STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the approval of a code of conduct for **CONSUMERS ENERGY COMPANY** and **THE DETROIT EDISON COMPANY.**	))))	Case No. U-12134

At the December 4, 2000 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

On September 14, 1999, the Commission issued an order commencing this proceeding "for the purpose of determining what modifications, if any, should be made to the existing codes of conduct" for Consumers Energy Company (Consumers) and The Detroit Edison Company (Detroit Edison). September 14, 1999 order, p. 3. Consumers' code was approved in the March 8, 1999 order in Case No. U-11290. Detroit Edison's code was approved in the September 14, 1999 order in Case No. U-11290. At the prehearing conference on October 7, 1999, Administrative Law Judge George Schankler (ALJ) granted the petitions for leave to intervene filed by the Association of Businesses Advocating Tariff Equity (ABATE), Attorney General Jennifer M. Granholm (Attorney General), Energy Michigan, Edison Sault Electric Company, the Michigan Alliance for

Fair Competition (MAFC), PG&E Corporation, Unicom Energy, Inc. (Unicom), Alpena Power Company, the Michigan Electric Cooperative Association (MECA), Wisconsin Public Service Corporation (WPS Corp), Upper Peninsula Power Company (UPPCo), Northern States Power Company-Wisconsin (NSP-W), Wisconsin Electric Power Company (Wisconsin Electric), DTE Edison America, Inc., the Midland Cogeneration Venture Limited Partnership, the Michigan Petroleum Association, and the Michigan Association of Convenience Stores. The Commission Staff (Staff), Consumers, and Detroit Edison also participated in the case.

Evidentiary hearings were conducted on March 27 and 28, 2000. On April 24, 2000, the Commission issued an order reversing the ruling of the ALJ that had stricken all of the testimony offered by the MAFC. A hearing was conducted on May 25, 2000 to receive that testimony and related rebuttal offered by Detroit Edison.

On June 5, 2000, Public Act 141 of 2000, the Customer Choice and Electricity Reliability Act (Act 141 or the Act), MCL 460.10 et seq.; MSA 22.13(10) et seq., took effect. Subsection 10a(4) provides:

> 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 alternative electric suppliers consistent with section 10, this section, and sections 10b through 10bb.

MCL 460.10a(4); MSA 22.13(10a)(4). In light of this provision, on June 19, 2000, the Commission suspended the schedule previously set by the ALJ, and directed the parties and the ALJ to address how the case should proceed, including the possibility of the need to issue further notice. The ALJ held a prehearing conference on June 27, 2000, and, as a result, issued another notice of

hearing. Pursuant to that notice, a prehearing conference was held on July 12, 2000 at which the ALJ admitted the Midwest Independent Power Suppliers Coordination Group and Fiber Link, Inc., as parties. Additional testimony was heard on August 22, 2000. The record consists of 848 pages of transcript and 30 exhibits.

The Staff, Energy Michigan, Detroit Edison, Consumers, the Attorney General, Alpena Power, WPS Corp/UPPCo/NSP-W/Wisconsin Electric (collectively, WPS Corp), Unicom, the MAFC, MECA, ABATE, and Fiber Link filed briefs on or before September 18, 2000. The Staff, Energy Michigan, Detroit Edison, Consumers, the Attorney General, ABATE, the MAFC, MECA, WPS Corp, and PG&E filed reply briefs on October 2, 2000.[1]

The Commission agreed to read the record, thus dispensing with the need for a proposal for decision, exceptions, and replies to exceptions. The statute requires that the Commission issue its order on or before December 4, 2000.

II.

DISCUSSION

Revised Code or New Code

The Staff believes that the existing codes of conduct do not comply with Act 141. To remedy the deficiencies, it offers two alternatives for the Commission's consideration. First, it offers what it characterizes as basic but necessary revisions to the existing codes. Exhibits S-14 and S-15. Second, it offers a more comprehensive code of conduct to replace the existing codes. Exhibit S-16. The Staff says that it is important to make the code as effective as possible early in

[1]Indiana Michigan Power Company and the Michigan Propane Gas Association filed initial and reply briefs. As discussed below, the Commission has not considered those briefs in its deliberations because they were not filed by parties to the case.

the implementation of retail open access so that all participants will have a clear understanding of the limits on utilities' dealings with their affiliates. It also argues that Michigan is competing with other states "to attract potential suppliers, and the type of code adopted signals the nature of the competitive environment in Michigan." Staff's brief, p. 11.

Consumers supports only minor revisions to the code that the Commission previously approved. It opposes the Staff's more comprehensive code as based on a belief that a "massive, intrusive and costly regulatory machinery is necessary to restrain Michigan utilities." Consumers' brief, p. 9. It says that the record will not support that view and, in fact, argues that experience with the gas customer choice program indicates otherwise. Consumers suggests that, at this early stage in retail open access, the Commission make minor changes to its approved code and await actual experience before requiring changes that could prove costly and unduly intrusive into the management prerogatives of the utilities.

