language stating, as can be inferred from 2000 PA 141, that the utilities shall not give preference to affiliates or their customers in any manner. *6 T 411-12*.
4. Energy Michigan supports the Staff's recommendation that Section D of the provisional Code contain additional language to clarify that the utility will not communicate to customer, aggregator, broker, etc. that any advantages accrue to them in the utilities regulated services if they choose an affiliated, aggregator, broker, marketer, etc. *6 T 412*.
5. Section F of the provisional Code should be changed as recommended by Staff to require that a utility will provide customers with names of all entities authorized by the MPSC to provide electric service in Michigan as a potential list of providers. *6 T 412*. Energy Michigan agrees that this is a much more clear definition of the providers to be included on any list provided.
6. The language in Section G of the provisional Code could easily be misunderstood or misconstrued. *6 T 412*. The type of information to be provided needs to be spelled out more clearly as discussed by witness VanHaften. *6 T 412*. This goal could be accomplished if Section G is revised to require historic usage or billing data and identifies the person or entities which can request customer information and under what circumstances it should be provided. *6 T 412-13*.

7. Section L should be revised as proposed by Staff to require that documentation demonstrating compliance be kept by covered entities and available for Staff review. A detailed dispute resolution process needs to be specified and clearly be accompanied with the substantial penalties contained in PA 141 Sec.10c. *S 14, p. 4-5 of 5, 6 T 413; also S-17.*

Collectively, these changes would improve the existing provisional Codes although the recommendations are not as effective as the proposed new Code described in Exhibit S 16.

V. While The Staff Mark Up of Existing Utility Codes Is An Improvement, Stronger Measures Are Required And Are Authorized by 2000 PA 141

Several witnesses have testified that adoption of the Staff mark up of the provisional Codes would improve the status quo but that a totally new, stronger Code is required.

A. MPSC Staff Witness Margaret Roberts VanHaften Supported a New Code of Conduct

Staff witness VanHaften testified that even a marked up version of the provisional standards of conduct did not deal at all with either the relationship between the utility and alternate suppliers, or oversight enforcement and penalties for violations of the standards. Staff believes “Provisions dealing with these issues as well as added provisions dealing with separation, discrimination and information not covered in the provisional standards of conduct are essential components of an effective Code of Conduct.” *6 T 414.*

Ms. VanHaften proposed that additional issues be covered by a brand new Code of Conduct and supported those proposals as follows:

1. Applicability (Sec. I)

Unlike the utility provisional Codes, Staff's proposed new Code of Conduct applies to Consumers Energy and Detroit Edison in their relationships with their affiliates and the affiliates of their parent companies. The utility Codes can be read to apply only to affiliates of the utility but not necessarily to the affiliates of the parent. *6 T 408*. Ms. Van Haften's position is supported by PA 141, Sec.10a(4).

2. Separation (Sec. II)

Regulated and competitive activities should be legally separated because in a competitive market all participants, including those not affiliated with the utility, must have equivalent and nondiscriminatory access to the utilities' monopoly facilities. *6 T 416*.

Structural and physical separation provide clear boundaries between regulated and competitive activities which enable regulators and others to more effectively track the transactions between regulated and unregulated entities. *Id.* With structural and physical separation, Staff of the Commission can track and prevent cross subsidization by regulated utilities or unregulated activities. Note that the quality of regulated services would not be reduced because regulated utility revenues would not be funding competitive activities. *6 T 417*. Competitive affiliates with an independent board of directors as well as separate facilities, equipment and employees often have less opportunity for the utility to provide the subsidiary with resources and there is clearer documentation of transactions between utility and affiliate. *Id.*

Functional separation does not provide the same degree of security from anti-competitive behavior. While functional separation may require separate facilities, equipment and employees and books and records, it is

still much more difficult to track the formal and informal transactions between regulated and competitive entities than if full legal separation is utilized. *6 T 418*. These Staff conclusions support II. A., B., G., K. and L. of the Staff Code of Conduct proposed in Exhibit S-16. Staff also believes that the separation provisions should be combined with a provision requiring separation of books and records. *See Staff proposed Code, Section II.C., S-16*.

Staff also recommends a prohibition of sharing facilities, equipment or services because such sharing can result in cost shifting or cross subsidization and sharing of proprietary information. These issues are addressed in II.D. of the proposed Code S-16.

Staff recommends adoption of II. E. and F. of the recommended Code because people, including members of the board of directors, officers and employees, should not be shared by the utility and its affiliates which provide competitive services or products. *6 T 419*. These issues are addressed in provisions II. E. and F. of the recommended Code.