Detroit Edison also supports the continuation of its current code of conduct with a minor change in wording. It asserts that the burden of proof is on the parties seeking any changes to the existing code of conduct and that those parties have failed to carry that burden. It also argues that a broader code will actually harm electric customers because it will destroy economies of scale and scope that lower costs and rates for all customers. It says that a targeted code, such as its current code, is sufficient to guard against potential problems and that it will be easier to make incremental changes later, if warranted, than to redesign the marketplace by rescinding an overly intrusive code.

Unicom and PG&E support the Staff's broader code of conduct as more conducive to opening the market to competition and encouraging alternative suppliers to participate. The Attorney General argues that a code of conduct must "ensure institutional fairness as the monopoly utility

interacts with its affiliates and non-affiliates as it conducts its regulated and unregulated activities." Attorney General's brief, p. 4. ABATE also supports the Staff's more comprehensive code.

Energy Michigan says that the existing codes of conduct are not sufficient because they do not prohibit regulated utilities from directly engaging in competitive activities, do not contain prohibitions against parent company market power abuses, are vague, and do not require physical and legal separation. It supports the Staff's more comprehensive code with further restrictions. The MAFC also supports the Staff's more comprehensive code of conduct, with changes that it views as necessary to comply with the Act.

WPS Corp says that it supports modifications to the existing codes for Consumers and Detroit Edison, but could also support the Staff's broader code if it is modified to eliminate what it views as unreasonable provisions. WPS Corp argues that whatever approach the Commission takes should be designed to protect competition, not competitors.

The Commission concludes that it should adopt a more comprehensive code of conduct at this early stage of the development of a competitive market. This approach is consistent with the majority of states that have addressed the issue. The current codes for Consumers and Detroit Edison were approved in the context of a voluntary commitment by those companies to offer retail open access, and thus did not necessarily reflect all of the provisions that the Commission considered necessary or appropriate. In that context, it is not surprising that the traditional monopoly utilities support a weaker code of conduct, while new entrants and customers support a stronger code. Act 141 changes the legal basis for offering retail open access in this state, and requires all utilities and alternative electric suppliers to be subject to a code of conduct approved by the Commission. The Commission agrees with the Staff that it is important to demonstrate with the approved code of conduct that the Commission is committed to full and fair competition from

the beginning. The Commission is well aware from past audits and reports of affiliate transactions, in this state and elsewhere, of the opportunities and incentives for abuses. An effective code of conduct must be designed to minimize the opportunities and incentives to use dealings with affiliates or other entities within the existing corporate structure to promote the utilities' interests over the public's interest in achieving the statutory goal of a competitive market. For these reasons, the Commission concludes that the Staff's proposed comprehensive code, Exhibit S-16, should be the starting point for the code approved in this case.[2]

Applicability

1. Covered entities

The Staff proposes that the code apply to all electric utilities and licensed alternative electric suppliers.

MECA argues that the unique corporate structure of the cooperatives renders many of the concerns addressed by a code of conduct inapplicable to the cooperatives because their customers also own the company. It also argues that the cooperatives are too small to have market power. It suggests that accounting separation is sufficient to guard against subsidization by the cooperatives. It offers a proposed code of conduct for the cooperatives in Exhibit I-31. In any event, it argues, subsection 10x(2) of the Act requires the Commission to recognize the unique status of the cooperatives. "The commission shall not require a cooperative electric utility or an independent investor-owned utility with fewer than 60 employees to maintain separate facilities, operations, or personnel, used to deliver electricity to retail customers, provide retail electric service, or to be an

[2]Act 141 changed the nature of this case, and it therefore cannot be said that any party bears the burden of proof to show that changes from the current codes are needed.

alternative electric supplier." MCL 460.10x(2); MSA 22.13(10x)(2). It also argues that the language and legislative history make it clear that the 60-employee provision applies only to investor-owned utilities and that all cooperatives, regardless of their employee count, are entitled to the exemption in that subsection.

The Attorney General responds that the cooperatives are "no less motivated to engage in cross-subsidization than an investor-owned utility." Attorney General's reply brief, p. 2. ABATE agrees. The MAFC responds that the purpose of the code is not just to protect customers but also to promote competition, and thus the fact that any profits of a cooperative ultimately go to the customers of the cooperative is not dispositive. It also argues that only those cooperatives with fewer than 60 employees are entitled to the exemption in subsection 10x(2), a position with which ABATE and Consumers agree.

Alpena Power says that the record shows that it has less than 60 employees, and thus the exemption in subsection 10x(2) must apply to it. If the Commission adopts MECA's suggestion for a separate code to be applied to the cooperatives, it would not object to a similar code for itself.

In its reply brief, MECA says that it is logical and appropriate for the Commission to adopt one code of conduct. It offers a version of the Staff's more comprehensive code, modified to account for the requirements of the statute and what it characterizes as the need to balance fairness with the limited resources of the cooperatives.

Unicom says that the code of conduct should not apply to affiliates of non-Michigan utilities because most of the concerns addressed by the code of conduct do not exist when the utility is out of state. It says that the statute supports its view because the term "electric utility" includes only those utilities regulated by the Commission.

Energy Michigan says that, under the statute, the code of conduct cannot apply to alternative electric suppliers that are not affiliated with a Michigan jurisdictional electric utility. It says that alternative electric suppliers would remain regulated under specific statutory provisions that govern all suppliers and the Commission's authority to license alternative electric suppliers.

The Commission concludes that a single code of conduct should apply to all electric utilities, including cooperatives and the smaller investor-owned companies. The statute specifies that the Commission shall adopt "a" code of conduct. Except for the exemption that the Legislature created in subsection 10x(2), the Commission is not persuaded that there is any need to fashion a different code of conduct for each category of utilities. In particular, the Commission rejects the suggestion of MECA that the Commission should give the cooperatives greater latitude than the statute provides. Thus, the code of conduct shall apply in full to all electric utilities, as defined by Act 141, except that it shall not be interpreted to require a cooperative electric utility or an independent investor-owned utility with fewer than 60 employees to maintain separate facilities, operations, or personnel, used to deliver electricity to retail customers, provide retail electric service, or to be an alternative electric supplier. The Commission agrees with MECA that the Legislature intended the 60-employee provision to apply to only investor-owned utilities. The Commission reaches that conclusion from both the structure of the sentence and the legislative history. In all other respects, a single code of conduct will apply to all electric utilities.

With respect to alternative electric suppliers, the statute is clear that the code must apply to alternative electric suppliers, although the Commission sees no reason to limit the scope of the code to licensed alternative electric suppliers. The failure to obtain the license required by the Act does not excuse noncompliance with the code. The Commission does not agree with Unicom and

Energy Michigan that the code should not or cannot apply to alternative electric suppliers not affiliated with a Michigan-jurisdictional electric utility. The statute contains no such limitation.

2. Covered activities

Consumers argues that the code of conduct approved under Act 141 cannot reach home heating services, appliance repair services, or fiber optic installation services. It asserts that none of the purposes of the statute describe functions other than those of electric providers and the relationship between those providers and their customers. Thus, it says that it is clear that the Legislature intended the Commission to continue to regulate electric utilities and those who provide electricity to end users in this state under the restructuring legislation. Detroit Edison and WPS Corp agree that Act 141 authorizes the Commission to adopt a code that applies only to retail open access services.

The Attorney General argues that the statute must be read as extending the code to more than retail open access and that any other reading is "untenable" and "inimical to the interests sought to be protected by the law." Attorney General's brief, p. 5. The MAFC and Fiber Link agree that the code must apply to all regulated and unregulated services, whether provided by the electric utility or an affiliate.[3]

The Commission concludes, from the language of the statute, that the Legislature intended the code of conduct to apply beyond activities in the retail open access market. The language of subsection 10a(4) is broad in declaring that the code of conduct shall prevent subsidization, infor-

[3]Fiber Link suggests adding the following language to the code: "When operating in another regulated industry, such as telecommunications, utilities, or their affiliates, should be explicitly subject to all regulations imposed on any other competitor in that industry." Fiber Link's brief, p. 10. The Commission finds that provision unnecessary. Any participant in a regulated field is subject to all applicable laws.

mation sharing, and preferential treatment "between a utility's regulated and unregulated services." The Commission does not view it as an oversight that the Legislature did not say "between a utility's regulated electric services and retail open access services." In addition, the issue of the scope of the code was before the Legislature. In that context, the use of expansive language about the scope of the code of conduct is a further indication that the Legislature did not intend to limit the scope to only retail open access.

Separation

1. Affiliates

The Staff's proposed comprehensive code of conduct requires that affiliates offering competitive services or products be legally separate corporate entities.

The Attorney General agrees that structural separation is vital to any code of conduct and "believes that the most effective way to address the problem of fairness in the interaction between the regulated utility, its affiliates and competitors, [sic] is through structural separation." Attorney General's brief, p. 5. She says that behavioral rules are not enough to ensure fairness, particularly in light of the difficulties of enforcement. Energy Michigan says that the separation must be physical as well as legal.

ABATE argues that the structural separation is necessary to prevent cross-subsidization, to promote competition, and to ensure that customers understand that there is no link between the utility's regulated services and its competitive services. It says that structural separation is also necessary to ensure that a utility does not use revenues and resources from regulated customers to subsidize competitive services offered by its affiliates, including guaranteeing the debts of its

affiliates. The MAFC says that there must be structural separation to prevent what it characterizes as "virtually undetectable" anticompetitive cross-subsidization. MAFC's brief, p. 19.

MECA responds that the phrase "whether those services are provided by the utility or the utility's affiliated entities" in subsection 10a(4) demonstrates that the Legislature contemplated that a utility could offer competitive services directly as well as through affiliates. It therefore asserts that the Commission cannot require that all competitive services be offered through an affiliate.

WPS Corp argues that the operational synergies of the utility corporate structure that are not essential to competitive retail open access services must be preserved and that it is impractical and inconsistent with the act to prohibit a utility from providing any competitive services or products by requiring that it do so through separate affiliates. It objects to any restriction on sharing that "fails to distinguish between normal operational advantages [and] unfair competitive advantages." WPS Corp's brief, p. 7.