Section II. H. of the recommended Code allows employee transfers between utility and affiliate but requires appropriate documentation.

Sections II. I. through L. of the proposed Code are needed to address separation of regulated and competitive activities including joint advertising and prevention of tying arrangements. *6 T 419, S-16*.

3. Discrimination (Sec. III)

Staff has testified that further protections are needed to help prevent discriminatory behavior by the utility in favor of its affiliates or against non-affiliates. *T. 419*. Section III. A. and D. prevent preferential

treatment as do the existing provisional Codes. *T 420*. Additional Sections III.B. and particularly III.C. are absolutely critical to ensure that utility affiliates or their customers do not receive goods, services, products or property from a regulated entity at a subsidized price. III.C. in particular requires that an affiliate receiving services, products or properties from the utility must pay the higher of fully allocated cost or market price. *T 420*. This provision is absolutely necessary that regulated utilities, and more importantly their customers, receive full and fair compensation for all goods and services provided to an affiliated entity. This provision alone can prevent the majority of mischief and economic damage created by unfair utility affiliate competition. If utilities provide goods or services to affiliates at prices below cost or market value, it is the utility customer who is hurt. Utility revenues are traditionally used to offset costs or expenses. The higher the levels of revenues the greater the offset and the lower the amount of projected rate increase or the larger the amount of decrease that can be justified. Conversely, if utilities provide goods and services to affiliates at prices below cost or market, the reduced levels of revenue may in fact be responsible for utility rate increases to captive customers. The Commission has adopted this position in the affiliate transaction Case U-11916, May 3, 2000, at page 10.

Looking at the reverse side of the picture, if a utility receives goods and services at a below market price, its competitors are handicapped and have no realistic chance to compete fairly against the utility affiliate. Accurate pricing of goods and services provided by a utility to its affiliate can ensure fair treatment to the utility's captive customers, prevent unfair competition and still preserve, to the captive customers of the utility, the advantages of scope and scale associated with the utility.

Sections III. A. and D. of the proposed new Code are only a part of the protections needed to prevent discriminatory behavior by the utility in

favor of its affiliates or against non-affiliates. *T 419-20*. Ms. VanHaften also recommended adding provisions to their new Code to deal with specific types of discriminatory behavior including the grant of discounts and special considerations as addressed in III. B. of the recommended Code. Also, Section III. C. of the recommended Code will prevent financial subsidization of competitive activities when a utility provides services, products and property to affiliates. This purpose is accomplished by requiring that these transfers shall be compensated at the higher of market price or cost of service. *T 420*.

Section III. E. of the recommended Code is needed to prohibit provision of information or consulting services to the affiliate by the regulated utility. *T 421*.

Section III. F. is needed to prevent the utility from pointing potential customers toward affiliates in their role as transmission and distribution provider. *Id.*

4. Disclosure of Information

Information sharing between a utility's regulated and unregulated operation is prohibited by PA 141, 10a(4). Staff's Sec. IV. Disclosure of Information is organized to ensure that the five basic types of information, which if shared by the utility only with an affiliate, would provide that affiliate with a competitive advantage, are made available to all competitors on an equivalent basis. *T 421*. Staff has shown how customer data such as names and addresses (IV.A.), customer billing data (IV.B.), non-customer specific aggregated data (IV.C.), information regarding the distribution system and future plans to expand that system (IV.D.) and provision of alternate electric supplier information to affiliated competitors (IV.E.) can prevent or harm competition. *T 421-23*. The Staff

prohibitions contained in IV. prohibit inappropriate use of this information which could fatally handicap non-affiliated competitors to affiliated utility entities.

Sections IV. A., B., C., D., and E. are proposed to prevent sharing of five types of information between utility and affiliate without providing equal access to the information to competitors. These provisions are needed to cover information relating customers names and addresses, customers usage and billing data, aggregate customer data, information regarding the transmission and distribution system and information relating to customer switching, etc. *6 T 421-23.*

5. Utility – Alternate Supplier Relationship (Sec. V)

The Staff has also proposed provisions in Section V which are needed to prevent a utility from giving the appearance that it speaks on behalf of any alternate supplier or interfering with contractual relationships between suppliers and customers. *6 T 423.*

6. Compliance Plans (Sec. VI)

Staff proposed Section VI creates a mechanism whereby the compliance of utilities with the proposed Code can be accomplished and policed efficiently. Staff achieves this purpose by designating a corporate officer of the utility to oversee and be responsible for the Code as well as requirements that compliance be certified and charge that descriptions of relationships between utilities and their affiliates be provided. These requirements are specified in VI.A. through D. and create mechanism which can improve the efficiency of the Staff and policing compliance with its Code.