Consumers complains that the advocates for structural separation have not addressed "the recovery of costs certain to be incurred if the Commission requires Michigan utilities to duplicate their entire management and human resource infrastructure." Consumers' brief, p. 11. It notes that those costs must be borne by customers or shareholders. It also expresses concern that the efficiencies that the utilities have gained over many years, which benefit customers, might be sacrificed if structural separation is required.

The Commission concludes that functional separation is sufficient at this time to provide the protection intended by the Legislature. A requirement that competitive services and products be provided through separate corporations, although arguably compatible with the purposes of the Act, would be a marked departure from current arrangements, might be disruptive, and would have

unknown costs. Moreover, the Commission finds merit in MECA's argument that the Legislature, in drafting subsection 10a(4), contemplated unregulated services being provided without structural separation. On the other hand, the code approved by this order imposes substantial functional separation, and is designed to achieve much the same result as full legal separation without its potential drawbacks. On balance, the Commission concludes, at this time, that the code should require only that competitive services and products be offered through one or more affiliates (separate corporations) or other entities within the existing corporate structure, such as divisions. The Commission intends to vigilantly enforce the code. If experience with the code shows this functional separation to be insufficient, the Commission will revisit the issue and may impose structural separation.

2. Sharing

The Staff's proposed code places a number of restrictions on the sharing of employees and other corporate resources between an electric utility and its affiliates.

WPS Corp argues that utilities and their affiliates "must be allowed to enjoy the size and scope of their corporate structure and continue to share support services such as accounting, billing, payroll, tax, insurance, financial reporting, purchasing, engineering, information services, etc. The advantages gained from these economies of scale and scope benefit customers." WPS Corp's brief, p. 6. It therefore objects to the prohibition on sharing facilities, equipment, and services, including computer hardware and software. It also says that it is impractical, as well as unnecessary, to prohibit the sharing of officers and directors for smaller corporate organizations.

Consistent with her view on structural separation, the Attorney General would preclude the sharing of employees and other resources between the utility and its separate affiliates. Energy Michigan says that the sharing of employees as well as officers and directors must be prohibited. It

also argues that, to prevent the preferential provision of customer data, there should be a time limit on the return of utility employees who have been transferred to an affiliate. It would also explicitly prohibit joint sales calls by the utility and its affiliate as a form of joint marketing.

The Commission concludes that, having not adopted the alternative of structural separation, most of the Staff's proposed limits on sharing are necessary to achieve the purposes of the code of conduct. These are specified in various part of sections II, III, and IV of the code. The prohibition on the sharing of officers and directors, which is part of structural separation, must be deleted. The prohibition on any sharing of computer hardware and software must be deleted as unnecessarily restrictive, although any sharing must be done in a manner that prevents discriminatory access to competitively sensitive information. The sharing of financial, personnel, and payroll information, for example, is permissible. The Commission agrees with Energy Michigan that joint sales calls should not be permitted because they are within the scope of joint marketing activities, although it does not agree that there should be time limits on the return of employees to the utility. If any electric utility or alternative electric supplier believes that the limitations on sharing work an unintended hardship under the circumstances, the code permits it to seek a waiver of one or more of the limitations.

3. Use of logo

The Staff's proposed code requires an affiliate that uses the logo of an electric utility to indicate that it is not regulated by the Commission. In addition to requiring disclosure that the affiliate is not regulated by the Commission, Energy Michigan would require the affiliate to indicate in any communication to customers using the utility name and logo that the affiliate is not the same as the utility and that customers do not have to purchase from the affiliate to continue receiving quality regulated service from the utility. It would also require the affiliate to pay fair

market value to use the utility's name or logo. In the alternative, it would prohibit a utility's affiliate from using the name or logo. The MAFC would also prefer to prevent an affiliate's use of the utility's name or logo, but recognizes the value of the proposed disclaimer. It agrees that compensation to the utility is appropriate.

Detroit Edison argues that the restriction on the sharing of trade names and logos is an unconstitutional infringement on its freedom of speech. It says that the United State Supreme Court has rejected bans on speech designed to avoid customer confusion: "[B]ans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, [but rather] usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth." 44 Liquormart, Inc v Rhode Island, 517 US 484, 503 (1996). It asserts that there is no substantial interest served by restricting the use of trade names and logos and, even if there were, the proposed means do not directly promote those interests and are not proportional to the interests.

The MAFC responds that the proposed disclaimer that the Staff recommends is not unconstitutional, but rather was envisioned by the United States Supreme Court in Bates v State Bar of Arizona, 433 US 350, 384 (1977): "We do not foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled." It says that it is important that customers be aware that the unregulated services provided by the affiliate are, in fact, not regulated and that the Commission did not set the rates and cannot provide a remedy to an injured customer. ABATE agrees and notes that "[t]he government may ban forms of communication more likely to deceive the public than to inform it . . .." Central Hudson Gas & Electric Corp v Public Service Commission of New York, 477 US 557, 563 (1980). Further, it adds that mislead-

ing advertising is subject to constraint. See, Virginia Pharmacy Board v Virginia Citizens Consumer Council, 425 US 748, 771-772 and n 24.