7. Oversight Enforcement and Penalties (Sec. VIII)

The oversight and enforcement section of the Staff's proposed Code requires utilities to provide documentation demonstrating compliance with the Code and adopt a dispute resolution process. (C.) recommends that utilities be subject to reduction of return on common equity for violations of the Code. This recommendation is superceded by PA 141 at Sec.10c. Justification for these measures is contained in the testimony of William Celio (6 T 435-440). It goes without saying that a complicated and financially significant matter such as enforcement of a Code of Conduct cannot be effective unless it is accompanied with efficient tools to determine compliance.

Collectively, these recommendations of the Staff form a Code of Conduct that is comprehensive and necessary in today's marketplace. The recommendations are supported by Staff witnesses with the experience, background and, most particularly, impartiality that give them great weight.

B. Energy Michigan Witness Roy Boston

Roy Boston, Director of U.S. / Canada Government Affairs for Enron Corp., presented testimony which, in part, justifies the need for an approach to regulation which would be stronger and more comprehensive than that contained in the Staff mark up of existing utility Codes of Conduct. Several of Mr. Boston's comments regarding the Staff's new Code contain information demonstrating that the marked up Code is not a suitable or effective alternative. Specifically, Mr. Boston explains that the sharing of utility employees from corporate officers to lower level employees allows inappropriate sharing of market sensitive or customer account information. 6 T 472. Also, corporate support functions could be interpreted to permit joint marketing or sales function between utilities and their

affiliates. *Id.* Finally, under the Staff's proposed Codes as under utility Codes, there is no time limit on the return of utility employees back to a parent, this lapse clearly allows sharing of critical sharing of information which would be carried by that employee from an affiliate back to a parent. 6 T 473.

C. PG&E Energy Services Witness Douglas Oglesby

Douglas Oglesby, Vice President and General Counsel for PG&G Energy Services Corporation testified that it was necessary to incorporate strict structural separation between regulated and competitive services under any adopted Code of Conduct. 6 T 494-95. Mr. Oglesby stated that the utility and affiliate should be allowed to share corporate support, insurance, tax, legal, government, regulatory and payroll services, etc. 6 T 498. Mr. Oglesby supported the need for structural separation as well as functional separation because functional separation still allows common management, common facilities, shared resources, shared systems and the likelihood of unfair preferential exchange of confidential information not available to competitors. 6 T 505-06. Mr. Oglesby noted that the biggest problem posed by provision of regulated and competitive services from the same entity is the likelihood of customer confusion. Another problem is that customers may believe that the utility's competitive services are backed by the utility's regulated services. 6 T 506. Mr. Oglesby explained that it would be difficult if not impossible for the Commission to effectively monitor and enforce separation rules and detect violations if the regulated and competitive businesses reside within the same legal entity. 6 T 508. For these reasons, Mr. Oglesby and PG&E support structural separation in Codes of Conduct. 6 T 509.

The type of Code used for natural gas utilities is not viewed as suitable by Mr. Oglesby. Mr. Oglesby explained that unlike gas utilities, electric utilities are vertically integrated, a market structure not only different from gas industry but one that would be much more difficult to police. 6 T 510. The need for real time balancing creates a much closer operational relationship between electric

generation transmission and distribution than is the gas with gas production. *6 T 510*. Finally, the electric industry has created an entirely different set of value added services such as energy management, energy efficiency and power quality which do not exist as counterparts to the regulated natural gas industry. These new electric services offer an opportunity for cross subsidization, exercise of market power and discrimination unknown in the gas industry and therefore are not contemplated by the current Codes of Conduct used to regulate natural gas industry participants. *6 T 511*.

D. ABATE Witness Maurice Brubaker

Mr. Brubaker stressed the need for structural separation as opposed to just functional separation. *6 T 481-82*. Mr. Brubaker described the need for structural separation which physically separates employees and operations into different corporations rather than use of the functional separation concept which does not require utilities and their affiliates to operate in separate organizations. The clear import of this testimony is that the proposed utility Codes and the Staff markup of those Codes do not meet Mr. Brubaker's basic criteria for an effective Code of Conduct since these approaches do not mandate structural separation. *6 T 482*.