The Commission concludes that there is no legal prohibition against the proposed restriction on the use of the utility's logo. The Staff's proposal does not ban the use of the logo, but rather seeks to prevent a utility and its affiliates from creating confusion, intentionally or not, about the regulatory status of its affiliates. Such a restriction is consistent with United States Supreme Court precedent. The Commission does not find it necessary, as Energy Michigan proposes, to require the utility or affiliate to indicate that they are not the same entity. Its concern about a link between the quality of service and purchases from a non-affiliate is addressed in Section II, paragraph I of the code. On the other hand, to the extent that the utility's logo has value, the affiliate's use of the logo creates a duty to compensate the utility for its use.

Discrimination

1. Use of modifiers

The Staff cautions against using modifiers such as "undue," "unduly," and "to the extent practicable" in any code of conduct because those terms leave too much room for interpretation. ABATE and the MAFC agree.

Detroit Edison says that such modifiers permit "good faith and reasonable deviations in tariff application where the facts and circumstances justify such a deviation." Detroit Edison's brief, p. 17. It also says MCL 460.557(4); MSA 22.157(4) uses similar language in prohibiting "unjust" discrimination. Consumers criticizes the Staff for a concern with vagueness in the use of

terms such as "undue" while having no apparent concern with other vague aspects of the Staff's proposed code of conduct.

The Commission concludes that the use of modifiers such as "unduly" is appropriate to indicate that identical treatment is not required, but rather that any difference in treatment must be justified on a rational basis other than the relationship (or lack of relationship) between the parties. The Commission is not aware that the use of the term "unjust" in MCL 460.557(4), before it was amended in 1995, created any difficulties in implementing the legislative intent. The Commission expects a similar lack of difficulty in implementing the code of conduct.

2. Transfer pricing

The Staff's proposed code of conduct requires that any services, products, or property provided to an affiliate by an electric utility be priced at the higher of fully allocated cost or market price.

Detroit Edison denies that cross-subsidization can occur unless there is harm to customers of regulated services. Consumers advocates that such transfers be priced between the incremental cost that the utility incurs to provide the services or products and the stand-alone cost. To do otherwise, it says, deprives regulated customers of the benefit of the economies of scale and scope.

MECA argues that the Commission cannot decide the issue of transfer pricing because the issue was addressed in the May 3, 2000 order in Case No. U-11916, which is now on appeal, divesting the Commission of jurisdiction. Consumers argues that the incorporation of Case No. U-11916 was never noticed in this case, is not authorized in Act 141, and violates the prohibition against interfering with management decisions.

The Commission concludes that the transfer pricing standard in Case No. U-11916 is appropriate here as well and that the pricing standard for transfers from an affiliate to the utility should also be made part of the code of conduct. The transfer pricing standard prevents subsidiza-

tion and also avoids the preferential treatment of affiliates that results if the utility provides goods and services to its affiliates at incremental cost while providing those same goods and services, if at all, only at market prices to other providers. The fact that the order in Case No. U-11916 is on appeal does not mean that the standard in that case cannot be applied elsewhere. Like all Commission orders, that order is in effect unless and until overruled. MCL 462.25; MSA 22.44.

3. List of suppliers

Detroit Edison complains that it is burdensome for the code to require it to maintain a complete list of alternative electric suppliers to provide to customers who make inquiries about alternative electric suppliers.

The Commission concludes that the code does not place an undue burden on the utility. The code provides that if an electric utility provides a customer or potential customer with the names of its affiliates that are alternative electric suppliers, it must also provide the names of all licensed alternative electric suppliers. That burden, if it can be characterized as such, can be avoided by the utility's refraining from providing the names of its affiliates. But it is inherently discriminatory and anticompetitive for the utility to provide only the names of its affiliates.

Disclosure of Information

Detroit Edison complains that it is burdensome and unnecessary for the code to require a utility to provide information to alternative electric suppliers that may not want the information.

The Commission concludes that the concern can be addressed by clarifying that the utility's duty is to offer to make the information available and to the honor the requests that it receives. It is not required to provide information that an alternative electric supplier does not want.

Enforcement

The Commission concludes that specific provisions on enforcement are not necessary. The statute specifies in Section 10c, MCL 460.10c; MSA 22.13(10c), the penalties and remedies for violations of the Act and the Commission's orders.

III.

REMAINING ISSUES

The MPGA's Application for Leave to Appeal

On August 31, 2000, the Michigan Propane Gas Association (MPGA) filed an application for leave to appeal the ALJ's ruling that denied its request to intervene in the case. On September 5, 2000, Consumers filed a response in opposition. On September 14, 2000, Detroit Edison and MECA filed responses in opposition. On October 3, 2000, MECA filed motions to strike the initial brief and reply brief of the MPGA on the basis that it was not a party to the case. In their reply briefs, Consumers, Detroit Edison, and WPS Corp also asked that the Commission strike the MPGA's initial brief. On October 9, 2000, the MPGA filed a response.

The Commission affirms the ALJ's ruling denying the MPGA status as a party and grants the motions to strike its briefs. The MPGA has not shown good cause for delaying the filing of a petition for leave to intervene in this case until August 9, 2000. This case began more than a year ago, and Act 141 took effect two months before the MPGA sought to intervene. In light of the lateness of its petition, the MPGA must, at a minimum, show that its late participation would add significantly to the Commission's deliberations. To the contrary, the MPGA appears to simply add another voice to positions already put forth by others. Consequently, the ALJ properly continued the case without adding the MPGA as a party, and the MPGA was not entitled to file briefs as

though it were a party. The Commission was aware of the pending application for leave to appeal by which the MPGA sought to become a party. If the Commission had concluded that the MPGA should be a party to the case, it would have acted on that application in time to permit the MPGA to participate.

Furthermore, the MPGA is mistaken in its conclusion that the Commission's Rules of Practice and Procedure authorize a non-party to file a brief. Rule 337(5), 1992 AACS, R 460.17337(5), permits a party to challenge rulings of the ALJ in its brief. That rule does not authorize a non-party to file a brief.

The MAFC's Application for Leave to Appeal

On August 31, 2000, the MAFC filed an application for leave to appeal the ALJ's ruling that struck the testimony and exhibits of its witness Anthony M. Ponticelli. On September 14, 2000, Detroit Edison and MECA filed responses. On September 15, 2000, one day late, WPS Corp filed a response.

The Commission affirms the ALJ's ruling. The stricken testimony, mostly a survey of actions in other states and legal argument, is duplicative of the filings of others, could have been filed earlier in the case, is hearsay in part, and would add little to the case, particularly in light of the discussion above, which agrees with much of the MAFC's position.

I&M's Late Petition to Intervene

On September 18, 2000, Indiana Michigan Power Company (I&M) filed a brief and petition for leave to intervene for the limited purpose of presenting its view that the code of conduct should not apply to it or, alternatively, that it should be able to ask for a waiver if the requirements of the code are materially different than the requirements imposed in other jurisdictions. Consumers and

Detroit Edison asked in their reply briefs that the Commission strike I&M's brief. On October 10, 2000, I&M filed a response.

The Commission denies the petition for leave to intervene, which was filed more than three months after Act 141 took effect, and strikes I&M's initial and reply briefs. I&M offers no compelling reason for the delay in filing its petition. As required by Act 141, the Commission is approving a code of conduct for all electric utilities and alternative electric suppliers. Act 141 includes no requirement that those entities participate in this case as a condition of the code's application to them.[4] On the other hand, the Commission notes that the code permits a utility to seek exemption from provisions of the code, which may address In&M's concern.

Motion to Strike Fiber Link's and the MAFC's Briefs

Detroit Edison included in its reply brief a motion to strike Fiber Link's and the MAFC's initial briefs on the grounds that those briefs raised issues that are outside the scope of the case and rely on matters that are not part of the record. Consumers asked that the Commission strike the portion of Fiber Link's brief that refers to a letter from legislators. On October 12, 2000, the MAFC filed a response. On October 13, 2000, Fiber Link filed a response.

The Commission grants the motion in part. It does not agree that the interest of Fiber Link and the MAFC in having the code apply to more than retail open access is outside the scope of the case, as discussed above. It is therefore not appropriate to strike their entire briefs. On the other hand, those briefs rely in part on a letter from legislators, and that letter is not part of the record.

[4]Similarly, the Act does not specify that the Commission should commence a rulemaking proceeding to adopt a code of conduct, which is understandable because it is highly unlikely that such a proceeding on such a contentious subject could have resulted in rules by the statutory deadline.

The fact that the letter was filed and may be found in the Commission's docket file does not make it part of the record. Likewise, the fact that some parties attached the letter to pleadings does not make it part of the record, and the Commission cannot take official notice of a letter from legislators. Even more important, Michigan law precludes the use of a legislator's present recollection of what he or she intended at the time of passage of a bill as evidence of legislative intent. Presque Isle Twp School Dist No 8 Bd of Ed v Presque Isle Co Bd of Ed, 364 Mich 605, 611-612; 111 NW2d 853 (1961). The motions to strike are granted to that extent.

Proposed Conclusions of Law and Proposed Findings of Fact

The MAFC submitted with its brief what it labeled proposed conclusions of law and proposed findings of fact. Section 85 of the Administrative Procedures Act, MCL 24.285; MSA 3.560(185), does not require an agency to respond to proposed conclusions of law. The proposed "findings of fact" are not support by any citation to the record, and are not findings of fact. Rather, the MAFC apparently wants the Commission to rule in broad terms that, as a matter of law, certain vaguely described conduct is anticompetitive. The Commission declines to make those rulings in the factual vacuum that the MAFC presents, particularly when they do not control the decision.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; MSA 22.151 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; MSA 22.1 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; MSA 22.13(1) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. A code of conduct consistent with this order should be adopted.

THEREFORE, IT IS ORDERED that the code of conduct, attached as Exhibit A, is adopted.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of December 4, 2000.

/s/ Dorothy Wideman
Its Executive Secretary

THEREFORE, IT IS ORDERED that the code of conduct, attached as Exhibit A, is adopted.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

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Chairman

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Commissioner

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Commissioner

By its action of December 4, 2000.