E. Conclusion: Energy Michigan Supports the MPSC Staff's New Code of Conduct With the Revisions Described in VI. Below

The testimony of witnesses VanHaften, Boston, Oglesby, and Brubaker supports the conclusion that Staff's proposed mark up of the existing utility Codes of Conduct, while an improvement, is not sufficient to provide effective regulation and prevent the exercise of market power. A more far reaching and stringent proposal is necessary to govern the restructured electric industry. The Staff's proposed Code of Conduct, Exhibit S-16, addresses the glaring deficiency of the existing provisional Codes and the few deficiencies of the Staff mark up of those Codes which have been described above.

VI. Energy Michigan's Proposed Revisions to the Staff Code of Conduct

Energy Michigan witness Roy Boston is Director of U.S. / Canada Government of Affairs of Enron, Corp. and has direct responsibility for regulatory and legislative efforts to promote the development of competitive energy markets in the upper Mid-West states. Mr. Boston has evaluated and made recommendations regarding proposed Codes of Conduct applicable in the upper Mid-West area and has testified in Wisconsin regarding these issues. In his prior employment, he provided comments in other jurisdictions regarding Codes of Conduct.

Mr. Boston strongly supports both the need for a Code of Conduct and the general format and content of the Staff's proposed Code as the best vehicle to accomplish a competitive market. *T 469-71.*

While supporting the Staff's proposed Code in a general sense, Mr. Boston recommends four specific modifications of the Staff's proposed Code:

1. The prefatory portion of Section II. (Separation) of the Staff Code should be modified to make it clear that the separation required includes physical as well as legal separation between regulated and unregulated business ventures. *T 469.*

Also, Staff's Section II.E. Prohibition Against Joint Employment should be broadened to preclude all sharing of employees and not just sharing officers and directors.

Unless revised, the Staff's separation concept in II. would allow non-officer or director employees to be shared by regulated and unregulated entities. These employees may possess market sensitive or customer account information which would allow exercise of market power or abuse. *T 471.* Mr. Boston did explain

that those employees engaged in corporate support could be shared since the opportunity for abuse of information was greatly reduced. *Id.*

Mr. Boston justifies his physical separation requirement by explaining that, absent physical separation, utility employees and their affiliate counterparts could impermissibly or inadvertently share market sensitive information. The only way to adequately prevent this sharing of information across corporate entities is to ensure they are physically separated from each other. *T 473.*

2. Section II.H. As written, the Staff recommendations require a quarterly log of employee transfers between utility and affiliate but permit these transfers. Mr. Boston recommends that this requirement be broadened to place a time limit on the return of a utility employee that has been transferred to an affiliate to prevent the utility from circumventing the prohibition of the preferential provision of customer data through employee transfer. The keeping of logs alone does not prevent damage to the competitive market place that can occur due to employee transfers. *T 473.*
3. Section II.I.: Mr. Boston recommends that the prohibitions against joint marketing be amplified by specifically prohibiting joint sales calls of utilities and their affiliates. *T 470.*
4. Section II.L. Mr. Boston believes that II.L. of Staff's proposed Code does not go far enough to prevent customer confusion about the business entity soliciting their business. The disclosure statement required under Section II.L. only references the fact that the affiliate is not regulated by the Commission. Mr. Boston specifically recommends that the disclosure statement require that any communication between the affiliate and the customer that includes the utility name or logo also include a statement that the affiliate is not that same as the utility and that customers do not have to buy products from the affiliate to receive quality, regulated services from the utility. *T 474.*

Conclusion

Incorporation of the recommendations of Energy Michigan's witness Roy Boston will assure that the Staff's proposed Code of Conduct provides effective guidance and regulation of the relationship between utilities and affiliates and will enable development of a competitive framework for electric services in Michigan.

VII. Conclusion

Energy Michigan supports adoption of the Staff's proposed Code of Conduct incorporating the recommended changes of witness Roy Boston. The proposed Staff Code is superior to the Staff mark up of existing Codes because it incorporates effective separation standards, provisions to prevent discrimination, disclosure and information standards and governance of the relationship between utilities and alternate suppliers, together with oversight and enforcement remedies. With the addition of the Boston recommendations, the Staff Code would provide a far more effective framework than the Staff mark up of existing provisional Codes.

As a second best alternative, Energy Michigan supports the Staff mark up of the utility provisional Codes incorporating the Boston recommendations. It should be stressed that without the structural separation and pricing transfer mechanisms recommended in the Staff's proposed Code, the Staff mark up version of existing provisional Codes does not offer long term effective policing of utility affiliate relationships.

WHEREFORE, Energy Michigan respectfully requests that the Commission adopt the Staff proposed Code of Conduct, together with the modifications proposed by witness Roy Boston.

Respectfully submitted,

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