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Its Executive Secretary

In the matter of the approval of a code of conduct for **CONSUMERS ENERGY COMPANY** and **THE DETROIT EDISON COMPANY.**	))))	Case No. U-12134

Suggested Minute:

> "Adopt and issue order dated December 4, 2000 adopting a code of conduct to promote the development of competition, consistent with the Customer Choice and Electricity Reliability Act, as set forth in the order."

EXHIBIT A

CODE OF CONDUCT

This code of conduct is intended to promote fair competition by establishing measures to prevent cross-subsidization, information sharing, and preferential treatment. An electric utility or an alternative electric supplier is prohibited from taking punitive action against any individual (including an employee) or entity who files a complaint with the utility, the alternative electric supplier, or the Commission or otherwise causes an alleged violation of this code of conduct to come to the attention of the Commission.

I. Applicability:
This code applies to all electric utilities regulated by the Commission and to alternative electric suppliers, as defined by MCL 460.10g; MSA 22.13(10g).

II. Separation
An electric utility or alternative electric supplier that offers both regulated and unregulated services shall do so with the structural or functional separation needed to prevent anticompetitive behavior. This includes, but is not limited to, the following:

A. An electric utility shall not offer unregulated services or products except through one or more affiliates or through other entities within the existing corporate structure, such as divisions.
B. An electric utility's or alternative electric supplier's regulated services shall not subsidize in any manner, directly or indirectly, the business of its affiliates or other separate entities.
C. An electric utility or alternative electric supplier shall maintain its books and records separately from those of its affiliates or other entities within the existing corporate structure. An electric cooperative offering unregulated services shall maintain an accounting system that allocates costs between its regulated and non-regulated ventures on a fully allocated embedded cost basis, and any transfers of services, products, or property must be in compliance with the provisions of Section III, paragraph C.
D. An electric utility or alternative electric supplier and its affiliates or other entities within the existing corporate structure shall not share facilities, equipment, or operating employees, but may share computer hardware and software with documented protection to prevent discriminatory access to competitively sensitive information.
E. An electric utility's or alternative electric supplier's operating employees and the operating employees of its affiliates or other entities within the existing corporate structure shall function independently of each other and maintain separate offices.
F. An electric utility or alternative electric supplier shall not finance or co-sign loans for affiliates.
G. An electric utility may transfer employees between the utility and any of its affiliates or other entities within the existing corporate structure as long as the electric utility documents those transfers and files semi-annually with the Commission a report of each occasion on which an employee of the electric utility became an employee of an affiliate or other entity within the existing corporate structure and/or an employee of an affiliate or other entity within the existing corporate structure became an employee of the utility.
H. An electric utility and its affiliates or other entities within the existing corporate structure offering unregulated services or products shall not engage in joint advertising, marketing, or other promotional activities related to the provision of unregulated services, nor shall

they jointly sell services. The electric utility shall not give the appearance in any way that it speaks on behalf of its affiliates or other entities within the existing corporate structure offering unregulated services or products, nor shall the electric utility permit an affiliate or other entity within the existing corporate structure offering unregulated services or products to give the appearance that it speaks on behalf of the electric utility.

I. An electric utility or alternative electric supplier shall not suggest that it will provide any customer with preferential treatment or service by doing business with the utility, its affiliates, or other entities within the existing corporate structure offering unregulated services or products, nor shall the electric utility or alternative electric supplier suggest that any customer will receive inferior treatment or service by doing business with an unaffiliated supplier.

J. An electric utility shall not condition or otherwise tie the provision of a utility service or the availability of discounts, rates, other charges, fees, rebates, or waivers of terms and conditions to the taking of any goods or services from the utility, its affiliates, or other entities within the existing corporate structure.

K. An electric utility shall not allow its affiliates to use its logo unless the affiliate includes, in a clearly visible position and easily readable by customers, the following statement:

(Affiliate name) is not regulated by the Michigan Public Service Commission.

L. If an electric utility, its affiliate, or other entity within the existing corporate offers an unregulated service, any use of its logo shall include, in a clearly visible position and easily readable by customers, the following statement:

(Service) is not regulated by the Michigan Public Service Commission.

M. None of the provisions of this code shall be interpreted to require a cooperative electric utility or an independent investor-owned electric utility with fewer than 60 employees to maintain separate facilities, operations, or personnel, used to deliver electricity to retail customers, provide retail electric service, or to be an alternative electric supplier.

III. Discrimination

An electric utility or alternative electric supplier shall not unduly discriminate in favor of or against any party, including its affiliates. This includes, but is not limited to, the following:

A. An electric utility or alternative electric supplier shall not provide any affiliate or other entity within the existing corporate structure, or any customer of an affiliate or other entity within the existing corporate structure, preferential treatment or any other advantages that are not offered under the same terms and conditions and contemporaneously to other suppliers offering services or products within the same service territory or to customers of those suppliers. This provision includes, but is not limited to, all aspects of the electric utility's or alternative electric supplier's service, including pricing, responsiveness to requests for service or repair, the availability of firm and interruptible service, and metering requirements.

B. If an electric utility provides to any affiliate or other separate entity, or customers of an affiliate or other entity within the existing corporate structure, a discount, rebate, fee waiver, or waiver of its regulated tariffed terms and conditions for services or products, it shall contemporaneously offer the same discount, rebate, fee waiver, or waiver to all alternative electric suppliers operating within the electric utility's service territory or all alternative electric supplier's customers.

C. If an electric utility or alternative electric supplier provides services, products, or property to any affiliate or other entity within the existing corporate structure, compensation shall be based upon the higher of fully allocated cost or market price. If an affiliate or other entity within the existing corporate structure provides services, products, or property to an electric utility or alternative electric supplier, compensation shall be based upon the lower of fully allocated cost or market price.
D. If an electric utility provides a customer or potential customer with the names of its affiliates or other entities within the existing corporate structure that are alternative electric suppliers, it shall do so only by distributing their names along with the names of all licensed alternative electric suppliers.
E. An electric utility shall not provide information or consultation to an affiliate or other entity within the existing corporate structure regarding a potential business arrangement between that affiliate or other entity within the existing corporate structure and a potential customer.
F. An electric utility shall not refer a customer or potential customer to an affiliate or other entity within the existing corporate structure, nor steer a potential customer away from a competitor, nor shall the utility provide a customer or potential customer with advice or assistance regarding the selection of or relationship with an affiliate, other entity within the existing corporate structure, or other service provider.

IV. Disclosure of Information

Information obtained by an electric utility in the course of conducting its regulated business shall not be shared directly or indirectly with its affiliates or other entities within the existing corporate structure unless that same information is provided to competitors operating in the state on the same terms and conditions and contemporaneously. This provision includes, but is not limited to, the following:

A. Customer specific names and addresses shall not be provided to an affiliate or other entity within the existing corporate structure unless the same information is offered on the same terms and conditions, and contemporaneously, to all competitors.
B. Customer specific consumption or billing data shall not be provided to any affiliate or other entity within the existing corporate structure or alternative electric supplier without prior written approval of the customer. Once each calendar year a request for up to 12 months of historic usage or billing data may be made at no cost.
C. If an electric utility provides non-customer specific, or aggregated, customer information to its affiliate or other entity within the existing corporate structure, it must offer the same information on the same terms and conditions, in the same form and manner, and contemporaneously to all competitors.
D. An electric utility shall not provide its affiliates or other entities within the existing corporate structure with information about the distribution system, including operation and expansion, without offering the same information under the same terms and conditions, in the same form and manner, and contemporaneously to all licensed alternative electric suppliers.
E. An electric utility shall not provide any information received from or as a result of doing business with a competitor to the utility's affiliate or other entity within the existing corporate structure without the written approval of the competitor.

V. Utility - Alternative Electric Supplier Relationship

Except for instances covered by Section 10a(3) of 2000 PA 141 or other instances approved by the Commission, an electric utility shall not in any way interfere in the business operations of an alternative electric supplier. This provision includes, but is not limited to, the following:

A An electric utility shall not give the appearance in any way that it speaks on behalf of any alternative electric supplier.

B. An electric utility shall not interfere in any manner in the contractual relationship between the alternative electric supplier and its customers unless such involvement is clearly permitted in the contract between the customer and the alternative electric supplier or in tariffs approved by the Commission.

VI. Compliance Plans

Each electric utility and alternative electric supplier shall file a code of conduct compliance plan within 90 days of the approval of this code of conduct by the Commission. The electric utility or alternative electric supplier shall update the compliance plan annually. The compliance plan shall:

A. Designate a corporate officer of the electric utility or alternative electric supplier who will oversee compliance with the code of conduct and be available to serve as the Commission's primary contact regarding compliance with the code.

B. Include an affidavit signed by the designated corporate officer certifying that the electric utility or alternative electric supplier will comply fully with the code of conduct.

C. Include a clear organization chart of the parent or holding company showing all regulated entities and affiliates and a description of all services and products provided between the regulated entity and its affiliates.

In the compliance filing, the electric utility or alternative electric supplier may request a waiver from one or more provisions of this code of conduct. The electric utility or alternative electric supplier carries the burden of demonstrating that such a waiver will not inhibit the development or functioning of the competitive market.

VII. Oversight, Enforcement, and Penalties

A. An electric utility or alternative electric supplier shall maintain documentation needed to investigate compliance with the code of conduct. All documentation shall be kept at a designated company office in Michigan. The electric utility or alternative electric supplier shall make this information available for review upon a request by the Commission or its Staff. The designated officer will either be available or make personnel available who are knowledgeable to respond to inquiries by the Commission or its Staff regarding compliance with the provisions of the code of conduct.

B. The electric utility or alternative electric supplier shall use a documented dispute resolution process separate from any process that might be available from the Commission. This dispute resolution process shall address complaints arising from application of the code of conduct. The electric utility or alternative electric supplier shall keep a log of all complaints, including 1) the name of the person or entity filing the complaint, 2) the date the complaint was filed, 3) a written statement of the nature of the complaint, and 4) the results of the resolution process.

C. Penalties for violations of the code of conduct will be as provided in Section 10c of the Customer Choice and Electricity Reliability Act, MCL 460.10c; MSA 22.13(10c).